

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KINGSPAN INSULATED PANELS, D/B/A
KINGSPAN BENCHMARK

and

Cases 9-CA-072906
9-RC-069754

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 24

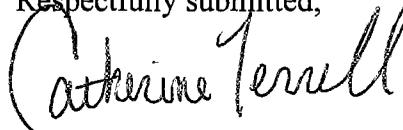
REQUEST FOR SPECIAL PERMISSION TO APPEAL TO THE BOARD
ADMINISTRATIVE LAW JUDGE AMCHAN'S ORDER DENYING COUNSEL FOR THE
ACTING GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENA
AD TESTIFICANDUM OF BOARD AGENT TANSINO

NOW COMES Counsel for the Acting General Counsel and respectfully requests permission to file an Appeal of Administrative Law Judge Amchan's Order denying, in part, Counsel for the Acting General Counsel's Petition to revoke the subpoena served by Respondent on Field Attorney Joseph Tansino. Pursuant to Section 102.26 of Board's Rules and Regulations, the reasons and grounds for approval of this request are set forth in the accompanying appeal.

WHEREFORE, it is respectfully requested that this Request for Special Permission to Appeal be granted.

Dated at Cincinnati Ohio this 24th day of April 2012.

Respectfully submitted,



Catherine Terrell
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
John Weld Peck Federal Building
550 Main Street, Suite 3003
Cincinnati, Ohio 45202

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KINGSPAN INSULATED PANELS, D/B/A
KINGSPAN BENCHMARK

and

Cases 9-CA-072906
9-RC-069754

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 24

**APPEAL OF ADMINISTRATIVE LAW JUDGE AMCHAN'S ORDER
DENYING COUNSEL FOR THE ACTING GENERAL COUNSEL'S PETITION
TO REVOKE SUBPOENAS**

INTRODUCTION

This appeal is being taken because the Administrative Law Judge, contrary to Section 102.118 of the Board's Rules and Regulations, erred when he failed to grant the Acting General Counsel's petition to revoke Respondent's, Kingspan Insulated Panels, d/b/a Kingspan Benchmark, subpoena ad testificandum which requires a current Board employee, Field Attorney Joseph Tansino, to appear before an Administrative Law Judge and give testimony in the above-styled matter, and instead ruled that Field Attorney Tansino must appear at the hearing and give testimony. For the reasons set forth more fully below, the Administrative Law Judge's ruling is in error because the Acting General Counsel did not give permission for Field Attorney Tansino to testify at the hearing as required by Section 102.118(a)(1) of the Board's Rules and Regulations. Further, the Administrative Law Judge's ruling is in error because Respondent has failed to demonstrate that notwithstanding the absence of consent by the Acting General Counsel unusual circumstances exist which requires Field Attorney Tansino's testimony at the hearing.

BACKGROUND

On November 29, 2011, the Charging Party/Union filed a representation petition with the Board seeking an election amongst certain of Respondent's employees. Thereafter, on December 13, 2011, the Regional Director for Region 9, on behalf of the Board, approved a Stipulated Election Agreement between Respondent and the Charging Party/Union. An election was conducted on January 13, 2012¹, which resulted in three determinative challenge ballots. The challenges were made by the Charging Party/Union. In addition, the Charging Party/Union filed timely objections to the election based on unfair labor practices alleged in Case 9-CA-072906.

The Acting Regional Director for Region 9 of the Board, on February 29, issued a Complaint and Notice of Hearing in Case 9-CA-072906 alleging the commission of certain unfair labor practices. The alleged unfair labor practices were co-extensive with the objections filed by the Charging Party/Union. Subsequently, on March 8, in Case 9-RC-069754, the Regional Director for Region 9 issued a Report on Challenged Ballots and Objections to Election, Order Directing Hearing, Order Consolidating Cases, Order Transferring Cases to the Board and Notice of Hearing to resolve the issues raised by the challenged ballots.

On March 28, Respondent served subpoenas ad testificandum on current Board employees Field Examiner Elizabeth J. Macaroni, Field Attorney Joseph Tansino, and Assistant to the Regional Director Laura E. Atkinson, all of Region 9, commanding them to testify in the above-captioned consolidated matter on April 30, at the hearing scheduled before an Administrative Law Judge. The same day, Respondent transmitted to the Acting General Counsel a request that he consent to allowing the testimony of the Board Agents asserting that their testimony is relevant to issues surrounding the voting eligibility of the determinative

¹ Hereinafter, all dates refer to the year 2012, unless otherwise stated.

challenged ballots. On April 6, the Acting General Counsel, by letter, denied Respondent's request for the Board employees to testify, particularly noting the absence of unusual circumstances that would warrant allowing Board agents to testify about the processing of unfair labor practice or representation cases. ^{2/}

On April 13, Counsel for the Acting General Counsel filed a Petition to Revoke Subpoenas and a Memorandum in support. (A copy of the Petition to Revoke Subpoenas and a Memorandum in Support of Petition to Revoke Subpoenas is affixed hereto as Attachment 1.) Thereafter, on April 19, Respondent filed a response in opposition. (A copy of Respondent's response is affixed hereto as Attachment 2.) On April 23, Administrative Law Judge Arthur J. Amchan issued an Order granting in part, denying in part the Counsel for the Acting General Counsel's Petition to Revoke Subpoenas. (A copy is affixed hereto as Attachment 3.) In this Order, Administrative Law Judge Amchan granted the Petition to revoke the subpoenas of Field Examiner Macaroni and Assistant Regional Director Atkinson but denied the Petition to revoke the subpoena of Field Attorney Tansino and directed Field Attorney Tansino to appear at the hearing and testify as requested by Respondent.

ARGUMENT

1. THE DENIAL OF THE PETITION TO REVOKE SUBPOENA SHOULD BE REVERSED BECAUSE THE TESTIMONY SOUGHT IS PRIVILEGED AGAINST DISCLOSURE IN VIEW OF THE ACTING GENERAL COUNSEL'S REFUSAL TO CONSENT TO ITS DISCLOSURE.

Field Attorney Tansino is subject to the supervision and control of the Acting General Counsel. Section 102.118 of the Board's Rules and Regulations prohibits Board employees from

² A copy of the March 28, 2012 subpoenas ad testificandum for Field Examiner Macaroni, Field Attorney Tansino and Assistant to the Regional Director Atkinson, Respondent's March 28, 2012, request to the Acting General Counsel to allow Board agent testimony, and the Acting General Counsel's April 6, 2012, letter denying the request for Board Agent testimony, are affixed respectively as Attachments A, B, C, D, and E to Attachment 1 herein, the Petition to Revoke Subpoenas and Memorandum in Support of Petition to Revoke Subpoenas.

disclosing official information without prior written consent of the Acting General Counsel for the Board. In this regard, Section 102.118 (a) (1) provides as follows: (emphasis added)

[N]o regional director, field examiner....attorney....or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent... of the general counsel...Nor shall any such person testify on behalf of any party to any cause pending in any court or before the Board...with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to any contents of any files documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpoena or otherwise without the written consent of the general counsel if the person is in the regional office of the agency...and subject to the supervisor and control of the general counsel. (Emphasis added)

Here, Respondent seeks to compel Field Attorney Tansino to testify about “information, facts or matters” that have come within his knowledge as a result of his official capacity as a Board agent. The Acting General Counsel thoroughly considered Respondent’s request for Field Attorney Tansino’s to testify at the hearing and denied the request. The validity of Section 102.118 of the Board’s Rules and Regulations has been long upheld by the Board and by the Courts. See, *Central Freight Line, Inc.* 250 NLRB 435 (1980); See also, *Davis v. Braswell Motor Freight Lines*, 363 F.2d 600 (C.A. 5 1966). Accordingly, the Order denying Counsel for the Acting General Counsel’s Petition to revoke the subpoena issued to Mr. Tansino should be reversed on the ground that the evidence sought is privileged against disclosure because the party seeking disclosure failed to obtain written consent from the Acting General Counsel as required by Section 102.118 of the Board’s Rules and Regulations.

2. THE DENIAL OF THE PETITION TO REVOKE SUBPOENA SHOULD BE REVERSED BECAUSE IT SEEKS DISCLOSURE OF PRIVILEGED INVESTIGATORIAL PROCESS.

The Board and the Courts have recognized a “limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the

NLRB.” *Stephens Produce Co., Inc. V. NLRB*, 515 F.2d 1373, 1376 (8th Cir., 1975). The testimony sought by Respondent in this subpoena relates to discussions that took place on two conference calls between Field Examiner Macaroni, Field Attorney Tansino, and Assistant to the Regional Director Atkinson and agents of Respondent and Charging Party regarding the processing of the representation petition in this matter. Counsel for the Acting General Counsel submits that the information sought is covered by the privilege protecting informal investigational procedures. *J. H. Rutter Rex Manufacturing Co. v. N.L.R.B.*, 473 F.2d 223, 232-233 (5th Cir., 1973), cert. denied, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973). The highly sensitive and delicate role of the board agent in processing representation petitions would be seriously impaired if a real likelihood existed that the board agent would become a witness in litigation or put the board agent in danger of appearing partisan. *The Earthgrains Company*, 351 NLRB 733 (2007); *Frank Invaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf and Recreation Co.*, 305 NLRB 493 (1991); *G.W. Galloway Company*, 281 NLRB 262, fn. 1 (1986); and *Finally, Inc. d/b/a Palace Club*, 229 NLRB 1128 (1977).

Respondent has shown no substantial reason to disregard this privilege. Moreover, the testimony sought in the subpoena is equally available from other witnesses readily available to Respondent, i.e. Todd Sarver, Respondent’s Counsel; Scott Hammond, representative of the Charging Party, or Julie Ford, Charging Party’s Counsel. Any relevant testimony relating to conference call may be adduced by Respondent through Mr. Sarver, Mr. Hammond, or Ms. Ford.

3. THE DENIAL OF THE PETITION TO REVOKE SUBPOENA SHOULD BE REVERSED BECAUSE THE TESTIMONY SOUGHT IS UNNECESSARY TO RESOLVE ANY ISSUE IN THIS CASE.

The issue to be litigated in this case is whether Respondent committed certain unfair labor practices during the critical period leading up to the representation election and to resolve

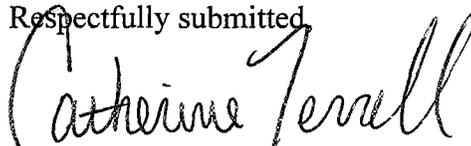
the issues raised by the challenges of three determinative ballots. Respondent has stated that its purpose in seeking the testimony of Field Attorney Tansino relates solely to the three challenged ballots. However, any extrinsic evidence that may be derived from pre-stipulation discussion between the parties and board agents to uncover the intent of ambiguous language in the stipulated agreement may be gleaned from the testimony of the parties' representatives. Therefore, Counsel for the Acting General Counsel submits that the testimony of Field Attorney Tansino is unnecessary and does not constitute unusual circumstances sufficient to compel a Board agent's testimony.

CONCLUSION

For the foregoing reasons, it is submitted that there are no unusual circumstances present here which warrants the testimony of Field Attorney Tansino without the consent of the Acting General Counsel. Accordingly, the Order denying Counsel for the Acting General Counsel's Petition to revoke the subpoena issued to Field Attorney Tansino should be reversed and the subpoena issued to him revoked.

Dated at Cincinnati Ohio this 24th day of April 2012.

Respectfully submitted,



Catherine Terrell
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202

Attachments

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KINGSPAN INSULATED PANELS, D/B/A
KINGSPAN BENCHMARK

and

Cases 9-CA-072906
9-RC-069754

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 24

PETITION TO REVOKE SUBPOENAS

NOW COMES Counsel for the Acting General Counsel and respectfully requests the Administrative Law Judge to issue an Order Revoking the subpoena ad testificandum served by Respondent on Field Examiner Elizabeth Macaroni, Field Attorney Joseph Tansino, and Assistant Regional Director Laura Atkinson. The reasons supporting this Petition are set forth in the accompanying memorandum.

WHEREFORE, it is respectfully requested that this Petition to revoke subpoenas be granted.

Dated at Cincinnati Ohio this 13th day of April 2012.

Respectfully submitted,

Catherine A. Terrell (NRC)

Catherine A. Terrell
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of

KINGSPAN INSULATED PANELS, D/B/A
KINGSPAN BENCHMARK

and

Cases 9-CA-072906
9-RC-069754

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 24

MEMORANDUM IN SUPPORT OF
PETITION TO REVOKE SUBPOENAS

On February 29, 2012, the Acting Regional Director for Region 9 of the National Labor Relations Board issued a Complaint and Notice of Hearing in Case 9-CA-072906 alleging the commission of certain unfair labor practices. Specifically, the complaint alleged that Respondent, on three occasions, interrogated employees about their union activities and increased the wage rates of six employees to discourage these employees from engaging in union activities, thereby interfering with employees in the exercise of their rights guaranteed in Section 7 of the Act.

On March 8, 2012, in Case 9-RC-069754, the Regional Director for Region 9 issued a Report on Challenged Ballots and Objections to Election, Order Directing Hearing, Order Consolidating Cases, Order Transferring Cases to the Board and Notice of Hearing to resolve the issues raised by the challenges to the ballots of Andrew Garrett, Ronnie W. Simpkins and Curtis Younkman, and certain of the Union's Objections, all stemming from a representation election held on January 13, 2012.

On March 28, 2012, Respondent served Subpoenas ad testificandum on Field Examiner Elizabeth Macaroni, Field Attorney Joseph Tansino, and Assistant Regional Director

Laura Atkinson, all of Region 9, commanding them to testify in the above-captioned consolidated matter on April 30, 2012 at a hearing scheduled before an Administrative Law Judge. (Attachments A-C) The same day, Respondent requested consent from the Acting General Counsel to compel testimony from the Board Agents. (Attachment D) On April 6, 2012, the Acting General Counsel, by letter, denied this request. (Attachment E)

ARGUMENT

1. THE PETITION TO REVOKE SUBPOENAS SHOULD BE GRANTED BECAUSE THE TESTIMONY SOUGHT IS PRIVILEGED AGAINST DISCLOSURE IN VIEW OF THE ACTING GENERAL COUNSEL'S REFUSAL TO CONSENT TO ITS DISCLOSURE.

Section 102.118 of the Board's Rules and Regulations prohibits Board employees from disclosing official information without prior written consent of the General Counsel for the Board. In this regard, Section 102.118 provides as follows: (emphasis added)

[N]o regional director, field examiner...attorney...or other officer or employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or of the general counsel, whether in response to a subpoena duces tecum or otherwise, without the written consent... of the general counsel...Nor shall any such person testify on behalf of any party to any cause pending in any court or before the Board...with respect to any information, facts, or other matter coming to his knowledge in his official capacity or with respect to any contents of any files documents, reports, memoranda, or records of the Board or the general counsel, whether in answer to a subpoena or otherwise without the written consent of the general counsel if the person is in the regional office of the agency...and subject to the supervision and control of the general counsel.

The validity of Section 102.118 of the Board's Rules and Regulations has been long upheld by the Board and by the Courts. See *Central Freight Line, Inc.* 250 NLRB 435 (1980); See also, *Davis v. Braswell Motor Freight Lines*, 363 F.2d 600 (5th Cir. 1966). Field Examiner Macaroni, Field Attorney Tansino, and Assistant Regional Director Atkinson are all subject to the supervision or control of the Acting General Counsel. Accordingly, the subpoenas issued to Macaroni, Tansino, and Atkinson should be revoked on the ground that the evidence sought is

privileged against disclosure because the party seeking disclosure failed to obtain written consent from the Acting General Counsel.

2. THE PETITION TO REVOKE SUBPOENAS SHOULD BE GRANTED BECAUSE IT SEEKS DISCLOSURE OF PRIVILEGED INVESTIGATORIAL PROCESSES.

The Board and the Courts have recognized a “limited evidentiary privilege which protects the informal investigatorial and trial-preparatory processes of regulatory agencies such as the NLRB.” *Stephens Produce Co., Inc. v. NLRB*, 515 F.2d 1373, 1376 (8th Cir. 1975) The testimony sought by Respondent in this subpoena relates to discussions that took place on two conference calls between Ms. Macaroni, Mr. Tansino, Ms. Atkinson and agents of Respondent and Charging Party regarding the processing of a petition filed by the Charging Party in Case 9-RC-069754. General Counsel submits that the information sought is covered by the privilege protecting informal investigatorial procedures. *J. H. Rutter Rex Manufacturing Co. v. NLRB*, 473 F.2d 223, 232-233 (5th Cir.), cert. denied, 414 U.S. 822, 94 S.Ct. 120, 38 L.Ed.2d 55 (1973). The highly sensitive and delicate role of the board agent in investigating and processing representation petitions would be seriously impaired if a real likelihood existed of the board agent becoming enmeshed as a material witness in subsequent related unfair labor practice cases or put the board agent in danger of appearing partisan. *Frank Invaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf and Recreation Co.*, 305 NLRB 493 (1991); *G.W. Galloway Company*, 281 NLRB 262, fn. 1 (1985); *Finally, Inc. d/b/a Palace Club*, 229 NLRB 1128 (1977).

Respondent has shown no substantial reason to disregard this privilege. Moreover, the testimony sought in the subpoena is equally available from other witnesses, i.e. Todd Sarver, Respondent’s Counsel; Scott Hammond, representative of the Charging Party, Julie Ford, Charging Party’s Counsel. Any relevant testimony relating to conversations with Ms. Macaroni,

Mr. Tansino, or Ms. Atkinson may be adduced by Respondent through Mr. Sarver,
Mr. Hammond, or Ms. Ford.

3. THE PETITION TO REVOKE SUBPOENAS SHOULD BE GRANTED BECAUSE THE TESTIMONY SOUGHT IS UNNECESSARY TO RESOLVE ANY ISSUE IN THIS CASE.

The issue to be litigated in this case is whether Respondent committed certain unfair labor practices during the critical period leading up to the representation election and to resolve the issues raised by the challenges of three determinative ballots. Respondent has stated that its purpose in seeking the testimony of Ms. Macaroni, Mr. Tansino, and Ms. Atkinson relates solely to the three challenged ballots. However, any extrinsic evidence that may be derived from pre-stipulation discussion between the parties and board agents to uncover the intent of ambiguous language in the stipulated agreement may be gleaned from the testimony of the parties' representatives. Therefore, Counsel for the Acting General Counsel submits that the testimony of Ms. Macaroni, Mr. Tansino and Ms. Atkinson is unnecessary and does not constitute unusual circumstances sufficient to compel board agent testimony.

CONCLUSION

For the foregoing reasons, it is submitted that the subpoenas issued to Elizabeth Macaroni, Joseph Tansino, and Laura Atkinson should be revoked, since the testimony sought is privileged and unnecessary.

Dated at Cincinnati Ohio this 13th day of April 2012.

Respectfully submitted,



Catherine A. Terrell
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202

Attachments

SUBPOENA

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

To **MS. ELISABETH MACARONI, NLRB, REGION 9, 3003 JOHN WELD PECK FEDERAL BLDG., 550 MAIN ST
CINCINNATI, OHIO 45202-3271**

As requested by **TODD L. SARVER, ESQ.**

whose address is **41 SOUTH HIGH ST., STE. 2000, COLUMBUS, OHIO 43215**
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE **an Administrative Law Judge**

_____ of the National Labor Relations Board
at **a place to be held at THE JOHN W. BRICKER FEDERAL BLDG., ROOM 308, 200 N. HIGH ST.**
in the City of **COLUMBUS, OHIO 43215**

on the **30TH** day of **APRIL** 20 **12** at **1 : 00** (a.m.) (p.m.) or any adjourned
KINGSPAN INSULATED PANELS INC. D/B/A KINGSPAN BENCHMARK, Case 9-CA-072906
or rescheduled date to testify in _____
(Case Name and Number)

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

A - 887331

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at **NATIONAL LABOR RELATIONS BOARD**

this **18TH** day of **MARCH** 20 **12**



Leopold A. Helffer

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

SUBPOENA

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

To MR. JOSEPH TANSINO, NLRB, REGION 9, 3003 JOHN WELD PECK FEDERAL BLDG., 550 MAIN ST.
CINCINNATI, OHIO 45202-3271

As requested by TODD L. SARVER, ESQ.

whose address is 41 SOUTH HIGH ST., STR. 2200, COLUMBUS, OHIO 43215
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge

_____ of the National Labor Relations Board
at a place to be held at THE JOHN W. BRICKER FEDERAL BLDG., ROOM 307, 200 N. HIGH ST.
in the City of COLUMBUS, OHIO 43215

on the 30TH day of APRIL 20 12 at 1:00 (a.m.) (p.m.) or any adjourned
KINGSPAN INSULATED PANELS INC. D/B/A KINGSPAN BENCHMARK, Case 9-CA-0729
or rescheduled date to testify in _____
(Case Name and Number)

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

A - 887329

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at **NATIONAL LABOR RELATIONS BOARD**

this **28TH** day of **MARCH**

20 **12**



Lesper A. Neltzer

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

ATTACHMENT B

U.S. GOVERNMENT PRINTING OFFICE: 2000-392-020

SUBPOENA

FORM NLRB-32
(12-07)

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

To MS. LAURA ATKINSON, NLRB, REGION 9, 3003 JOHN WELD PECK FEDERAL BLDG., 550 MAIN ST
CINCINNATI, OHIO 45202-3271

As requested by TODD L. SARVER, ESQ.

whose address is 41 SOUTH HIGH ST., STE. 2200, COLUMBUS, OHIO 43215
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE an Administrative Law Judge

_____ of the National Labor Relations Board

at a place to be held at THE JOHN W. BRICKER FEDERAL BLDG., ROOM 307, 200 N. HIGH ST.
in the City of COLUMBUS, OHIO 43215

on the 30TH day of APRIL 20 12 at 1:00 (a.m.) (p.m.) or any adjourned
KINGSPAN INSULATED PANELS INC. D/B/A KINGSPAN BENCHMARK, Case 9-CA-072906
or rescheduled date to testify in _____
(Case Name and Number)

In accordance with the Board's Rules and Regulations, 29 C.F.R. Section 102.31(b) (unfair labor practice proceedings) and/or 29 C.F.R. Section 102.66(c) (representation proceedings), objections to the subpoena must be made by a petition to revoke and must be filed as set forth therein. Petitions to revoke must be received within five days of your having received the subpoena. 29 C.F.R. Section 102.111(b) (3). Failure to follow these regulations may result in the loss of any ability to raise such objections in court.

A - 887330

Under the seal of the National Labor Relations Board, and by direction of the Board, this Subpoena is

Issued at **NATIONAL LABOR RELATIONS BOARD**

this **28TH** day of **MARCH**

20 **12**



Lesfer A. Neltzer

NOTICE TO WITNESS. Witness fees for attendance, subsistence, and mileage under this subpoena are payable by the party at whose request the witness is subpoenaed. A witness appearing at the request of the General Counsel of the National Labor Relations Board shall submit this subpoena with the voucher when claiming reimbursement.

PRIVACY ACT STATEMENT

Solicitation of the information on this form is authorized by the National Labor Relations Act (NLRA), 29 U.S.C. § 151 et seq. The principal use of the information is to assist the National Labor Relations Board (NLRB) in processing representation and/or unfair labor practice proceedings and related proceedings or litigation. The routine uses for the information are fully set forth in the Federal Register, 71 Fed. Reg. 74942-43 (Dec. 13, 2006). The NLRB will further explain these uses upon request. Disclosure of this information to the NLRB is mandatory in that failure to supply the information may cause the NLRB to seek enforcement of the subpoena in federal court.

ATTACHMENT C

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the matter of:)		
)		
Kingspan Insulated Panels, Inc. d/b/a)	NLRB Case Nos.	9-CA-072906 &
Kingspan Benchmark)		9-RC-069754
)		
Respondent,)		
)		
and)		
)		
Sheet Metal Workers International)		
Association, Local Union No. 24,)		
)		
Charging Party)		

**RESPONDENT KINGSPAN INSULATED PANELS, INC. D/B/A KINGSPAN
BENCHMARK'S REQUEST TO THE ACTING GENERAL COUNSEL OF THE
NATIONAL LABOR RELATIONS BOARD TO CONSENT TO COMPEL TESTIMONY
OF CERTAIN BOARD AGENTS**

Pursuant to the National Labor Relations Board's Rules & Regulations, Section 102.118, by and through its undersigned counsel, Respondent, Kingspan Insulated Panels, Inc. d/b/a Kingspan Benchmark (Kingspan), requests consent to compel testimony through subpoenas ad testificandum (attached) from the following Board agents in Region 9: Joseph Tansino; Laura Atkinson; and, Elisabeth Macaroni. The basis for this request is as follows.

Background

On November 30, 2011, the Sheet Metal Workers International Association, Local Union 24 (Union), filed a petition for a representation election in a unit consisting of, "All full time machine operators, fabricators, maintenance personnel, lead persons, and warehouse

(shipping/receiving personnel), but excluding all temporary employees, clerical office staff, supervisors, and ownership.”

On December 6, 2011, Kingspan proposed a voting unit that consisted of the following: “All full-time and regular part-time production and maintenance employees employed by the Employer at its Columbus, Ohio facility located at 720 Marion Road, including fabricators, glue coater operators, floaters, FIP line operators, FIP helpers, maintenance employees, janitors, CTL operators, foam router operators, foam line operators, packagers, laminators, customer service assistants, customer service coordinators, packaging operators, **draftsmen**, material movers, shipping & receiving clerks, and quality control technicians, but excluding, office clerical employees, employees employed by temporary agencies, managers, directors, schedulers, estimators, quality assurance specialists, engineers, sample technicians, buyers, FIP team leaders, lead packagers, team leaders, shift team leaders, professional employees, guards, and supervisors as defined by the Act.” Todd Sarver, counsel for Respondent, provided this proposal to Mr. Tansino by e-mail.

The Region conducted a conference call on December 7, 2011, among Mr. Tansino, Ms. Macaroni, Mr. Sarver, and Union Business Agent, Scott Hammond, regarding voting unit issues. The primary dispute during the call was the eligibility status of “team leaders.” The Union wanted the team leaders included; Kingspan wanted them excluded. During that call, Mr. Hammond asked Mr. Sarver who the draftsmen were. Mr. Sarver responded by identifying all three of them: Andrew Garrett, Ronnie W. Simpkins and Curtis Younkman. Mr. Hammond, after discussing the issue with other unidentified individuals who were with him, responded that the Union agreed to include those individuals in the voting unit.

The Region set up a subsequent conference call for Tuesday, December 12 at 4:00 p.m. to discuss the remaining voting unit issues. The representation hearing was set for December 13 at 9:00 a.m. in Cincinnati.

In the interim, Mr. Sarver supplied several documents to the Region. The Region, in turn (with consent), provided the documents to the Union. One of these documents was an organizational chart. The organizational chart refers to the three draftsmen as "engineering technicians."

On the December 12, 2011, the second conference call was held. In addition to the other individuals who participated in the December 7 conference call, Ms. Atkinson attended and the Union was represented by Counsel, Julie Ford. The parties were able to reach a stipulation regarding the voting unit. There was significant discussion regarding the team leads, the customer service coordinators and assistants and the quality control technician. The parties ultimately agreed to exclude the team leads and the customer service coordinators and assistants, but include the quality control technician, a salaried employee. During this call, the Union asked who the engineering techs (draftsmen) were and Mr. Sarver again identified the three individuals (Garrett, Simpkins, Younkman) and stated that the Union had already agreed to include these individuals. The Union did not voice any objection.

The voting unit in the stipulated election agreement was: "All full-time and regular part-time production and maintenance employees employed by the Employer at its Columbus, Ohio facility located at 720 Marion Road, including fabricators, glue coater operators, floaters, FIP line operators, FIP helpers, maintenance employees, janitors, CTL operators, foam router operators, foam line operators, packagers, laminators, packaging operators, **draftsmen**, material movers, sample technicians, shipping & receiving clerks, and quality control technicians, but

excluding, office clerical employees, temporary agencies, managers, directors, schedulers, estimators, quality assurance specialists, engineers, buyers, customer service assistants, customer service coordinators, team leaders, professional employees, guards, and supervisors as defined by the Act.” (emphasis supplied). On December 13, 2011, the Regional Director approved the stipulated election agreement.

On January 13, 2012, the NLRB conducted the election at Kingspan’s Columbus, Ohio facility. Of the 44 eligible voters, 42 ballots were cast – 20 for the Union; 19 against the Union; and 3 challenged ballots. Notwithstanding its knowledge of and agreement to the three individuals identified as draftsmen, the Union challenged Messrs. Garret, Simpkins and Younkman. Because the number of challenged ballots is sufficient to affect the results of the election, they must be resolved.

On January 20, 2012, the Union filed objections and the above-captioned unfair labor practice charge alleging certain conduct by Kingspan interfered with the election. On February 29, 2012, the Region issued a complaint on certain allegations contained in the charge; other allegations were withdrawn (as were the corresponding objections). On March 8, 2012, the Regional Director issued his Report on Challenged Ballots and Objections to the Election. According to the Report, the Union contends that the three challenged voters are excluded because they work in positions excluded from the bargaining unit (engineers - Garrett and Younkman; estimator – Simpkins). The Report consolidated the remaining objections with their corresponding remaining charge allegations, and ordered a hearing on the challenged ballots.

A hearing was initially set for April 17, 2012, before an administrative law judge on the unfair labor practice complaint, as well as the remaining objections and the Union’s outstanding challenges. On March 8, 2012, Kingspan, without objection from the Union, filed a request to

postpone the hearing to the week of April 30, 2012. On March 19, 2012, the Region issued an order rescheduling the hearing to April 30, 2012.

Nature of the Testimony Sought

The testimony Kingspan seeks from the identified Board agents relates solely to the three challenged ballots. Specifically, the testimony sought is confirmation that during the two conference calls regarding the scope of the voting unit, the Union asked for the identity of the three draftsmen, and upon receiving that information, agreed to include the three draftsmen (Messrs. Garrett, Simpkins and Younkman) in the voting unit. Given the Union's subsequent challenge of these three ballots, the testimony sought is relevant and probative.

The testimony sought does not compromise the non-partisanship of the Board, nor does it interfere in any way with the Board's internal processes. First, the testimony sought does not involve any information relating to the conduct of the election, or the unfair labor practice charge. Second, the scope of testimony sought does not relate to or regard any advice that the Region may have provided the Union. Third, the testimony sought does not seek any information related to internal Board processes, conversations, meetings, discussions, or any internal Board documents regarding the matters being litigated. Rather, the testimony sought relates solely to conversations in which both parties (Kingspan and the Union) participated.

Finally, the testimony sought is consistent with the Federal Rules of Evidence. All three Board agents were present (in one call and/or the other) when Union representatives made statements agreeing to the inclusion of certain individuals in the voting unit. The testimony sought seeks evidence regarding a statement made by a party opponent (which the Union is the party opponent on the challenged ballot issues) and therefore is not hearsay. As such, the

testimony sought is admissible as relevant, material and probative to Kingspan's case on the challenged ballots and should be permitted.

Legal Posture

Where the parties stipulated to a voting unit, and there are determinative challenged ballots, the Board uses a three-prong test to ascertain the parties' intent. Caesars Tahoe, 337 NLRB 1096, 1097 (2002). Initially, the Board reviews the stipulation to determine if the objective intent was expressed in clear, unambiguous terms in the stipulation. If the stipulation is ambiguous, then the Board looks to extrinsic evidence to resolve the ambiguity. Finally, if the parties' intent still cannot be discerned, then the Board utilizes its community-of-interest test. Id.

Here, the testimony sought by Kingspan is critical to Kingspan's position that the determinative challenged ballots should be opened and counted. First, it is Kingspan's position that there is no ambiguity in the stipulated election agreement, and the ballots should be opened and counted. Second, to the extent that there may be ambiguity, the Board agents' testimony is extrinsic evidence that resolves any alleged ambiguity in favor of opening the ballots and including them in the final tally. That is, the Union knew and understood who the draftsmen were when they were included in the voting ballot. As such, the testimony sought by Kingspan is relevant, material and probative both factually and legally, and accordingly should be permitted to occur.

Conclusion

Kingspan's request for testimony by the identified Board agents is narrow, limited, purely factual and does nothing to implicate, undermine, or compromise the Board's processes. Indeed to not consent to allowing the Board agents' testimony to be compelled in this matter and under these circumstances undermines the Board's processes. If parties cannot be held to their

representations leading to stipulated election agreements, then the parties either (a) have no incentive to attempt to work out such agreements for fear that the other party is not being forthright, or (b) have every incentive to engage in the gamesmanship that the Union has attempted here. Either way, the timely process that the Board promotes is thwarted.

Accordingly, Kingspan respectfully requests that pursuant to the subpoenas ad testificandum issued by Kingspan to the identified Board agents, the Acting General Counsel consent to allowing these Board agents to testify on the very limited issue sought by Kingspan.

Respectfully submitted,



Todd L. Sarver (0061571)
Steptoe & Johnson, PLLC
Huntington Center, Suite 2200
41 South High Street
Columbus, Ohio 43215
(614) 456-1671 (telephone)
(614) 221-0952 (facsimile)

Attorneys for Respondent,
Kingspan Insulated Panels, Inc.
d/b/a Kingspan Benchmark

March 28, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of March, 2012, an electronic PDF version of this Respondent Kingspan Insulated Panels, Inc. d/b/a Kingspan Benchmark's Answer to Complaint and Notice of Hearing was filed using the Board's electronic filing system upon:

Lafe Solomon, Esq.
Acting General Counsel
National Labor Relations Board
Washington, D.C. 20570-1000

And that one copy was served via e-mail and regular U.S. mail upon:

Gary Muffley, Regional Director
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
Gary.muffley@nrlb.gov

Ms. Catherine Terrell, Esq.
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
Catherine.terrell@nrlb.gov

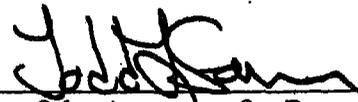
Ms. Laura Atkinson
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
Laura.atkinson@nrlb.gov

Ms. Elisabeth Macaroni
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
Elisabeth.macaroni@nrlb.gov

Mr. Joseph Tansino
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
Joseph.tansino@nlrb.gov

Julie C. Ford, Esq.
Doll, Jansen, Ford & Rakay
111 W. First St., Ste. 1100
Dayton, Ohio 45402-1156
jford@djflawfirm.com

Mr. Scott Hammond
Sheet Metal Workers, Local 24
4949 Northcutt Pl.
Dayton, Ohio 45414-3839
shammond@smw24.org



One of the Attorneys for Respondent
Kingspan Insulated Panels, Inc. d/b/a
Kingspan Benchmark



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

Division of Operations-Management

1099 14th Street, NW, Suite 10200

Washington, D.C. 20570

(202) 273-2900 (Phone)

(202) 273-4274 (Fax)

April 6, 2012

Todd L. Sarver, Esq.
Steptoe & Johnson, LLC
Huntington Center Suite 2200
41 South High Street
Columbus, OH 43215
VIA FACSIMILE (614) 221-0952

RE: Kingspan Insulated Panels, Inc.
d/b/a Kingspan Benchmark
Cases 09-CA-072906 and 09-RC-069754

Dear Mr. Sarver:

This is in response to your letter dated March 28, 2012, to Acting General Counsel Lafe Solomon. You request that the Acting General Counsel, pursuant to Section 102.118 of the Board's Rules and Regulations, permit Board agents from Region 9 to testify, pursuant to a Board subpoena, at a hearing before an administrative law judge that is scheduled to open on April 30, 2012. Pursuant to GC Memorandum 98-9, the Acting General Counsel has delegated the responsibility for making determinations in regard to Section 102.118 requests to the undersigned.

Your request states that you seek testimony from the Board agents in question regarding the status of three employees who voted subject to challenge by the Union in the representation election that is the subject of the hearing. You believe that, if permitted to testify, the Board agents would confirm that, during a conference call between the parties regarding terms of the stipulated election agreement in this matter, the Union agreed that the three employees in question were eligible to vote in the election.

Your request has been carefully considered. Absent a showing of most unusual circumstances, it is the policy of the Office of the General Counsel not to permit Board agents to testify as witnesses with respect to the processing of unfair labor practice and representation cases. The reason for this policy is that the highly sensitive and delicate role of Board agents in investigating and processing such cases would be seriously undermined if a real likelihood existed of Board agents becoming enmeshed as witnesses in a Board or court proceeding with respect to

ATTACHMENT E

matters related such case processing. See **Frank Invaldi, et al., a California Limited Partnership d/b/a Sunol Valley Golf and Recreation Co.**, 305 NLRB 493 (1991); and **G.W. Galloway Company**, 281 NLRB 262, fn. 1 (1985).

Your request does not provide a clear basis that would warrant a deviation from that policy. There are other witnesses, including agents of the Employer, who can testify as to the Union's statements during the two conference calls regarding the stipulated election agreement.

Under the circumstances, there is an insufficient basis to warrant a departure from the General Counsel's policy. Accordingly, for the reasons noted above, your request for permission to compel the testimony of the Board agents is denied.

Sincerely,

Lafe E. Solomon
Acting General Counsel

By Anne Purcell
Anne Purcell
Associate General Counsel

cc: Gary Muffley
Regional Director, Region 9



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
Division of Operations -Management
1099 14th Street, N.W.
Washington, D.C. 20570
(202) 273-2900 (Phone)
(202) 273-4274 (Fax)

FAX TRANSMISSION COVER PAGE

**CONFIDENTIALITY NOTICE:
OFFICIAL GOVERNMENT BUSINESS**

THIS COMMUNICATION IS INTENDED FOR THE SOLE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS COMMUNICATION IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION MAY BE STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY THIS OFFICE IMMEDIATELY BY TELEPHONE AND RETURN COMMUNICATION TO ME AT THE ABOVE ADDRESS VIA UNITED STATES POSTAL SERVICE.

THANK YOU.

DATE: April 6, 2012
TO: Todd L. Sarver, Esq.
Step toe & Johnson, LLC

[] PERSONAL AND CONFIDENTIAL

FAX NUMBER: (614) 221-0952
FROM: Elizabeth Kilpatrick, Deputy Asst. GC
Division of Operations-Management

NO. PAGES INCLUDING COVER: 3

COMMENTS: Kingspan Insulated Panels, Inc. dba Kingspan Benchmark
Cases 09-CA-072906 and 09-RC-069754
Response to 102.118 Request

WARNING: MOST FAX MACHINES PRODUCE COPIES ON THERMAL PAPER. THE IMAGE PRODUCED IS HIGHLY UNSTABLE AND WILL DETERIORATE SIGNIFICANTLY IN A FEW YEARS. IT SHOULD BE COPIED ON A PLAIN PAPER COPIER IF IT IS TO BE FILED AS AN OFFICIAL NLRB RECORD.



UNITED STATES GOVERNMENT
NATIONAL LABOR RELATIONS BOARD
 Division of Operations -Management
 1099 14th Street, N.W.
 Washington, D.C. 20570
 (202) 273-2900 (Phone)
 (202) 273-4274 (Fax)

FAX TRANSMISSION COVER PAGE

**CONFIDENTIALITY NOTICE:
 OFFICIAL GOVERNMENT BUSINESS**

THIS COMMUNICATION IS INTENDED FOR THE SOLE USE OF THE INDIVIDUAL OR ENTITY TO WHICH IT IS ADDRESSED AND MAY CONTAIN INFORMATION THAT IS PRIVILEGED, CONFIDENTIAL AND EXEMPT FROM DISCLOSURE UNDER APPLICABLE LAW. IF THE READER OF THIS COMMUNICATION IS NOT THE INTENDED RECIPIENT OR THE EMPLOYEE OR AGENT RESPONSIBLE FOR DELIVERING THE MESSAGE TO THE INTENDED RECIPIENT, YOU ARE HEREBY NOTIFIED THAT ANY DISSEMINATION, DISTRIBUTION, OR COPYING OF THIS COMMUNICATION MAY BE STRICTLY PROHIBITED. IF YOU HAVE RECEIVED THIS COMMUNICATION IN ERROR, PLEASE NOTIFY THIS OFFICE IMMEDIATELY BY TELEPHONE AND RETURN COMMUNICATION TO ME AT THE ABOVE ADDRESS VIA UNITED STATES POSTAL SERVICE.

THANK YOU.

DATE: April 6, 2012

TO: Todd L. Sarver, Esq.
 Steptoe & Johnson, LLC

PERSONAL AND CONFIDENTIAL

FAX NUMBER: (614) 221-0952

FROM: Elizabeth Kilpatrick, Deputy Asst. GC
 Division of Operations-Management

NO. PAGES INCLUDING COVER: 3

COMMENTS: Kingspan Insulated Panels, Inc. dba Kingspan Benchmark
 Cases 09-CA-072906 and 09-RC-069754
 Response to 102.118 Request

WARNING: MOST FAX MACHINES PRODUCE COPIES ON THERMAL PAPER. THE IMAGE PRODUCED IS HIGHLY UNSTABLE AND WILL DETERIORATE SIGNIFICANTLY IN A FEW YEARS. IT SHOULD BE COPIED ON A PLAIN PAPER COPIER IF IT IS TO BE FILED AS AN OFFICIAL NLRB RECORD.

*****-202 273 4274 -***** - - 202 273 4274 -*****

-NLRB DIV OPERL MGMT -

001	OK	9161422210952	003/003	00:00:58
STN	COMM.	ONE-TOUCH/	PAGES	DURATION
NO.	ABBR NO.	STATION NAME/TEL NO.		

FILE NO.=255

MODE = MEMORY TRANSMISSION START=APR-06 15:18 END=APR-06 15:11

*****-COMM. JOURNAL-***** DATE APR-06-2012 TIME 15:11 *****

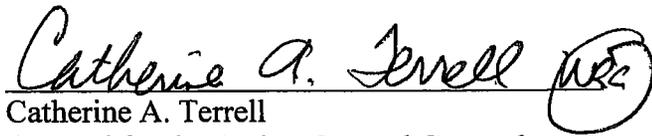
CERTIFICATE OF SERVICE

April 13, 2012

The undersigned hereby certifies that a copy of the Petition to Revoke Subpoenas and Memorandum in Support of said Petition was served this date by certified mail on Respondent's attorney, Todd L. Sarver, at his office at Steptoe & Johnson, PLLC, Huntington Center, Suite 2200, 41 South High Street, Columbus, Ohio 43215, and by e-mail at todd.sarver@steptoe-johnson.com.

And that a copy was served via e-mail and regular U.S. Mail upon:

Julie C. Ford, Esquire
Doll, Jansen, Ford & Rakay
111 W. First Street., Suite 1100
Dayton Ohio 45402
jford@djflawfirm.com


Catherine A. Terrell
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9**

In the matter of:)	
)	
Kingspan Insulated Panels, Inc. d/b/a Kingspan Benchmark)	NLRB Case Nos. 9-CA-072906 & 9-RC-069754
)	
Respondent,)	
)	
and)	
)	
Sheet Metal Workers International Association, Local Union No. 24,)	
)	
Charging Party.)	

**RESPONDENT KINGSPAN INSULATED PANELS, INC. D/B/A KINGSPAN
BENCHMARK'S OPPOSITION TO COUNSEL FOR ACTING GENERAL COUNSEL'S
PETITION TO REVOKE SUBPOENAS**

The basis for Respondent Kingspan Benchmark's Request for Consent from the Office of the Acting General Counsel for the subpoenas served upon the Board agents in the above-captioned matter is attached to the Counsel for the Acting General Counsel's Petition to Revoke as Attachment D, and it is incorporated herein by reference as if fully restated. The Office of the Acting General Counsel's refusal to consent to the subpoena of Board agents, and the Counsel for the Acting General Counsel's subsequent petition to revoke the subpoenas are without merit.

The primary basis for the Office of the Acting General Counsel's denial of the Request for Consent is that Kingspan Benchmark has its own representatives to the conversations at issue that it could call as witnesses to testify in the proceeding regarding the above-captioned matter. (See Attachment E, Petition to Revoke). Thus, the argument goes, Kingspan Benchmark does not need the Board's agents to testify about the conversations between the parties because it has

its own witnesses. This rationale is coy. While the Office of the Acting General Counsel does not acknowledge who Kingspan Benchmark's witness would be, the Counsel for the General Counsel in her Petition to Revoke is at least honest about it – the only Kingspan Benchmark witness to the conversations at issue is its labor attorney, Todd Sarver. Alternatively, Kingspan Benchmark can seek to compel the Union's business agent (with whom the dispute exists), or apparently the Union's attorney. While Kingspan Benchmark has subpoenaed the Union's business agent, the dispute centers around what the business agent said in these phone conversations. Thus, only one side has a non-attorney witness.

The Office of the Acting General Counsel's and the Counsel for the Acting General Counsel's response to the Request for Consent walks a fine line between ironic and oxymoronic. On the one hand, the Office of the Acting General Counsel and the Counsel for the Acting General Counsel spend significant time pontificating about the integrity of the Board's processes and the need to protect a privilege associated with the informal investigatory process. On the other hand, the Office of the Acting General Counsel and the Counsel for the Acting General Counsel seem to have no qualms with throwing other privileges – the attorney client privilege and the attorney work product doctrine – under the bus by putting not only Kingspan Benchmark in the position of having its attorney testify on its behalf, but also the Union. That is, under this rationale the parties' attorneys can and should be fact witnesses. Thus, preserving sanctity of privilege does not seem to be the Acting General Counsel's true motivation in seeking to avoid the subpoenas.

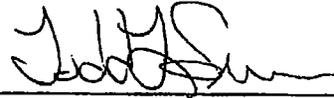
While the Office of the Acting General Counsel and the Counsel for the Acting General Counsel cite to case law regarding an investigatory privilege, they both completely fail to show how the testimony sought actually implicates any such privilege. Indeed, their arguments

quickly become circular. Once the existence of an investigatory privilege is identified, the solution propounded is that the parties' respective attorneys can testify as to the conversations. There is no connection made between the privilege and the testimony sought. As discussed above, the solution of having the parties' respective attorneys also serve as fact witnesses is internally inconsistent and fraught with significant problems. Not only does such a position implicate universally recognized privileges, but also puts Kingspan Benchmark in the position of having to rely on the Union's witnesses to build its case regarding a dispute over representations made by the same union representative.

The Office of the Acting General Counsel's and the Counsel for the Acting General Counsel's positions are all the more confounding when the nature of the testimony sought is considered. Kingspan Benchmark seeks only testimony from Board agents of conversations that took place between the Board, Kingspan Benchmark and the Union. That is all. As set forth in its Request for Consent, Kingspan Benchmark does not seek information about any internal discussions, or even any discussions the Region may have had with the Union; only two conversations in which all parties participated.

For the reasons set forth in its Request for Consent, and as further explained above, the Office of the Acting General Counsel's denial of Kingspan Benchmark's Request for Consent fails to provide a legitimate, cogent reason for its refusal to grant the Request. Moreover, Counsel for the Acting General Counsel's Petition to Revoke, in following suit, likewise fails to set forth a well-reasoned basis for revoking the subpoenas given the nature of the testimony sought.

Respectfully submitted,



Todd L. Sarver (0061571)
Steptoe & Johnson, PLLC
Huntington Center, Suite 2200
41 South High Street
Columbus, Ohio 43215
(614) 456-1671 (telephone)
(614) 221-0952 (facsimile)

Attorneys for Respondent,
Kingspan Insulated Panels, Inc.
d/b/a Kingspan Benchmark

April 17, 2012

CERTIFICATE OF SERVICE

I hereby certify that on this 17th day of April, 2012, an electronic PDF version of this Respondent Kingspan Insulated Panels, Inc. d/b/a Kingspan Benchmark's Answer to Complaint and Notice of Hearing was filed using the Board's electronic filing system upon:

The Division of Administrative Law Judges
1099 14th Street, NW, Room 5400 East
National Labor Relations Board
Washington, D.C. 20570-1000

And that one copy was served via e-mail and regular U.S. mail upon:

Ms. Catherine Terrell, Esq.
National Labor Relations Board, Region 9
3003 John Weld Peck Federal Building
550 Main Street
Cincinnati, Ohio 45202-3271
Catherine.terrell@nlrb.gov

Julie C. Ford, Esq.
Doll, Jansen, Ford & Rakay
111 W. First St., Ste. 1100
Dayton, Ohio 45402-1156
jford@djflawfirm.com

Mr. Scott Hammond
Sheet Metal Workers, Local 24
4949 Northcutt Pl.
Dayton, Ohio 45414-3839
shammond@smw24.org



One of the Attorneys for Respondent
Kingspan Insulated Panels, Inc. d/b/a
Kingspan Benchmark

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

KINGSPAN INSULATED PANELS, D/B/A
KINGSPAN BENCHMARK

and

Case 9-CA-072906

Case 9-RC-069754

SHEET METAL WORKERS INTERNATIONAL
ASSOCIATION, LOCAL UNION NO. 24

**ORDER GRANTING IN PART, DENYING IN PART THE COUNSEL FOR THE
ACTING GENERAL COUNSEL'S PETITION TO REVOKE SUBPOENAS**

The Acting General Counsel's petition to revoke Respondent's subpoenas issued to Field Examiner Elizabeth Macaroni and Assistant Regional Director Laura Atkinson is GRANTED. The Acting General Counsel's petition to revoke Respondent's subpoena issued to Field Attorney Joseph Tansino is DENIED. Mr. Tansino shall appear to testify at the hearing on April 30, 2012, as requested by Respondent.


Arthur J. Amchan
Administrative Law Judge

Dated: April 23, 2012
Washington, D.C.

CERTIFICATE OF SERVICE

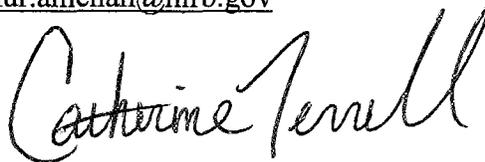
April 24, 2012

The undersigned hereby certifies that a copy of the Appeal of Administrative Law Judge Amchan's Order Denying Counsel for the Acting General Counsel's Petition to Revoke Subpoenas and Request for Special Permission to Appeal to the Board Administrative Law Judge Amchan's Order Denying Counsel for the Acting General Counsel's Petition to Revoke Subpoena Ad Testificandum of Board Agent Tansino was served by e-mail to the following:

Todd L. Sarver
Steptoe & Johnson, PLLC
Huntington Center, Suite 2200
41 South High Street
Columbus, Ohio 43215.
Todd.sarver@steptoe-johnson.com

Julie C. Ford, Attorney
Doll, Jansen, Ford, & Rakay
111 W. First St., Suite 1100
Dayton Ohio 45402
jford@djflawfirm.com

Arthur Amchan, Deputy Chief ALJ
Division of Judges
National Labor Relations Board
1099 14th Street, N.W., Room 5400 East
Washington, D.C. 20570-0001
Arthur.amchan@nrlb.gov



Catherine Terrell
Counsel for the Acting General Counsel
Region 9, National Labor Relations Board
John Weld Peck Federal Building
550 Main Street, Suite 3003
Cincinnati, Ohio 45202