

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

CEMEX, INC.

and

**GENERAL TEAMSTERS (EXCLUDING MAILERS),
STATE OF ARIZONA, LOCAL UNION NO. 104,
AN AFFILIATE OF THE INTERNATIONAL
BROTHERHOOD OF TEAMSTERS**

**Cases 28-CA-22165
28-CA-22169
28-CA-22220
28-CA-22313
28-CA-22409
28-CA-22534
28-CA-22699
28-CA-22711
28-CA-22726
28-CA-22967**

CEMEX, INC.

and

**INTERNATIONAL UNION OF OPERATING
ENGINEERS LOCAL 428, AFL-CIO**

**Case 28-CA-22267
28-CA-22419
28-CA-22823
28-CA-22894**

**REQUEST FOR SPECIAL PERMISSION TO APPEAL FROM THE
ADMINISTRATIVE LAW JUDGE'S ISSUANCE OF PROTECTIVE ORDER
PROVISIONS CONCERNING DOCUMENTS SOUGHT BY CHARGING PARTY
TEAMSTERS LOCAL UNION NO. 104's SUBPOENA DUCES TECUM**

Charging Party General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104 (herein “Charging Party”) requests special permission to appeal to the Board the issuance by Administrative Law Judge Burton Litvak (“ALJ” or “Judge Litvak”) of a provision contained in a protective order covering documents sought by Charging Party’s subpoena duces tecum. The provision at issue restricts Charging Party’s representatives, other than counsel, from reviewing documents that have been ordered by the ALJ to be produced by Respondent. This provision unfairly and unnecessarily restricts Charging Party’s due process rights, most notably, the right to fully participate at trial.

Charging Party respectfully requests that the Board order the ALJ to rescind this provision, and require Respondent to produce the documents without the burden of such restrictions.

I. STATEMENT OF CASE

A. Factual Background

A detailed recitation of the facts and circumstances relating to these matters, is contained in Counsel for the Acting General Counsel’s Request for Special Permission to Appeal from the Administrative Law Judge’s Issuance of Protective Order Provisions Concerning Documents Sought by Counsel for the Acting General Counsel’s Subpoena Duces Tecum in this case, filed with the Board on August 16, 2010 (herein “CAGC’s Special Appeal”), at Heading I, pages 2 through 8, inclusive. Charging Party incorporates herein by reference this section of CAGC’s Special Appeal.

Charging Party’s subpoena duces tecum served on Respondent, No. B566572 (herein “Teamsters’ Subpoena”) is attached as Exhibit E to CAGC’s Special Appeal.

B. Protective Order Issued by ALJ on July 20 and 21, 2010

At the hearing on July 20 and 21, 2010, the ALJ ruled that Charging Party and its representatives and attorneys have the full right to participate in the hearing, including the right to view confidential information. In addition, the ALJ ruled that Charging Party's attorneys and the CAGC may have a representative of the Charging Party present in the hearing to help explain or interpret documents that may be produced as part of the subpoenaed material. Judge Litvak acknowledged that any diminution of the Charging Party's right to participate in a trial would deny Charging Party its due process rights. (Tr. 719:8-721:23; 804:20-805:21; 823:6-824:3)

Contradicting this ruling, however, Judge Litvak issued a protective order denying Charging Party its due process rights with respect to categories of documents relating to allegations of work diversion, described in paragraphs 21(a) through 21(d), 33 to 35 and 39 of the Teamsters' Subpoena. As to these documents, the ALJ's protective order prohibits Charging Party's representatives from accompanying the CAGC to Respondent's facilities to view and inspect the subpoenaed documents.¹ Instead, the ALJ limited access to this category of documents to Charging Party's attorneys only. In response to Charging Party's objection, Judge Litvak invited Charging Party to appeal his order. (Tr. 804:20-805:13; 833:15-834:24)

¹ The categories of documents at issue are identical to documents sought by the CAGC's July 6, 2010 subpoena duces tecum. Addressing Respondent's objection that it would be too burdensome to physically produce these documents, the ALJ permitted Respondent to submit a chart showing essential information contained in the documents. IF CAGC is not satisfied with the chart and states grounds for needing to see the underlying documents, the CAGC will be allowed to go to Respondent's facilities where the documents are kept to inspect the documents. (Tr. 746:1-748:3)

II. ARGUMENT

A. The Board's Rules and Regulations Protecting the Due Process Rights of Charging Parties

As set forth in Heading II at pages 9-13 of the CAGC's Special Appeal, and incorporated herein by reference, Section 102.8 of the Board's Rules and Regulations (Board's Rules") defines the term "party" as "any person named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in any Board proceeding, including, without limitation, any person filing a charge or petition under [the Act]." By virtue of filing the unfair labor practice charges herein, Charging Party is deemed a "party" under the Board's Rules, and is entitled to participate fully in the hearing. *Rickert Carbide Die, Inc.*, 126 NLRB 757 fn. 1 (1960); *John L. Clemmy Company, Inc.*, 118 NLRB 599, 600 fn.1 (1957).

In addition, under Section 102.38 of the Board's Rules, Charging Party has the right to appear at the hearing in person, or by counsel or other representative, to call, examine and cross-examine witnesses and introduce evidence into the record. Charging Party also has the right to issue subpoenas seeking testimony and evidence in support of its case, including the same information sought by the General Counsel, and to request the Board to seek enforcement of its subpoena in federal court. See Board's Rules, Section 102.31(a); Section 102.31(d); see also *Hydro Conduit Corp.*, 274 NLRB 1293 (1985).

B. The July 21, 2010 Protective Order Denies Charging Party its Due Process Rights

Restricting access to the subpoenaed documents to Charging Party's attorneys necessarily deprives Charging Party of its due process rights. Counsel and the CAGC will be denied the

Charging Party's assistance in interpreting and deciphering documents needed at trial. The protective order deprives Charging Party of the right to participate fully in the unfair labor practice hearing.

III. CONCLUSION

For the foregoing reasons, and for all the reasons set forth in the CAGC's Special Appeal, Charging Party respectfully requests that the Board order that the ALJ rescind the protective order issued by him insofar as such order restricts the rights and opportunities of the Charging Party's representatives to assist their counsel and CAGC when reviewing documents produced pursuant to the Teamsters' Subpoena and the CAGC's July 6 Subpoena, and order that the documents at issue sought by the Teamsters' Subpoena and the CAGC's July 6 Subpoena be produced in a manner that will afford Charging Party's representatives to assist their counsel and CAGC in reviewing and understanding such documents.

Dated August 17, 2010 at Encino, California.

Respectfully submitted,

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Certificate of Service

Charging Party General Teamsters (Excluding Mailers), State of Arizona, Local Union No. 104, an Affiliate of the International Brotherhood of Teamsters, hereby submits that it has served via E-Gov, E-Filing and by e-mail a copy of the foregoing **REQUEST FOR SPECIAL PERMISSION TO APPEAL FROM THE ADMINISTRATIVE LAW JUDGE'S ISSUANCE OF PROTECTIVE ORDER PROVISIONS CONCERNING DOCUMENTS SOUGHT BY CHARGING PARTY TEAMSTERS LOCAL UNION NO. 104's SUBPOENA DUCES TECUM** on August 17, 2010, to the following:

Via E-Gov E-Filing:

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