

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
Washington, D.C.**

AMPERSAND PUBLISHING, LLC
d/b/a SANTA BARBARA NEWS-PRESS

Case 31-CA-29253

GRAPHIC COMMUNICATIONS CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

**ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL
TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE
ADMINISTRATIVE LAW JUDGE**

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Pursuant to Section 102.46 of the Board's Rules and Regulations, Series 8, as amended, Counsel for the General Counsel respectfully files this Answering Brief in opposition to Respondent's Exceptions to the Decision of Administrative Law Judge Lana H. Parke, hereafter ALJ or Judge Parke, in the captioned matter.¹ Counsel for the General Counsel hereby respectfully requests that the National Labor Relations Board ("the Board") deny Respondent's exceptions in their entirety.²

I. PROCEDURAL HISTORY

This case was tried before the Honorable Lana H. Parke on October 26 and October 27, 2009, in Santa Barbara, California, based on a Complaint issued by the Regional Director for Region 31 on August 7, 2009 ("the Complaint"). The Complaint was based on an unfair labor practice charge filed by Graphic Communications Conference, International Brotherhood of Teamsters ("the Union").

The Complaint alleges that Ampersand Publishing, LLC, d/b/a Santa Barbara News-Press ("Respondent" or "News-Press") violated Section 8(a)(1) of the National Labor Relations Act ("the Act") by issuing subpoenas to current and former employees, prior to their testimony at a Board hearing, requesting

¹ Counsel for the General Counsel Joanna F. Silverman works out of Region 31 of the National Labor Relations Board rather than Region 21 as indicated in Judge Parke's Decision. (ALJD 1.)

² Counsel for the General Counsel notes there appears to be an inadvertent error in paragraph four of Judge Parke's conclusions of law in which she writes "The unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and 8(a)(1) and Section 2(6) and (7) of the Act." (ALJD 9.) It is clear from the Judge's decision that she found that Respondent violated Section 8(a)(1) and not Section 8(a)(3).

their copies of the affidavits they submitted to the Board in a pending unfair labor practice investigation.

On February 5, 2010, Judge Parke issued her decision and order (“ALJD”), finding that Respondent had violated Section 8(a)(1) of the Act by issuing subpoenas to current and former employees prior to their testimony at a Board hearing, requesting their copies of the affidavits they submitted to the Board in a pending unfair labor practice investigation.

On March 19, 2010, Respondent filed its exceptions to the ALJD and Counsel for the General Counsel now replies through this Answering Brief.³

II. INTRODUCTION

The instant case is simple and straight-forward, involving a violation of Section 8(a)(1) of the Act. The facts on which the complaint issued are not in dispute. Respondent admitted that, on or about May 7, 2009, it, through its attorney agents at Cappello & Noël, including A. Barry Cappello, Dugan P. Kelley, and Richard R. Sutherland, issued subpoenas duces tecum to current or former employees requesting, *inter alia*, the following information:

Any and all documents provided to and/or received from Region 31 of the National Labor Relations Board pertaining to the charges in NLRB Case Nos. 31-CA-28589, 31-CA-28661, 31-CA-28667, 31-CA-28700,

³ References to the decision of the ALJ will be cited as “ALJD” followed by the appropriate page number from her decision. References to the transcript will be cited as “Tr.” followed by the appropriate page. References to Counsel for the General Counsel’s exhibits will be cited as “GC Ex”, followed by the appropriate exhibit number and references to Respondent’s exhibits will be denoted as “R Ex”, followed by the appropriate exhibit number. References to Respondent’s Brief in Support of its Exceptions will be cited as “RBex,” followed by the appropriate page number. References to Respondent’s Exceptions to the Decision of the Administrative Law Judge will be cited as “RExc,” followed by the appropriate page number.

31-CA-28733, 31-CA-28734, 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 possess, including but not limited to: letters, affidavits, notes and/or emails.

(GC Ex 1(f):2-3; GC Ex 2 through and including GC Ex 11; Tr. 52-55.)

Respondent filed 56 exceptions to Judge Parke's decision many of which are completely unsupported by fact or law and are not even mentioned in Respondent's Brief in Support of its Exceptions ("the Brief").⁴ Respondent includes in the Brief a section entitled "Issues Involved and to be Argued." (RBex 12.) While it purports to organize the argument by heading and reference to pertinent exceptions, these headings fail to reappear anywhere in the Brief. Respondent's Brief obfuscates the simple issue decided correctly by Judge Parke with countless unsubstantiated exceptions. Rather than offering a thoughtful, reasoned brief in support of exceptions, Respondent rehashes its post-hearing brief while failing to clearly indicate which arguments apply to each of its 56 exceptions.

Because of the confusing structure and lack of organization of Respondent's brief, Counsel for the General Counsel, in this answering brief, has placed into five categories Respondent's exceptions. This brief will address each category separately. The categories are as follows: (1) Respondent's Exceptions that are Unsupported by Fact, Law, and Ignored by Respondent in

⁴ For instance, Respondent's Exception 19 is as follows: "to the failure to explain how the General Counsel proved its case", Respondent provides no argument or support for this exception. (RExc 3.) On the face of the ALJD, Judge Parke amply explains the basis for her ruling.

its Brief; (2) Respondent's Exceptions Regarding Judge Parke's Reference to Judge Kocol's Recommended Order and Decision; (3) Respondent's Exceptions to Judge Parke's Finding of Facts; (4) Respondent's Exceptions Regarding Judge Parke's Application of Law in her Decision; and (5) Respondent's Exceptions to Judge Parke's Treatment of its Defenses.

As the following discussion will demonstrate, the Board should dismiss Respondent's exceptions in their entirety on the basis that Judge Parke's decision rests on the overwhelming weight of the evidence and on well-established Board precedent and federal case law.

III. DISCUSSION

RESPONDENT'S MISLEADING REFERENCE TO EXHIBITS

Before addressing Respondent's Exceptions substantively, Counsel for the General Counsel notes that throughout its Brief, Respondent cites to internal exhibits of GC Exhibit 1(f) and to GC Exhibit 30. (RBex 3, 4, 5, and 6.) GC Exhibit 1(f) is Respondent's Answer to Complaint and Notice of Hearing, dated August 21, 2009. While GC Exhibit 1(f) is in the record as part of the General Counsel's formal exhibits, Respondent failed to authenticate any exhibits it attached to its Answer at this hearing.

As for GC Exhibit 30, this document is decidedly not in the record. In fact, on November 25, 2009, Respondent filed a motion with Judge Parke to

reopen the record to have the Judge admit GC Exhibit 30.⁵ On December 4, 2009, Judge Parke issued her “Order Denying Motion to Reopen the Record.”⁶ In her Order, Judge Parke noted that “a review of the transcript shows stipulations were received that purported to obviate the necessity of receiving GC Exhibits 18 and 30 into evidence.” (Exhibit 1.) Judge Parke found that “the Respondent has not explained why the stipulations do not adequately reflect the facts those exhibits would show or the evidentiary deficiencies the receipt of GC Exhibits 18 and 30 would remedy.” (Exhibit 1.) Counsel for the General Counsel notes that Respondent did not except to Judge Parke’s denial of its motion to reopen the record. Rather than except to this ruling, Respondent simply refers to GC Exhibit 30 as if it had been received into evidence and is part of the record in this case. Any reference to GC Exhibit 30 in Respondent’s Brief should be ignored.

Respondent’s citation and reliance on exhibits it did not authenticate at the hearing or documents not in the record at all is misleading and troubling. Were Respondent’s citations to internal, unauthenticated exhibits to its Answer relied upon this would mean that any attachment to a motion would be self-authenticating. As Respondent failed to authenticate any of its internal exhibits to its Answer at the hearing before Judge Parke, any reference or argument

⁵ Respondent in this motion also sought for the Judge to receive into the rejected exhibit file GC Exhibit 18.

⁶ Judge Parke’s December 4, 2009 Order is Attached to this Brief as Exhibit 1.

based on those documents, including but not limited to Respondent's Section on "Conferring with GCC/IBT," in its Brief must be entirely disregarded. (RBex 3-6, 20, 30-31.)

(1) RESPONDENT'S EXCEPTIONS THAT ARE UNSUPPORTED BY FACT, LAW, AND IGNORED BY RESPONDENT IN ITS BRIEF⁷

Despite attempts, Counsel for the General Counsel could not find support in the Brief and could not ascertain the meaning of the following exceptions:

EXCEPTION 2	To the conclusion of law that "the unfair labor practices set forth above affect commerce within the meaning of Sections 8(a)(3) and (1) and Section(2)(6) and (7) of the Act (DEC. 9:11-12), as such a conclusion is
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⁷ Although not specifically set out by Respondent as exceptions, Respondent makes various unsupported and misleading statements in its Brief. Here Counsel for the General Counsel points out the most egregious instances.

For example, Respondent asserts that "[i]t 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." (RBex 25.) In fact, the Region was not admonished and Respondent cites no evidence to substantiate this bold assertion.

Next, Respondent contends that ALJ Anderson specifically analyzed Respondent's 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 . . . as a valid defense in Case No. 31-CA-28589 et al." (RBex 21-22.) Judge Anderson made no such finding and Respondent cites to no record evidence in support of its contention.

Also, Respondent argues that 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." (RBex 40.) In fact, in the hearing before Judge Anderson, Respondent made a valid request for *Jencks* materials under Section 102.118 of the Board's Rules and Regulations after the General Counsel completed its direct examination of Ms. Smith. (REx 8:4.) Pursuant to Respondent's request under Section 102.118, Counsel for the General Counsel provided to Respondent Ms. Smith's affidavit. Respondent then engaged in *voir dire* questioning of Ms. Smith and requested from Ms. Smith her copy of the affidavit she provided to the NLRB. Judge Anderson then conducted an *in camera* inspection of Ms. Smith's copy of the affidavit and determined that Respondent was entitled to Ms. Smith's copy of her affidavit. (REx 8:6-12.) The General Counsel's failure to object to Judge Anderson's *in camera* inspection of a witness statement after she testified at a hearing cannot reasonably be analogized to Respondent's issuance of subpoenas to employees for their affidavits prior to their testimony in a hearing against Respondent.

	contrary to the evidence and the record as a whole, and contrary to law.
EXCEPTION 4	To the cease and desist provision of the ALJ's Recommended Order and to each of them individually, as each cease and desist provision is contrary to the evidence and the record as a whole, and contrary to law. (DEC. 9:34-45).
EXCEPTION 5	To the affirmative action provision of the Recommended Order, and to each of them individually as such affirmative action provisions are contrary to the evidence in the record as a whole, and contrary to law. (DEC. 9:47-10:22).
EXCEPTION 6	To the Notice to Employees recommended by the ALJ (DEC. Appendix), as such Notice is contrary to the evidence on the record as a whole, and contrary to law.
EXCEPTION 7	To misrepresenting the issue in the Decisions, as such a representation is contrary to the evidence on the record as a whole. (DEC. 1:2).
EXCEPTION 8	To the finding that the News-Press "advertised nationally-sold products, including Cingular ..." (DEC. 2:4), as such a finding is unsupported by the record and contrary to fact.
EXCEPTION 9	To the finding that the News-Press "purchased and received at its facility goods valued in excess of \$5,000 directly from suppliers located outside the state of California ..." (DEC. 2:5-6), as such a finding is inconsistent with the statutory threshold necessary to meet the commerce requirements of Section 2(2), 2(6), and/or 2(7) of the Act.

EXCEPTION 12	To the finding that ALJ Anderson conducted “a twenty-day hearing ...” (DEC. 3:30), as such a finding is contrary to fact.
EXCEPTION 19	To the failure to explain how the General Counsel proved its case.
EXCEPTION 35	To the misstatement that the News-Press argued “that a personally possessed copy of an affidavit must be produced pursuant to FRE 401, 402, 203 ...” (DEC. 7:48-49), as such a statement is unsupported by the record.
EXCEPTION 41	To the self-serving statement that ALJ Parke viewed the case “objectively” (DEC.8:11), as such statement is contrary to the facts.
EXCEPTION 55	To the failure to permit counsel to conduct the examination of Karna Hughes pursuant to Fed. R. Evid. 611(c). (Tr77-79;90-91).
EXCEPTION 56	To the failure to provide to the News-Press, pursuant to Section 102.118(b) of the Board’s Rules and Regulations, Series 8, as amended, Mr. Mineards’ February 13, 2009 affidavit. (Tr. 28-31).

Section 102.46(c) of the NLRB’s Rules and Regulations requires that:

Any brief in support of exceptions shall contain no matter not included within the scope of the exceptions and shall contain, in the order indicated, the following:

- (1) A clear and concise statement of the case containing all that is material to the consideration of the questions presented.
- (2) A specification of the questions involved and to be argued, together with a reference to the specific exceptions to which they relate.
- (3) The argument, presenting clearly the points of fact and law relied on in support of the position taken on each question, with specific page reference to the record and the legal or other material relied on.

With respect to the above-listed exceptions, the Respondent’s brief failed to comply with the requirements of Section 102.46(c) of the Rules and Regulations. Based on this failure to provide a basis upon which to evaluate these exceptions, Respondent’s exceptions should be denied.

(2) RESPONDENT’S EXCEPTIONS REGARDING JUDGE PARKE’S REFERENCE TO JUDGE KOCOL’S RECOMMENDED ORDER AND DECISION

EXCEPTION 10	To the references and findings of facts with respect to the “2007 subpoenas” (DEC. 2:39-43; 5:27-30; 8:14-35), as such findings were contrary to law and fact.
EXCEPTION 43	To basing any of her decision on subpoenas issued in 2007, as such a finding was contrary to law and the facts. (DEC. 8:14-36).
EXCEPTION 44	To the finding that “through the issuance of the 2009 subpoenas, [the News-Press] again sought production of restricted witness statements ...” (DEC. 8:16-17), as such a finding is contrary to the facts.
EXCEPTION 45	To the finding that the News-Press “twice-repeated [an] attempt to force current or former employees to disclose protected witness statements outside the parameters set by the Board’s Rules ...” (DEC. 8:17-20), as such a finding is contrary to law and the facts.
EXCEPTION 50	To the reliance on ALJ Kocol’s decision as precedent, as such a finding is contrary to law. (DEC. 8:28-31).
EXCEPTION 51	To the conclusion that “the reasoning of Judge Kocol’s ruling unmistakably applied to similar subpoena requests

	that [the News-Press] pressed for in the 2009 subpoenas ...” (DEC. 8:31:32), as such a finding was contrary to law and the facts.
EXCEPTION 52	To the finding that “Judge Kocol’s ruling had to have [the News-Press] on notice that such subpoena requests were improper and would not be sustained ...” (DEC. 8:32-33), as such a finding was contrary to law and the facts.
EXCEPTION 53	To the finding that the News-Press had “a work environment tainted by the numerous serious, unremedied unfair labor practices found by Judge Kocol ...” (DEC. 8:34-35), as such a finding was contrary to law and the facts.

Despite Respondent’s contentions, Judge Parke did not cite to Judge Kocol’s Recommended Order and Decision as precedent. Rather, Judge Parke referred to Judge Kocol’s Recommended Order and Decision as part of the procedural history of the instant case. Such a recitation places Respondent’s conduct in this case in context. It is standard for an administrative law judge to reference prior litigation in his or her decision, not as precedent but in recognition that parties do not act in a vacuum. Judge Parke in no way relied on Judge Kocol’s decision as precedent in making her determination that Respondent violated the Act in issuing the 2009 subpoenas. To the extent that Judge Parke referred to Judge Kocol’s rulings regarding the 2007 subpoenas in her decision, she was not citing to Judge Kocol’s rulings as binding precedent

but rather to include an account of what had transpired prior to Respondent’s issuance of the subpoenas at issue in the instant case.⁸

Judge Parke’s finding of a violation in the instant case was based on Respondent’s conduct in 2009 when it issued subpoenas to current and former employees prior to their testimony at a Board hearing. In fact, in framing the issue, Judge Parke wrote, “[t]he question before me is whether the Respondent’s 2009 subpoena demand for employee witness statements interfered with, restrained, or coerced employees in violation of the Act.” (ALJD 5-6.) Judge Parke relied on the undisputed facts adduced before her during the hearing and on applicable law to find that Respondent violated the Act, not on Judge Kocol’s Recommended Order and Decision. Respondent’s exceptions to Judge Parke’s reference to Judge Kocol’s Decision should thus be denied.

(3) RESPONDENT’S EXCEPTIONS TO JUDGE PARKE’S FINDING OF FACTS

EXCEPTION 11	To the finding that “the 2009 subpoenas, in pertinent part, requested that the subpoenaed individuals produce affidavits provided to Region 31 that pertained to the unfair labor practice charges underlying the March 2009 complaint ...” (DEC. 3:25-27), as such a finding is contrary to fact.
EXCEPTION 42	To the finding that “the 2009

⁸ Respondent also asserts that Judge Parke relied on a withdrawn charge 31-CA-28662 in her Decision. There is no such reference or reliance on the withdrawn charge in Judge Parke’s Decision.

	subpoenas require[ed] [sic] its current or former employees to produce affidavits they had provided to the Board ..." (DEC. 8:12- 13), as such a finding is contrary to the facts.
EXCEPTION 46	To the finding that the actions of the News-Press could "reasonably be expected to have a chilling effect on employees' right to cooperate in Board investigations..." (DEC. 8:19-20), as such a finding is contrary to law and the facts.
EXCEPTION 47	To the finding that "it is both logical and realistic to expect reasonable employees to fear that the Board might not be able to prevent premature or improper release of voluntary witness statements, which, in turn, might subject them to employer intimidation or coercion regarding their cooperation in the investigation or their testimony at a hearing, all of which could chill employee rights ..." (DEC. 8:22:26), as such a finding is contrary to law and the facts.
EXCEPTION 48	To the finding that "viewed subjectively, [the News-Press] must have intended such a coercive effect ..." (DEC. 8:26), as such a finding is contrary to law and the facts.
EXCEPTION 49	To the finding that the News-Press "provided no viable explanation or legal justification for twice seeking employees' Board statements ..." (DEC. 8:27-28), as such a finding is contrary to law and the facts.
EXCEPTION 54	To the finding that in the circumstances "it is not only reasonable, but nearly unavoidable to infer that in issuing, the Respondent

	was motivated, at least in part, by a desire to quell employee willingness to give evidence to, or for, the General Counsel ...” (DEC. 8:35-38), as such a finding was contrary to law and the facts.
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Despite Respondent’s exceptions, Judge Parke made the above-
enumerated findings based on the record evidence before her. Throughout its
Brief, Respondent relies on evidence not in the record to support its various
arguments. For example, Respondent, in the Brief, attempts to modify the
meaning of the request it made in the subpoenas it issued in 2009 by
referencing unauthenticated documents attached to its Answer as discussed
supra at 4-6. Regardless of how Respondent would like for the Board to read
the meaning of the subpoenas, the subpoenas issued by Respondent speak for
themselves and request, *inter alia*, affidavits provided to and/or received from
Region 31 of the National Labor Relations Board prior to employees’ testimony
at a hearing against Respondent. Any efforts by Respondent to modify the
meaning of these subpoenas should be disregarded as Respondent failed to
present any such evidence at the hearing. In fact, the evidence adduced at trial
shows that Respondent did not formally amend its original subpoena duces
tecum to clarify that it was not seeking the Board affidavits contained in the
Region’s investigatory file.⁹ Further, Respondent presented no evidence that it

⁹ Respondent argues that its former employee Richard Mineards “*confirmed* that the *News-Press* communicated to him that he did not have to comply with the subpoena served on him by the *New-*

notified the subpoenaed employees that it was not seeking the Board affidavits contained in the Region’s investigatory file, or that it was only seeking affidavits that were altered in some way from the documents in the Region’s investigatory file. While Respondent argues that it was solely seeking the employees’ copies of their Board affidavits and was not seeking any contents of the Region’s investigatory file, the conduct at issue here constituted an attempt by Respondent to circumvent protections afforded to employees who cooperate in Board investigations. Judge Parke, instead of relying on evidence not in the record, relied on the subpoenas issued by Respondent and properly found that these subpoenas violated the Act.

(4) RESPONDENT’S EXCEPTIONS REGARDING JUDGE PARKE’S APPLICATION OF LAW IN HER DECISION

EXCEPTION 1	To the conclusion of law that “the Respondent violated Section 8(a)(1) of the Act by issuing subpoenas to current and former employees prior to their testimony at a Board hearing that required their copies of affidavits they had submitted to the Board in an unfair labor practice” (DEC. 9:8-101), as such a conclusion is contrary to the evidence on the record as a whole, and contrary to law.
EXCEPTION 3	To the failure to find and conclude, based on the record evidence as a

Press.” (emphasis in original.)(RBex 44.) Contrary to this representation, Respondent established at the hearing that, at some point after receiving the subpoena, Respondent Counsel Richard Sutherland verbally communicated to Mineards that Mineards did not have to produce the affidavit at the hearing. (Tr. 43.) Respondent did not establish when this interaction took place. In fact, it is entirely possible that this interaction between Sutherland and Mineards took place after Judge Anderson quashed the subpoenas in their entirety on May 26, 2009.

	whole, that the <i>News-Press</i> did not violate the National Labor Relations Act (“the Act”) in any respect, and that the Complaint should have been dismissed in its entirety.
EXCEPTION 13	To the finding that the “policy” described in <i>NLRB v. Robbins Tire & Rubber Co.</i> , 437 U.S. 214 (1978) applied the instant case, as such a finding is contrary to fact and law. (DEC. 4:29-5:25).
EXCEPTION 16	To the finding that the News-Press was “not entitled to employee witness statements given to the Board except and until employees have testified in a Board proceeding and then only after a timely request for statements is made for the purpose of cross-examination ...” (DEC. 5:4-6), as such a finding is contrary to law.
EXCEPTION 17	To concluding that policy considerations explained in <i>Robbins Tire & Rubber Co.</i> , relating to the Board applied to a non-Board individual in the context of a subpoena authorized by the Executive Secretary. (DEC. 5:6-25).
EXCEPTION 18	To the finding that <i>H.B. Zachary’s Co.</i> , 310 NLRB 1037 (1993) applied to the specific facts of this particular case. (DEC. 5:21-25; 5:43-53).

EXCEPTIONS 20 AND 34	Respondent's Exceptions Regarding Burdens of Proof
EXCEPTION 33¹⁰	To the failure to conclude that the Act, through the provisions of Section 8(a)(4), address the fabricated concerns about "chilling ... the Board's investigatory sources ..." (DEC. 7:22-23).

With respect to this category of exceptions, Respondent has essentially re-filed its post-hearing brief. Judge Parke properly applied case law to the facts before her and, on this basis, found that Respondent violated Section 8(a)(1) of the Act.

In the instant case, the Judge properly laid out the applicable law. Judge Parke noted that

[t]he Board has a well-established policy against disclosure of witness statements (except as provided in Sec. 102.118(b)(1) of the *NLRB Rules and Regulations and Statements of Procedure*), which has been sustained by the Supreme Court in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978) and by circuit courts.

(ALJD 4-5.)(footnotes omitted.) She continued on to find that

[u]nder the Board's policy, the Respondent is not entitled to employee witness statements given to the Board except and until employees have testified in a Board proceeding and then only after a timely request for the statements is made for the purpose of cross-examination.

(ALJD 5.)(footnotes omitted.)

Judge Parke comprehensively analyzed *Robbins Tire* observing that the Supreme Court

¹⁰ With respect to Respondent's Exception 33, the Complaint did not allege a violation of Section 8(a)(4) and thus Judge Parke did not evaluate whether the alleged conduct violated that section of the Act.

recognized that disclosure of witness statements (except as provided in Sec. 102.118(b)(1)) could have a 'chilling effect on the Board's [investigatory] sources,' since employees 'may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify at a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated.'

(ALJD 5.)(footnotes omitted.) Judge Parke also acknowledged that

the Board's nondisclosure policy extends to the situation where an affiant has given a copy of his/her statement to the Charging Party Union; neither that circumstance nor an employee's personal possession of a copy of the affidavit establishes, 'clearly and unmistakably, that the employee has consented to release the affidavit to the opposing side.'

(ALJD 5.)(footnotes omitted.) Judge Parke determined, after an exhaustive evaluation of case law and the applicable regulations that,

the Board's relevant regulatory language and case law involve complex issues and express complex concepts; it is both logical and realistic to expect reasonable employees to fear that the Board might not be able to prevent premature or improper release of voluntary witness statements, which, in turn, might subject them to employer intimidation or coercion regarding their cooperation in the investigation or their testimony at hearing, all of which could chill employee rights.

(ALJD 8.)(footnotes omitted.) Judge Parke concluded her decision by finding that,

[v]iewed objectively, in the circumstances set forth herein, the Respondent's conduct of issuing the 2009 subpoenas requiring its current or former employees to produce affidavits they had provided to the Board had the effect of interfering with, restraining, or coercing employees in violation of Section 8(a)(1) of the Act.

(ALJD 8.)(footnotes omitted.)

It is also well established that an employer violates Section 8(a)(1) of the Act if it questions employees about alleged unfair labor practices without giving

them specific assurances that their cooperation is strictly voluntary. *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964).¹¹ An employer's request for a copy of a statement that an employee has given to a Board Agent "is, in substance, an attempt to engage in the kind of interrogation" that is prohibited by the Act. *W.T. Grant Co.*, 144 NLRB 1179, 1180-1181 (1963) *citing Joy Silk Mills v. NLRB*, 185 F.2d 732, 743 (D.C. Cir. 1950).

The Board has long held that an employer violates Section 8(a)(1) when it solicits copies of affidavits that employees have provided to Board Agents in connection with the General Counsel's investigation of unfair labor practice charges. *Inter-Disciplinary Advantage, Inc.*, 349 NLRB 480, 505 (2007). In *Inter-Disciplinary Advantage, Inc.*, the Board found that the employer violated Section 8(a)(1) when its attorney questioned an employee about statements she may have made to a Board Agent in the case and then asked her for a copy of the affidavit she gave to the Board. The Board found that an employer's request for copies of affidavits provided by employees to the Board is inherently coercive and unlawful.¹²

¹¹ See also *Beverly Health and Rehabilitation Services, Inc.*, 332 NLRB 347, 349 (2000)(employer's rule, which compels employees to cooperate in unfair labor practice investigations or risk discipline, "violates the longstanding principle, established in *Johnnie's Poultry*, that employees may not be subjected to employer interrogations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union . . . Failure to inform employees of the voluntary nature of the employer's investigation is 'a clear violation' of Section 8(a)(1) of the Act").

¹² See also *Hilton Credit Corp.*, 137 NLRB 56, 58 fn. 1 (1962)(employer violated Section 8(a)(1) by telling employees who gave statements to Board Agents investigating unfair labor practices charges against the employer that they had to give a copy of such statements to the employer); *Henry I. Siegel Co.*, 143 NLRB 386, 387 fn. 1 (1963)(employer's demands for pretrial employee affidavits inhibited

In the instant case, it is undisputed that Respondent, through its attorney, issued subpoenas duces tecum to current and former employees prior to an unfair labor practice hearing, requesting all documents in their personal possession, including affidavits, that were provided to or received from the Region. 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. *See, e.g., Beverly Health and Rehabilitation Services, Inc.*, 332 NLRB 347 (2000)(failure to inform employees of the voluntary nature of the employer's investigation was “a clear violation” of Section 8(a)(1) of the Act). Applying the above principles, Respondent’s solicitation from employees of the affidavits that they had provided to Board Agents in connection with the unfair labor practice investigation was inherently coercive in violation of Section 8(a)(1). *See, e.g., Inter-Disciplinary Advantage, Inc.*, 349 NLRB at 505. Judge Parke’s finding of a violation of Section 8(a)(1) is amply supported by the case law.

(5) RESPONDENT’S EXCEPTIONS TO JUDGE PARKE’S TREATMENT OF ITS DEFENSES

EXCEPTION 14	To the failure to receive evidence regarding NLRB Charge No. 31-CA-28662 (DEC. 4:39-46; RESP. Ex. 9
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an effective Board investigation; it is the demand for such affidavits which interferes with the Board's efforts to secure vindication of employees' statutory rights without regard to whether such demands are successful). *See also Wire Products Mfg. Corp.*, 326 NLRB 625, 627-628 (1998)(employer violated Section 8(a)(1) by interrogating employees about whether they had given statements to an agent of the Board: such questioning is inherently coercive and applies with equal force to questions pertaining to the content of the statements or whether the statements were made).

	(rejected); RESP. Ex. 10 (rejected)).
EXCEPTION 15	To the failure to find that the subpoenas were a procedural matter resolved before ALJ Anderson in NLRB Case No. 31-CA-28589 et al, thus mooting NLRB Case No. 31-CA-29253 (DEC. 6:6-12).
EXCEPTION 21	To the conclusion that mere “service” of NLRB subpoena issued by the Executive Secretary constituted an unfair labor practice (DEC. 6:9-11), as such a conclusion is contrary to law.
EXCEPTIONS 22-29	Respondent’s Exceptions Regarding its <i>Noerr-Pennington</i> and First Amendment Defenses
EXCEPTIONS 30, 31	Respondent’s Exceptions Regarding Privilege and Waiver
EXCEPTION 32	To the conclusion that an administrative policy artificially crafted by an executive branch agency trumps judicial findings on legislatively enacted and codified standards, as such a finding is contrary to law. (DEC. 7:16-22).
EXCEPTIONS 36-40	Respondent’s Exceptions Regarding the Application of the Federal Rules of Evidence

As with the previous category of exceptions, Respondent has re-presented its post-hearing brief. Judge Parke carefully considered and addressed each of Respondent’s defenses in her Decision and properly found that Respondent violated Section 8(a)(1) of the Act. Judge Parke laid out Respondent’s defenses as follows:

- (1) any issues relating to the 2009 subpoenas were resolved at the Anderson hearing;
- (2) serving subpoenas in a Board proceeding is activity protected by the First Amendment to the United States Constitution;
- (3) the subpoenas sought nothing from the region’s

investigatory file, and the Respondent was entitled to personally possessed documents and affidavits of the subpoenaed individuals because no privilege protected such documents, or if it did, it was waived; (4) the federal rules of evidence compel disclosure of a personally possessed copy of an otherwise privileged document.

(ALJD 4.) She then evaluated and properly disposed of each of Respondent's defenses.

With respect to Exception 15 and Respondent's defense first addressed by the ALJ, Judge Parke properly found that the issue before her was not moot, writing,

[w]hile Judge Anderson revoked the 2009 subpoenas insofar as they sought employee witness statements provided to the Board, the issue of whether service of those subpoenas constituted unfair labor practices was not before Judge Anderson, and he did not address that question.

(ALJD 6.)

Next, Judge Parke addressed whether Respondent's service of subpoenas in the Board Proceeding is protected by the First Amendment to the United States Constitution. Judge Parke considered Respondent's argument that "the right to subpoena is constitutionally protected by the First Amendment right to petition the Government for a redress of grievances (the Petition Clause)" and "that the Noerr-Pennington Doctrine appropriately applies to Board proceedings." (ALJD 6.)

Judge Parke considered the application of the *Noerr-Pennington* doctrine in the context of the National Labor Relations Act and found that "[i]n the labor

relations context, the Petition Clause protects access to judicial processes, and the Court instructs that labor laws must be interpreted, where possible, to avoid burdening such access.” (ALJD 6.) She further found that, in labor law, *Noerr-Pennington* immunity protects direct petitioning but has not been extended to cover incidental conduct. (ALJD 6.) Judge Parke properly found that “subpoenaing documentary evidence from witnesses for potential use in a judicial proceeding is conduct incidental to direct petitioning.” (ALJD 6.) Judge Parke thoroughly considered Respondent’s defense based on *BE & K* finding it

inapposite to the issue herein since *B.E. & K* involved direct petitioning, i.e. a lawsuit, rather than conduct incidental thereto. Even assuming that analogizing *B.E. & K* to the Respondent’s witness-statements subpoenas is apt, it is apparent that the subpoena requests could be unfair labor practices if the requests lacked reasonable bases and were brought with coercive purpose.

(ALJD 6-7.)

The *Noerr-Pennington* doctrine is not applicable and does not privilege the subpoenas issued by Respondent which requested that current and former employees produce, *inter alia*, Board affidavits. The Board is not attempting to enjoin or intervene in Respondent’s direct petitioning of the government.

Respondent contorts an unrelated doctrine to protect its attempted discovery of Board processes. The instant case is factually and procedurally distinguishable from cases like *Bill Johnson’s Restaurants, Inc., v. NLRB*, 461 U.S. 731 (1983),

and *BE & K*, 351 NLRB 451 (2007). In those cases, the Board sought to enjoin lawsuits filed by the employers on the basis that the lawsuits themselves were unfair labor practices. In the instant matter, the Board did not attempt to enjoin Respondent's petitioning of the government through a lawsuit filed by Respondent. Rather, the Board was prosecuting Respondent in its own forum and it was in that forum that Respondent used the Board's processes, Board subpoenas, to violate employees' Section 7 rights. The *Noerr-Pennington* doctrine does not privilege such conduct.

Respondent's *Noerr-Pennington* defense is an attempt to obfuscate Respondent's admitted conduct. Respondent cannot use the Board's own processes to violate the NLRA. In fact, as recognized in *Delmas Conley d/b/a Conley Trucking*, 349 NLRB 308, 311 (2007),

The problem of witness intimidation has long been a particular concern for the Board and has shaped Board practice and policy. Indeed, it is precisely the concern with the potential for 'witness intimidation' and the 'peculiar character of labor litigation' in which 'the witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment,' that undergirded the Supreme Court's holding in *NLRB v. Robbins Tire & Rubber Co.*

The Board in *Delmas Conley* noted the Board's concern over the potential for witness intimidation in Board litigation made it critical to avoid pretrial discovery in Board proceedings. In this case, Respondent subpoenaed witness statements gathered during the investigation of unfair labor practice charges. Respondent's conduct clearly implicates what the Supreme Court considered to

be a risk of “interference” with the Board’s proceedings, that Respondent will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all. *Delmas Conley* at 311.

Respondent’s argument in its Brief appears to be that the government, through this litigation, is infringing on Respondent’s right to request NLRB subpoenas duces tecum from the Agency. The instant litigation does not implicate Respondent’s right to request NLRB subpoenas duces tecum from the Agency but rather addresses one of the requests it included in the Agency-supplied subpoenas that Respondent issued to its former and current employees.

The allegation in the instant complaint does not interfere with Respondent’s ability to request and receive subpoenas from the NLRB nor does it interfere with Respondent’s ability to petition the government under the First Amendment of the Constitution. Rather, the complaint allegation addresses Respondent’s ability to coerce and intimidate current and former employees via a message contained in its subpoenas. Under Respondent’s argument, as long as it is using a subpoena issued to it by the NLRB, there is nothing it could state or request that would violate the Act. Taken to an extreme, Respondent could include language in its subpoena duces tecum that it would fire any employees who attend the hearing against it and such a statement would be protected by Respondent’s First Amendment right to petition the government just by virtue

of being communicated via an NLRB subpoena. Respondent cannot be permitted to use NLRB subpoenas duces tecum to communicate unprotected messages to employees or to require them to turn over documents to which Respondent is not entitled. The *Noerr-Pennington* doctrine does not apply in this context and Respondent's conduct in the instant matter clearly violates the public policy concerns underpinning *Delmas Conley* and *Robbins Tire*.

Next, Judge Parke evaluated Respondent's defense that "it was entitled to personally possessed affidavits of the subpoenaed individuals because no privilege protected them, or, alternatively, that any such privilege was waived."

(ALJD 7.) Judge Parke found that "Respondent's argument is misplaced" as

[t]he employee witness statements are not shielded from subpoena by attorney-client privilege but by the Board's longstanding policy of protecting employees from the reprisal and harassment inherent in labor litigation by exempting their statements from disclosure unless and until they are called to testify.

(ALJD 7.) Judge Parke concluded that the protection against disclosure of employee witnesses statements "exists in order to remove any chilling effect that would otherwise befall the Board's investigatory sources" and that the Respondent failed to offer a persuasive argument as to "why the Board's policy does not protect the employee statements it subpoenaed." (ALJD 7.)

Judge Parke next addressed Respondent's argument that the Federal Rules of Evidence ("FRE") compel disclosure of a personally-possessed copy of an otherwise privileged document. Judge Parke noted that the Board's Rules

and Regulations authorize application of the FRE to Board proceedings insofar as practicable. (ALJD 7.) Moreover, Judge Parke found that even were administrative law judges conducting board hearings required to adhere to the FRE, “the Respondent has not identified any evidentiary rule therein that would compel subpoenaed employees to produce investigatory Board affidavits, even those personally possessed.” (ALJD 7.) Judge Parke also directly addressed Respondent’s argument that its conduct was permissible under FRE 612. Judge Parke noted that “[e]xcept for unusual circumstances, FRE 612 contemplates production of such a writing after an adverse party has established the witness used it to refresh memory, which would generally occur during cross-examination.” (ALJD 8.) Judge Parke properly determined that Respondent’s conduct was not insulated by the Federal Rules of Evidence.

Respondent also argues that the instant complaint was time-barred under Section 10(b) of the Act positing that the allegation in this case is “the same cause of action alleged by GCC/IBT in NLRB Charge No. 31-CA-28622 on January 4, 2008.” (RBex 45.) Respondent’s issuance of the 2009 subpoenas in this case constitutes an entirely separate cause of action from what was alleged in Case No. 31-CA-28622. The complaint in this case arose out of Respondent’s conduct in issuing subpoenas on or about May 7, 2009 requesting, *inter alia*, affidavits provided to and/or received from Region 31. The Union filed a charge regarding this May 7, 2009 conduct on May 8, 2009.

(GC Ex 1(f):1.) The charge in this case was not a re-filing of Case No. 31-CA-28622 but rather a new charge arising out of distinct conduct by Respondent. Judge Parke properly found that the charge and complaint in this case were timely-filed and not barred by Section 10(b) of the Act.

IV. CONCLUSION

Respondent's exceptions constitute an attempt to relitigate the merits of this case. Despite Respondent's claims, the evidence fully supports the decision and recommended order in which Judge Parke made proper procedural rulings and premised her legal conclusions on established precedent. Counsel for the General Counsel therefore respectfully requests that the Board deny Respondent's exceptions in their entirety.

Dated at Los Angeles, California, this 31st day of March, 2010.

Respectfully submitted,

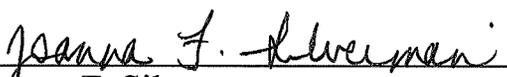

Joanna F. Silverman
Counsel for the General Counsel
National Labor Relations Board, Region 31
11150 West Olympic Boulevard, Suite 700
Los Angeles, CA 90064-1824

Exhibit 1

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

AMPERSAND PUBLISHING, LLC
d/b/a SANTA BARBARA NEWS-PRESS

and

31-CA-29253

GRAPHIC COMMUNICATIONS CONFERENCE,
INTERNATIONAL BROTHERHOOD OF TEAMSTERS

ORDER DENYING MOTION TO REOPEN RECORD

On November 25, 2009, the Respondent filed a motion to reopen the record for the purpose of (1) receiving into the rejected exhibit file GC Exhibit 18, which had been rejected but not placed in the rejected file and (2) admitting GC Exhibit 30, which was never offered into evidence.

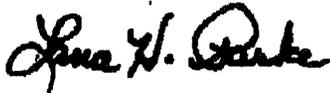
Counsel for the General Counsel opposes the motion on grounds that the documents marked as GC Exhibit 18 and GC Exhibit 30 were the subject of stipulations reached by the parties.

A review of the transcript shows stipulations were received that purported to obviate the necessity of receiving GC Exhibits 18 and 30 into evidence. The Respondent has not explained why the stipulations do not adequately reflect the facts those exhibits would show or the evidentiary deficiencies the receipt of GC Exhibits 18 and 30 would remedy.

Accordingly, Respondent's motion is hereby denied.

SO ORDERED.

Dated, December 4, 2009 at San Francisco, CA:



Lana H. Parke
Administrative Law Judge

Served by Fax:

James J. McDermott, Regional Director; Joanna Silverman
L. Michael Zinser
Barry Cappello/Dugan P. Kelley
Ira L. Gottlieb

310.235.7420
615.244.9734
805.965.5950
818.973.3201

Exhibit 1

Re: Ampersand Publishing, LLC d/b/a Santa Barbara News-Press
Cases 31-CA-29253

CERTIFICATE OF SERVICE

I hereby certify that a copy of the ANSWERING BRIEF OF COUNSEL FOR THE GENERAL COUNSEL TO RESPONDENT'S EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE was served on the 31st day of March, 2010:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570
Electronically filed (www.nlr.gov)

Served By Regular Mail

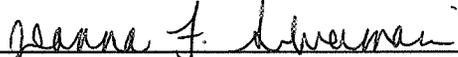
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