UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CEMEX, INC.

and **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

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

CEMEX, INC.

and **Cases 28-CA-22267**
28-CA-22419
28-CA-22823
28-CA-22894

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 428, AFL-CIO

CEMEX'S OPPOSITION TO THE COUNSEL FOR ACTING GENERAL COUNSEL'S AND TEAMSTERS' REQUEST FOR SPECIAL APPEAL

Introduction

The National Labor Relations Board should deny the Counsel For Acting General Counsel's and Teamsters' request to appeal two provisions of the Administrative Law Judge's Protective Order because: (1) such an appeal conflicts with current Protective Order proceedings before the Federal District Court; (2) the putative appellants misstate the Board's "due process" law; and (3) the putative appellants' cursory rationale for their appeal ignores the extensive record and findings that support the Protective Order.

Argument

I. THE PROPOSED APPEAL CONFLICTS WITH CURRENT PROTECTIVE ORDER PROCEEDINGS BEFORE THE FEDERAL DISTRICT COURT.

A. Procedural Background.

On September 4, 2009, the CAGC issued a broad subpoena duces tecum to the Respondent, which called for production of commercially sensitive confidential information revealing – among other things – "the nature, identity, and volume of work" (subpoena item 23) and "profit or loss margins" (subpoena item 28). Respondent requested that the CAGC agree to a comprehensive Protective Order covering production of the confidential information. The CAGC refused, and the parties began discussing Protective Order issues with the ALJ. In the middle of that discussion, the CAGC – without notice to Respondent or the ALJ – filed an enforcement action in the Federal District Court of Arizona on October 5, 2009. The ALJ continued the underlying hearing pending resolution of the CAGC's enforcement action.

After four months of extended litigation, multiple briefs, and numerous oral arguments before the District Court, the Court denied the CAGC's petition for enforcement in large part, but ordered production of profit and loss data subject to a

comprehensive Protective Order. (*See* Court's February 1, 2010 Protective Order, at 3, 6-7, attached as Exhibit 1). As to the Protective Order, the Court found on the extensive record before it that "CEMEX has a substantial interest in protecting the confidentiality of their customer lists and profit/loss statements . . . [including] customer name, volume bought, price, and place of delivery" from "competitor and potential competitors" and "labor unions." (Id. at 3). The Court found that the unprotected disclosure of CEMEX's Confidential Information could cause "considerable harm with competitors potentially undercutting CEMEX's prices to all of their customers with very little effort" and with labor unions that could "use it to bargain against CEMEX." (Id.). Based on its findings, the Court entered a detailed Protective Order that applied "in the underlying proceeding," "in this proceeding," and "in these proceedings." (Id. at 6).

As to the continuing nature of the Protective Order, the Court stated: "IT IS FINALLY ORDERED that this Order will continue to be binding throughout and after the final disposition of this action. . . . Within fifteen days (15) after the close of the record, Counsel for General Counsel shall return all Confidential Information and any copies thereof (including summaries and excerpts) to CEMEX's Counsel." (Id. at 7).

B. <u>Current Proceedings Before The Federal District Court</u>.

Shortly after the CAGC petitioned the ALJ to reconvene the hearing, the CAGC announced that the CAGC would withdraw all prior subpoenas and issued a new subpoena, also calling for the production of the same types of commercially sensitive information, but in even more detail. The Teamsters' union issued an identical "cut and paste" subpoena as well.

Respondent's counsel contacted the CAGC to confirm that it would produce confidential information under the District Court's Protective Order, but the CAGC asserted that the District Court's Protective Order – which on its face states that it applies to any Confidential Information produced in the case (*See* Order at 6-7) – became moot and "dissolved" when the CAGC withdrew the first subpoena and reissued the second. Respondent asked the CAGC for any authority to support that startling proposition, but the CAGC could locate none.

Thereafter, the parties argued the issue to the ALJ, and the ALJ agreed with the CAGC and issued his own Protective Order (on which the CAGC and the Teamsters seek a special appeal). In response, Respondent moved the Federal District Court to clarify on an expedited basis whether its Protective Order "dissolved" when the CAGC withdrew one subpoena and replaced it with another. The Court set an expedited briefing schedule and will conduct oral argument on September 2, 2010.

C. <u>The Board Should Deny The Special Appeal At Least Until The District Court Rules</u>.

All parties agree that the National Labor Relations Act (29 U.S.C. § 161(2)) vests subpoena enforcement authority solely and only in the District Court. The CAGC further acknowledges that the District Court has the power to enter Protective Orders that govern the production of documents in response to agency subpoenas. And the CGC admits that (1) confidential material sought in the September 4, 2009 subpoena overlaps with confidential material covered by the July 6, 2010 subpoena; and (2) the CAGC can continue to seek confidential records within the scope of the now-withdrawn subpoenas. But the CAGC then argues that the Court's Protective Order – applicable to the

production of "commercially sensitive information" "in this proceeding" and "throughout this action" – only applies to the single subpoena that gave rise to the enforcement action, and is irrelevant to the CAGC's and union's new subpoenas, even though those subpoenas request the same commercially sensitive information.

Respondent contends that the District Court's Protective Order is and remains the law of the case, and controls the Protective Order issues. If the Court agrees on September 2nd, the Court's ruling will likely moot the special appeals to the Board. If the Court disagrees, then the Board can reexamine whether the ALJ Protective Order, underlying facts, and relevant law warrant a special appeal without a conflicting "law of the case" Order from the District Court. *Compare Athbro Precision Eng'g Corp.*, 171 NLRB 21, 21 (1968) ("On January 17, 1968, the district court issued its order and judgment holding that the election was valid and directing the Board to certify the Petitioner and treat the certification as it would any other certification. The Board accepts the district court's order as the law of this case.").

II. THE PUTATIVE APPELLANTS MISSATE THE BOARD'S "DUE PROCESS" LAW.

The putative appellants argue in their requests for special appeal that Charging Parties have a right to participate in the unfair labor practice proceeding. True. However, the putative appellants further argue that the ALJ may not restrict that right in any way. Not true. National Labor Relations Board Rules and Regulations § 102.38 gives Charging Party Unions "the right to appear at such hearing in person, *by counsel*, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, *except that the participation of any party*

shall be limited to the extent permitted by the administrative law judge." (Emphasis added). Tellingly, in the CAGC's request for special appeal, the CAGC uses an ellipse to omit the italicized "except that" provision, indicating that the CAGC knows well that an ALJ can limit the manner in which a Charging Party participates in a hearing.

Indeed, the NLRB endorses the use of "attorneys only" protective orders given the proper circumstances and even cites to an "attorneys only" protective order case in its "ALJ Bench Book." *See Division of Judges Bench Book 2005 Supplement*, § 8-330, citing *inter alia, United Parcel Service*, 304 NLRB 693, 693-694 (1991) (where the ALJ ordered that the use of confidential information "shall be limited to this hearing and shall neither be disclosed nor disseminated to other than counsel of record at this hearing"); *compare Dlubak Corp.*, 307 NLRB 1138, 1160 (1992) (where the ALJ "issued a protective order restricting the General Counsel from disclosure outside of the NLRB of financial information provided by the Respondent in compliance with the subpoena"). And, of course, the ALJ entered a limited "attorneys only" protective order in this case. (*See* CAGC Brief at 6, 8 n.7).

Consequently, the Board should deny the special appeal requests because – contrary to the putative appellants' arguments – the ALJ may limit the extent of a Charging Party's participation in an unfair labor practice proceeding where warranted.

III. THE PUTATIVE APPELLANTS' CURSORY RATIONALE FOR THEIR APPEAL IGNORES THE RECORD AND CONTROLLING FINDINGS.

A. The CAGC And Teamsters Offer No Compelling Rationale To Reverse The ALJ's Finding Of Need For One Attorneys-Only Provision.

Both the CAGC and Teamster urge the Board to reverse the ALJ's Protective Order, which directs that, if the CAGC wants to sift through 1.2 million individual "job

tickets" (showing who took a particular load of concrete to which customer in what amount on what day), the CAGC must do that on-site, with the Charging Party attorneys, if desired, but not the Charging Parties because – as noted by Respondent – it would be inappropriate for union business agents or organizers to spend days or weeks in Respondent's facilities with unrestricted access to key confidential and commercially sensitive customer information; particularly where the unions represent many of Respondents' competitors nationwide. The CAGC and Teamsters ask the Board to reverse that reasonable restriction purportedly because the union attorneys need the business agents and organizers to help "them to decipher and understand documents that may be introduced at trial, especially subpoenaed material." (CAGC Brief at 10; Teamsters Brief at 4-5).

But that argument fails – as it failed when argued to the ALJ – because the attorneys-only restriction at issue applies only to one type of document (one-page job tickets), and the ALJ determined that those documents contain only basic customer order and delivery information, which require no "deciphering" or "interpretation."[1] In addition, if the CAGC or union attorneys want to copy one or 1.2 million job tickets and

---

[1] MS. ROSENFELD (Union Attorney): In particular, I believe you're referring to the job tickets. Those are the very documents that the General Counsel and the Unions' counsel would need the assistance of the Charging Parties to interpret.

JUDGE LITVACK: I don't see how. It's a job ticket. You can read a job ticket. I can figure out what a job ticket means. I don't think it's -- I don't think the information contained on a job ticket is so obtuse that you wouldn't understand what it means. We're not dealing with material going to an atomic bomb here. This is just a job ticket that someone gets.

[RT 805:16-806:1, attached at Exhibit 2.]

take them back to the CAGC's offices, the Charging Party non-attorney representatives can view them there per the ALJ's Protective Order.

B. The CAGC Offers No Compelling Rationale To Reverse The ALJ's Protective Order Regarding The Return Of Confidential Information.

The CAGC also asks the Board to reverse the ALJ's ruling that the CAGC and Charging Parties must return Respondent's Confidential Information within 15 days after the close of the record. The CAGC argues that such a provision "will prevent the submission of a complete record to the Board [on Exceptions] upon which it may base its decision." (CAGC Brief at 11). That argument fails because it confuses Respondent's Confidential Information produced in response to a subpoena and Exhibits received into evidence at the hearing. The ALJ's Protective Order requires the return of the former, but not the latter. Indeed, Respondent anticipates that Confidential Information submitted into evidence will be done so under seal, ensuring the protection of such information from public disclosure. Consequently, the CAGC will have post-hearing access to all Exhibits. And of course, the CAGC could not cite or reference Confidential Information to the Board or a reviewing Court that was not admitted into evidence, so the CAGC would suffer no prejudice from returning all non-Exhibit Confidential Information.[2]

[2] Documents produced in response to a trial subpoena in an Unfair Labor Practice proceeding do not all within the ambit of any category of "Agency" documents covered by the Federal Records Act, and the CAGC offers no authority to the contrary. The DOJ/Executive Branch case cited by the CAGC at 12 – on its face – has no resemblance to a ULP hearing.

Conclusion

For the foregoing reasons, Respondent respectfully requests that the Board deny the putative appellants request for special review.

RESPECTFULLY SUBMITTED this 23rd day of August, 2010.

STEPTOE & JOHNSON LLP

By /s/ Steven D. Wheeless

Steven D. Wheeless
Elizabeth M. Townsend
Collier Center
201 East Washington Street, Suite 1600
Phoenix, Arizona 85004-2382
602-257-5234
swheeless@steptoe.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the OPPOSITION TO REQUEST FOR SPECIAL APPEAL, in Cases 28-CA-22165 et al., was served via E-Gov, E-Filing, facsimile, and e-mail on this 23rd day of August, 2010, on the following:

Via E-Gov E-Filing:
Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, NW, Rm. 11602
Washington, D.C. 20570-0001

Honorable Mary M. Cracraft
Associate Chief Administrative Law Judge
Division of Judges
National Labor Relations Board
901 Market Street, Suite 300
San Francisco, CA 94103-1779

One copy via e-mail:
Cornele A. Overstreet, Regional Director
Paul R. Irving
Mara-Louise Anzalone
Christopher J. Doyle
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004-3099

Emails: cornele.overstreet@nlrb.gov; paul.irving@nlrb.gov; mara-louise.anzalone@nlrb.gov; christopher.doyle@nlrb.gov

Elizabeth Rosenfeld Cohen, Attorney at Law
Wohlner, Kaplon, Phillips,
Young & Cutler
15456 Ventura Boulevard, Suite 500
Sherman Oaks, CA 91403
E-mail: rosenfeld@wkpyc.com
Attorneys for Teamsters Local 104

Michael J. Keenan, Attorney at Law
Ward, Keenan and Barrett, PC
3838 North Central Avenue, Suite 1720
Phoenix, AZ 85012
E-mail: mkeenan@wardkeenanbarrett.com
Attorneys for Operating Engineers Local 428

Laurie Preston, Director, Human Resources – Arizona
CEMEX Construction Materials South, LLC
4646 East Van Buren, Suite 250
Phoenix, AZ 85008
Email: LPreston@cemexusa.com

One copy via facsimile:
General Teamsters, State of Arizona
Local Union No. 104
1450 South 27th Avenue
Phoenix, AZ 85009
Facsimile: (602) 272-3744

General Teamsters, State of Arizona
Local Union No. 104
238 West Elm Street
Tucson, AZ 85705
Facsimile: (520) 624-5262

International Union of Operating Engineers
Local 428
6601 North Black Canyon Highway
Phoenix, AZ 85015
Facsimile: (602) 257-8674

/s/ Monica Medlin, Legal Secretary

Exhibit 1

WO

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

NATIONAL LABOR RELATIONS BOARD, Plaintiff, vs. CEMEX, INC., Defendant.	No. 2:09-cv-2546-PHX-JAT **AMENDED ORDER** (amending Order at Doc. # 25)

Pending before the Court is National Labor Relations Board's ("NLRB") application pursuant to §11(2) of the National Labor Relations Act, 29 U.S.C. § 161(2) for compliance on the part of CEMEX, Inc. ("CEMEX") with a subpoena duces tecum dated September 4, 2009 (Doc. # 1). The Court held an initial hearing on December 7, 2009. On the basis of the December 7 hearing and the arguments contained in the parties' moving papers, the Court will address in part the issues presented by NLRB's application. The remaining issues will be considered at the January 22, 2010, hearing. In short, in this Order the Court will address CEMEX's request for a protective order and to seal the discovery documents, reserving argument and determination on the remaining issue of whether the Court should enforce the September 4, 2009, subpoena duces tecum.

///

///

I. BACKGROUND

On June 30, 2009 the NLRB's General Counsel issued and served on CEMEX a Fourth Amended Consolidated Complaint and a notice of hearing charging CEMEX with violating various statutes for, *inter alia*, diverting work from its union-represented employees to its non-unionized workforce and closing two of its unionized facilities. The NLRB contends CEMEX's conduct was undertaken based on its employees' union activities. (Doc. #2). On September 4, 2009, the NLRB issued a subpoena duces tecum to CEMEX's Custodian of Records. (Doc. #2, Ex. A). Upon CEMEX's refusal to produce documents the NLRB took action in this Court on October 5, 2009 for the enforcement of the September 4, 2009 subpoena duces tecum against CEMEX.

II. CEMEX's REQUEST FOR PROTECTIVE ORDER AND TO SEAL DOCUMENTS

A. Protective Order Is Granted

CEMEX claims it needs a protective order with regards to Items 23 and 28 because those documents contain competitively and financially sensitive information, and also contain customer information.[1]

"[T]he public can gain access to litigation documents and information produced during discovery unless the party opposing disclosure shows 'good cause' why a protective order is necessary." *Phillips v. General Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002). The district court is allowed to override the presumption of public access where "good cause" is shown. FED.R.CIV.P. 26(c); *Phillips*, 307 F.3d at 1210. "For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." *Phillips*, 307 F.3d at 1210-11. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning do not satisfy the Rule 26(c) test." *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9 Cir. 1992) (quotation

---

[1]The ALJ found good cause for granting a protective order regarding the profit/loss statements and the customer information as to Item 23; however, denied the request to seal the documents.

omitted). The Court will balance the public and private interests to decide if a protective order is necessary if particularized harm is found. *Phillips*, 307 F.3d at 1211.

CEMEX has a substantial interest in protecting the confidentiality of their customer lists and profit/loss statements from the general public, and more specifically, their competitors and potential competitors. If this information were allowed to be public, CEMEX could suffer considerable harm with competitors potentially undercutting CEMEX's prices to all of their customers with very little effort. Some of the harmful information requested would include customer name, volume bought, price, and place of delivery. Furthermore, CEMEX claims if the information was public, labor unions would use it to bargain against CEMEX. Accordingly, CEMEX has provided specific examples and articulated reasoning as to why there would be harm absent a protective order.

CEMEX's showing of good cause is stronger when balanced against the public's interest to documents during the discovery process. The right to inspect and copy judicial records is generally "justified by the interest of citizens in keeping a watchful eye on the workings of public agencies" and "understanding the judicial process." *Kamakaňa v. City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006) (citations and quotations omitted). However, "[t]he public has less of a need for access to court records attached only to non-dispositive motions because those documents are often 'unrelated, or only tangentially related, to the underlying cause of action.'" *Id.* at 1179 (quotation omitted).

Therefore, given CEMEX's considerable need for protection of commercially sensitive information and the public's relatively low need for access to documents produced during discovery, the balance weighs in favor of issuing a protective order as to Item 23 and 28. It is important to note that the documents produced during discovery might never make it onto any type of dispositive motion, or be admitted into evidence at trial.

B. Sealing Documents is Premature

1. In General

CEMEX argues that they need the additional protection of having the documents sealed. However, this Court disagrees, and finds that putting the documents under seal would

be premature. *See, e.g.*, LRCiv 5.6 ("The Court generally will not enter an order that gives advance authorization to file documents under seal that are designated . . . under a protective order or confidentiality agreement."). Since the case is still in the discovery stages, many of the documents produced will be "unrelated, or only tangentially related, to the underlying cause of action." *Kamakana*, 447 F.3d at 1179. "Materials unearthed during discovery . . ." are private and not a part of the judicial record, which are "public documents almost by definition, and the public is entitled to access by default." *Id.* at 1180 (citation omitted). Therefore, sealing documents that are already subject to a protective order at the discovery stage is unnecessary.

If the court were to add the additional protection of a seal, "'once the [sealed discovery] documents [were] made part of a dispositive motion [e.g., a summary judgment motion ruled upon by the court] . . . they [would] lose their status of being raw fruits of discovery,' and no longer enjoy protected status 'without some overriding interests in favor of keeping the discovery documents under seal.'" *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1136 (9th Cir. 2003) (quotation omitted). After losing status as a sealed document, in order to keep it sealed when attached to a dispositive motion or when admitted to the trial record, it will have to meet the "compelling reasons" standard. *Kamakana*, 447 F.3d at 1179. Without more, a "good cause" showing will not satisfy the "compelling reasons" test. *Id.* at 1180. Because this Court finds sealing the discovery documents premature, it does not address whether CEMEX has "compelling reasons" for protection under seal.

2. Freedom of Information Act ("FOIA")

CEMEX also argues that additional protection above a protective order is needed because the information is subject to the FOIA. (Doc. #7 at 9). CEMEX claims not having the documents sealed would leave open the possibility that the unions or any competitor could request the information, essentially eviscerating the protection of the confidential information. *Id.* The NLRB argues that an FOIA request for documents is too speculative and an insufficient reason to seal the documents. (Doc. #10 at 6).

This Court agrees with the NLRB that the *potential* for an FOIA request is insufficient to require the sealing of the documents. There is no guarantee that an FOIA request will be encountered in the present case. Furthermore, the "FOIA provisions offer sufficient protection for [CEMEX] during the period . . . which charging parties may seek information from their files." *E.E.O.C. v. AON Consulting, Inc.*, 149 F.Supp.2d 601, 609 (S.D. Ind. 2001). CEMEX is required to receive notice of such requests for commercially sensitive information so that they have an opportunity to object to its disclosure. *See* 5 U.S.C. § 552(b)(4); 29 C.F.R. § 1610.19; *AON Consulting*, 149 F.Supp.2d at 609. In addition to the notice requirement, the protective order language requires the NLRB to return the documents fifteen (15) days after the close of the record.

Therefore, for the reasons stated above, the Court denies CEMEX's request to seal the documents.

III. JOINT DOCUMENT AND PRODUCTION COSTS STATEMENT

The Court will set argument on the remaining issue for January 22, 2010, at 1:30 PM. The Court will not revisit the protective order and sealing issues.

The parties shall jointly prepare and file by January 15, 2010, a statement of each of NLRB's requests currently before the Court, organized as follows:

1. A description of the item or category of items requested and rationale and anticipated need for the item(s).

    A. The objection or objections by defendant to the request and rationale for each objection. If the objection includes length of time needed to respond to the request, or additional cost incurred in responding to the request (in the event the Court decides to shift the burden of cost to the NLRB), the respondent shall specify how much time or cost is anticipated.

    B. If the respondent proposes an alternative source of the information sought, then Plaintiff shall specify in detail why the alternative is unacceptable and will not substantially suffice for the purpose requested.

2. Next item, etc.

Accordingly,

IT IS ORDERED that National Labor Relations Board's application pursuant to §11(2) of the National Labor Relations Act (Doc. # 1) is granted in part, denied in part, and Ordered to remain pending for further resolution at the January 22, 2010, hearing.

IT IS FURTHER ORDERED that CEMEX's Motion for Leave to File Sur-Reply (Doc. # 14) is denied.

IT IS FURTHER ORDERED setting oral argument on the remaining issues as discussed above for January 22, 2010, at 1:30 PM in Courtroom 503, 401 West Washington Street, Phoenix, AZ 85003. To assist the court reporter, the parties shall prepare and bring to the oral argument a Table of Authorities, in alphabetical order, which includes all of the authorities on which the parties will rely at oral argument. The Table of Authorities shall not exceed the scope of the parties pleadings.

IT IS FURTHER ORDERED that the parties shall jointly prepare and file the document above referenced on or before January 15, 2010.

The Court enters the following with respect to the Protective Order discussed above:

IT IS ORDERED that documents produced by CEMEX to Counsel for General Counsel that are marked "Confidential" shall only be disclosed to the ALJ and the court reporter, Counsel for General Counsel and its staff, and witnesses who are under oath and actually testifying about such Confidential Information in the underlying proceeding. Confidential Information produced by CEMEX shall be secured and maintained by Counsel for General Counsel in a manner so as to avoid disclosure of its contents to any persons not identified herein. All witnesses who are shown such Confidential Information during their testimony are hereby ordered to maintain such information in confidence and to not disclose the contents of such Confidential Information outside their testimony in this proceeding.

IT IS FURTHER ORDERED that Confidential Information introduced in these proceedings shall not be disclosed to or discussed with the Charging Party Unions or their agents or representatives. Specifically, Counsel for General Counsel and witnesses in these proceedings are hereby precluded from disclosing Confidential Information to or discussing

Confidential Information with the Charging Party Unions, their agents or their representatives. Further, the Charging Party Unions and any competitors shall be excluded from the hearing at times when the Confidential Information is being discussed.

IT IS FINALLY ORDERED that this Order will continue to be binding throughout and after the final disposition of this action. All Confidential Information shall be used only for the prosecution and/or defense of this action. Within fifteen days (15) after the close of the record, Counsel for General Counsel shall return all Confidential Information and any copies thereof (including summaries and excerpts) to CEMEX's Counsel.

Amended *nunc pro tunc* effective 21st day of December, 2009.

DATED this 1st day of February, 2010.

James A. Teilborg
United States District Judge

Exhibit 2

Exhibit 2

BEFORE THE

NATIONAL LABOR RELATIONS BOARD

In the Matter of: CEMEX, INC., and GENERAL TEAMSTERS (EXCLUDING MAILERS) STATE OF ARIZONA, LOCAL UNION 104, AN AFFILIATE OF INTERNATIONAL BROTHERHOOD OF TEAMSTERS,	)	Case Nos.: 28-CA-22165 28-CA-22169 28-CA-22220 28-CA-22313 28-CA-22409 28-CA-22534
CEMEX, INC., and INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL 428, AFL-CIO.	)	Case Nos.: 28-CA-22267 28-CA-22419

The above-entitled matter came on for further hearing, pursuant to adjournment, before BURTON LITVACK, Administrative Law Judge, at the National Labor Relations Board, 2600 North Central Avenue, Phoenix, Arizona, on Tuesday, July 20, 2010.

1 with regard to subpoenaed material. And I think that if -- I
2 cannot exclude those people from participating in the hearing,
3 nor viewing confidential material at the hearing and only at
4 the hearing.
5 However, I will modify that to this extent if this would
6 help you, Mr. Wheeless. Any information, any underlying
7 information that you permit Mr. Doyle and Ms. Anzalone to come
8 to a facility to view, I think that the Charging Parties'
9 attorneys may also do that. I would agree with you to the
10 extent that I don't think you need to open your doors to union
11 representatives to be coming in and viewing confidential
12 material at your facility. So I'll modify the protective order
13 to that extent.
14 MS. ROSENFELD: May I speak to that?
15 JUDGE LITVACK: Sure.
16 MS. ROSENFELD: In particular, I believe you're referring
17 to the job tickets. Those are the very documents that the
18 General Counsel and the Unions' counsel would need the
19 assistance of the Charging Parties to interpret.
20 JUDGE LITVACK: I don't see how. It's a job ticket. You
21 can read a job ticket. I can figure out what a job ticket
22 means. I don't think it's -- I don't think the information
23 contained on a job ticket is so obtuse that you wouldn't
24 understand what it means. We're not dealing with material
25 going to an atomic bomb here. This is just a job ticket that

1 someone gets.

2 MS. ROSENFELD: It seems to have no greater need for a

3 broader confidentiality order than what's already in place with

4 respect to disclosure by the Unions' representatives and how

5 that confidential information is to be treated.

6 JUDGE LITVACK: Say that again.

7 MS. ROSENFELD: I'm sorry?

8 JUDGE LITVACK: Say it again.

9 MS. ROSENFELD: Okay. There's nothing about the fact that

10 the job ticket is at that location that makes the general

11 protective order any less effective in preserving

12 confidentiality. So if the Unions' representatives can see all

13 other matter of confidential information subject to

14 nondisclosure as per the protective order, but for the job

15 ticket, there has to be something special about these job

16 tickets that requires greater restraint.

17 JUDGE LITVACK: No. I don't think the Respondent has to

18 have its doors open to everybody to come looking at materials.

19 That's all. It has nothing to do with what's on the document.

20 It has to do with how many people are going to be out looking

21 at documents. I think you doing it would be sufficient.

22 MS. ROSENFELD: But if a protective order restricts it to

23 one Charging Party representative would serve the same purpose.

24 We're not proposing that we bring the entire Union staff down

25 to look at the job tickets.