

**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**

**ACTING GENERAL COUNSEL'S REPLY TO RESPONDENT'S
OPPOSITION TO SPECIAL APPEAL**

In its Opposition to the Counsel for the Acting General Counsel's and Teamsters' Request for Special Appeal, filed on August 23, 2010 (Respondent's Opposition), Respondent asks the Board to deny Counsel for the Acting General Counsel's (CAGC's) Request for Special Permission to Appeal (CAGC's Special Appeal), filed with the Board on

August 17, 2010, or to do so at least until such time as the United States District Court for the District of Arizona (the District Court) rules on Respondent's motion in that matter, and argues that CAGC's Special Appeal is otherwise without merit. CAGC's Special Appeal sufficiently addressed most of the arguments which Respondent raises in its Opposition. CAGC files this limited reply to encourage the Board to rule on CAGC's Special Appeal so that all involved can have the benefit of the Board's guidance, and to demonstrate to the Board that, contrary to Respondent's suggestion, the Administrative Law Judge's protective order is not limited to only those documents not received into the record as exhibits in the underlying unfair labor practice matter.

I. THE BOARD HAS THE AUTHORITY TO ISSUE ITS RULING OIN THE SPECIAL APPEAL REGARDLESS OF THE UNITED STATES DISTRICT COURT PROCEEDING

Respondent seeks to avoid having the Board rule on the CAGC's Special Appeal by pontificating that the District Court's protective order "is and remains the law of the case, and controls the Protective Order issues." Respondent's Opposition at p. 5. Respondent's lone authority for this encompassing pronouncement, *Athbro Precision Engineering Corp.*, 171 NLRB 21 (1968), is a representation case which neither had facts nor issues that are remotely similar to the underlying unfair labor practice case, including protective orders or special appeals. Aside from this inapposite case, Respondent has not cited any authority that mandates the Board to abstain from issuing a ruling on the Special Appeal during the District Court proceeding.

Moreover, while no one can predict the outcome of the District Court proceeding, having the Board rule on the Special Appeal would assist the parties by clarifying whether Charging Parties' representatives must be excluded from viewing subpoenaed documents and

whether CAGC must return all “Confidential Information” to Respondent upon the completion of the hearing. A ruling on these issues will have an obvious impact on how the unfair labor practice hearing unfolds and, potentially, how the ALJ and the Board ultimately decide the many complex legal issues that will be litigated.

II. RESPONDENT MISREPRESENTS THE ALJ’S PROTECTIVE ORDER REGARDING THE RETURN OF CONFIDENTIAL INFORMATION

Contrary to Respondent’s assertion, the ALJ’s protective order does not contemplate the return of only those “Confidential Information” documents that are not admitted into the record as exhibits. See Respondent’s Opposition at p. 8. The ALJ’s protective order does not distinguish, or suggest a distinction, between documents produced in response to CAGC’s subpoenas as opposed to those documents admitted into the record as exhibits at the hearing. See ALJ Exhibit 1; Tr. 639:13-14.

Moreover, by suggesting that the ALJ’s protective order makes the distinction between confidential documents admitted into the record and those that are not, Respondent essentially concedes the point made by CAGC in its Special Appeal. Respondent does not attempt to defend the ALJ’s protective order as presently constructed. Respondent is correct in suggesting that at a minimum, an appropriate protective order would distinguish between record exhibits and those not admitted into evidence, but the reality is that the ALJ’s protective order in this case does not. As a result, for the reasons stated in CAGC’s Special Appeal, it is respectfully requested that the Board grant CAGC’s Special Appeal with respect to the ALJ’s order requiring CAGC to return all confidential documents within 15 days of the close of the underlying hearing.

III. CONCLUSION

For the reasons discussed above and in the CAGC's Request for Special Permission to Appeal, the CAGC requests the Board order the ALJ rescind the protective orders issued by him insofar as they: (a) restrict the rights and opportunities of the Charging Parties' representatives to assist their counsel and CAGC when reviewing documents produced by CAGC's subpoena duces tecum; and (b) require the return of confidential documents to Respondent within 15 days of the close of the hearing.

Dated at Phoenix, Arizona this 31st day of August 2010.

Respectfully submitted,

/s/Chris J. Doyle

Chris J. Doyle

John T. Giannopoulos

Mary G. Davidson

Counsel for the Acting General Counsel

National Labor Relations Board

Region 28

2600 North Central Avenue, Suite 1800

Phoenix, AZ 85004-3099

Telephone: (602) 640-2198

Facsimile: (602) 640-2178

E-Mail: Christopher.Doyle@nlrb.gov

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S REPLY TO RESPONDENT'S OPPOSITION TO SPECIAL APPEAL in CEMEX, INC., Cases 28-CA-22165 et al., was served by E-Gov, E-Filing, e-mail and overnight delivery via United Parcel Service on this 31st 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, Room 11602
Washington, DC 20570-0001

Via E-Mail:

Steven D. Wheelless, Attorney at Law
Elizabeth Townsend, Attorney at Law
Stephoe & Johnson, LLP
Collier Center
201 East Washington Street
Phoenix, AZ 85004
E-mail: SWheelless@stephoe.com
etownsend@stephoe.com
mmedlin@stephoe.com

Elizabeth Rosenfeld, Attorney at Law
Wohlner, Kaplon, Phillips, Young & Cutler, PC
16501 Ventura Boulevard, Suite 304
Encino, CA 91438
E-mail: rosenfeld@wkpypc.com

Via Overnight Delivery:

Cemex, Inc.
4646 East Van Buren Street, Suite 250
Phoenix, AZ 85008

General Teamsters (Excluding Mailers),
Local Union No. 104, an Affiliate of the
International Brotherhood of Teamsters
1450 South 27th Avenue
Phoenix, AZ 85009

General Teamsters (Excluding Mailers),
Local Union No. 104, an Affiliate of the
International Brotherhood of Teamsters
238 West Elm Street
Tucson, AZ 85705

Michael J. Keenan, Attorney at Law
Ward, Keenan and Barrett, PC
3838 North Central Avenue, Suite 1720
Phoenix, AZ 85012
E-mail: mkeenan@wardkeenabarrett.com

International Union of Operating Engineers
Local 428, AFL-CIO
6601 North Black Canyon Highway
Phoenix, AZ 85015

/s/Chris J. Doyle
Chris J. Doyle
John T. Giannopoulos
Mary G. Davidson
Counsel for the Acting General Counsel
National Labor Relations Board
Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004-3099
Telephone: (602) 640-2198
Facsimile: (602) 640-2178
E-Mail: Christopher.Doyle@nlrb.gov