

**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**

**NOTICE OF RECENT DISTRICT COURT ORDER DENYING RESPONDENT'S
MOTION TO CONFIRM VALIDITY OF THE COURT'S PROTECTIVE ORDER**

On August 16, 2010, Counsel for the Acting General Counsel filed with the Board a Request for Special Permission to Appeal and 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. On August 17, 2010, the Charging Party General Teamsters, Local Union No. 104 filed with the Board a 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.

In its August 23, 2010 Opposition to the Counsel for the Acting General Counsel's and Teamsters' Requests for Special Appeal, Respondent asserted that the Board should deny the special appeals "at least until the District Court rules" upon Respondent's motion to the Court "to clarify . . . whether its Protective Order 'dissolved' when the CAGC withdrew one subpoena and replaced it with another." (Opp. 4).

On September 3, 2010, the U.S. District Court for the District of Arizona denied Respondent's Motion to Confirm Validity of the Court's Protective Order. *See NLRB v. CEMEX, Inc.*, No. 2:09-cv-2546-PHX-JAT (D. Ariz. Sept. 3, 2010) (unpublished) (attached). The hearing before the administrative law judge re-commences on September 13, 2010.

Dated at Phoenix, Arizona, this 7th day of September 2010.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of NOTICE OF RECENT DISTRICT COURT ORDER DENYING RESPONDENT'S MOTION TO CONFIRM VALIDITY OF THE COURT'S PROTECTIVE ORDER 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 7th day of September 2010, on the following:

Via E-Gov, E-Filing:

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Office of the Executive Secretary
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IN THE UNITED STATES DISTRICT COURT

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FOR THE DISTRICT OF ARIZONA

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NATIONAL LABOR RELATIONS BOARD,

No. 2:09-cv-2546-PHX-JAT

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Applicant,

ORDER

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vs.

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CEMEX, INC.,

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Respondent.

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Pending before the Court is Respondent CEMEX, Inc.'s Motion to Confirm Validity of the Court's Protective Order (Doc. 45). For the reasons that follow, the Court denies CEMEX's motion.

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On June 30, 2009, the National Labor Relation Board's ("NLRB") 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. On September 4, 2009, the NLRB issued a subpoena duces tecum to CEMEX's Custodian of Records. 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. On February 1, 2010, this Court entered an Amended Order granting CEMEX's request for a protective order as to Items 23 and 28 of

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1 the September 4 subpoena, which related to competitively and financially sensitive
2 information and customer information. During a January 22, 2010 hearing, the Court denied
3 the majority of the NLRB's requests relating to the September 4 subpoena.¹

4 On July 6, 2010, the NLRB issued a new subpoena in order to cure the defects
5 contained in the September 4 subpoena as outlined during the January 22 hearing. CEMEX
6 now urges this Court to apply language contained in the February 1 Order to limit the July
7 6 subpoena.

8 The NLRB argues that this Court lacks subject matter jurisdiction to consider
9 CEMEX's request. The Court agrees. Congress vested the ability to enforce or otherwise
10 initiate actions involving the NLRB subpoenas solely with the NLRB. 29 U.S.C. § 161(2).
11 CEMEX is given the ability to oppose any subpoena issued by the NLRB. However, as was
12 the case with the initial September 4 subpoena, CEMEX must await the NLRB's decision
13 to seek enforcement of the subpoena. CEMEX is not free to initiate a proceeding in this
14 Court relating to a subpoena issued by the NLRB. While such a procedural framework may
15 not be ideal or always necessarily efficient, the Court is bound by this framework as
16 established by Congress.

17 Moreover, it appears that CEMEX has also failed to exhaust its administrative
18 remedies. Based upon the record currently before the Court, it does not appear that CEMEX
19 attempted to seek special leave to appeal to the NLRB, a procedure expressly provided for
20 under the NLRB's Rules and Regulations. 29 C.F.R. § 102.26.

21 In any event, even if the Court properly has subject matter jurisdiction and CEMEX
22 properly exhausted its administrative remedies, the Court disagrees with CEMEX's
23 interpretation of the Court's February 1 Order. The Court granted the protective order with
24 regards to Items 23 and 28 of the September 4 subpoena. The Court did not make any
25 general sweeping statements that the February 1 Order applied to all future subpoenas, or any
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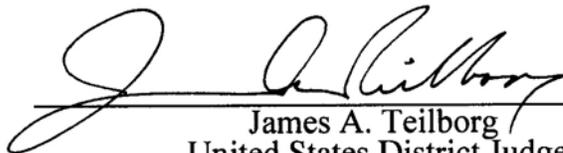
27 ¹ For a review of the Court's particular orders regarding the September 4 subpoena,
28 see Doc. 33.

1 and all information that might be considered as competitively and financially sensitive
2 information. While the Court did state that its February 1 Order "will continue to be binding
3 throughout and after the final disposition of this action," (Doc. 32 at p. 7) it is clear from the
4 context of the Order that the Court was referring to those documents produced under Items
5 23 and 28 of the September 4 subpoena—not all possible future subpoenas that might be
6 issued in the case. As such, the Court finds that the protective order issued as part of the
7 February 1 Order is only applicable to the September 4 subpoena, and not all future
8 subpoenas that might arise during the course of this case.

9 Accordingly,

10 **IT IS ORDERED** that Respondent CEMEX, Inc.'s Motion to Confirm Validity of the
11 Court's Protective Order (Doc. 45) is denied.

12 DATED this 3rd day of September, 2010.

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17 James A. Teilborg
18 United States District Judge
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