

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

In the Matter of:

Case No. 9-RC-83978

THE ARDIT COMPANY

Employer

and

INTERNATIONAL UNION OF BRICKLAYERS
& ALLIED CRAFTWORKERS, OHIO KENTUCKY
ADMINISTRATIVE DISTRICT COUNCIL,
LOCAL UNION NO. 18

Petitioner

PETITIONER'S MEMORANDUM IN OPPOSITION TO REQUEST FOR REVIEW

MANGANO LAW OFFICES CO., L.P.A.

/s/Ryan K. Hymore

Ryan K. Hymore
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Counsel for Petitioner

Date: August 3, 2012

**MEMORANDUM IN OPPOSITION
TO REQUEST FOR REVIEW**

I. ISSUE PRESENTED

The only substantive issue presented by the Employer is whether—geographically speaking—the Union is *the appropriate union* to represent the Employer’s employees. Such a consideration, however, is irrelevant, and the Board has rejected the same argument for more than half a century. Related to this issue is whether the Employer’s subpoena duces tecum should have been revoked. The Union incorporates its petition to revoke the subpoena duces tecum as if fully restated herein. (Union Ex. 1, attached hereto.)

II. ARGUMENTS AND AUTHORITIES

A. *No Compelling Reasons Support the Employer’s Request for Review.*

“The Board will grant a request for review only where compelling reasons exist therefor.” 29 CFR 102.67(c). To be sure, such a request may be granted only when the Board is presented with evidence of one of the following:

- (1) That a substantial question of law or policy is raised because of (i) the absence of, or (ii) a departure from, officially reported Board precedent.
- (2) That the Regional Director’s decision on a substantial factual issue is clearly erroneous on the record and such error prejudicially affects the rights of a party.
- (3) That the conduct of the hearing or any ruling made in connection with the proceeding has resulted in prejudicial error.
- (4) That there are compelling reasons for reconsideration of an important Board rule or policy.

29 CFR 102.67(c)(1)-(4). The Employer has not demonstrated that any of the foregoing grounds are present. As such, its request for review should be denied.

B. *Geographical Considerations of Whether a Union Is the Appropriate Union Are Inappropriate and Irrelevant.*

The Board has long held that a union's constitution, territorial jurisdiction, and other limitations do not generally affect the determination of an appropriate unit. *CCI Construction Co.*, 326 NLRB 1319 (1998) (holding that evidence of a union's geographical jurisdiction is not relevant to a unit determination), citing *Groendyke Transport*, 171 NLRB 997, 998 (1968); *Building Construction Employers Assn.*, 147 NLRB 222, 224 (1964). "It is the Petitioner's willingness, rather than its constitutional ability to represent these employees which is the controlling factor." *Mayfair Indus., Inc.*, 126 NLRB 223, fn.1 (1960), citing *F. C. Russell Company*, 116 NLRB 1015, fn.5. Likewise, "the Board has uniformly held that the willingness of a petitioner to represent employees, rather than the eligibility of employees to membership in the petitioner, is controlling under the Act." *"M" System, Inc.*, 115 NLRB 1316, fn.2 (1956), citing *Gusdorf & Son*, 107 NLRB 998 (1954). Here, the Regional Director determined that the Union is ready, willing, and able to represent the Employer's employees in the proposed unit wherever those employees may work. Tellingly, the Employer presented no argument, aside from the *inappropriate union* argument, as to why the petitioned for unit is inappropriate. It did not even timely file a post-hearing brief.¹ As such, the Employer's request for review should be denied.

¹ The Employer has requested review of the Acting Regional Director's July 16, 2012 order denying the Employer's motion to file its brief one-day late. (Employer's Req. for Review at Ex. B.) But miscalculating a filing deadline, as the Employer did here, is not good cause for filing a post-hearing brief out of rule. *E.g., Unitec Elevator Servs. Co.*, 337 NLRB 426, 28 (2002). The Union was prejudiced by the Employer's request to file post-hearing briefs because the Union requested to present its closing argument orally on the record to avoid delay and costs associated with briefing. (Union Ex. 2, Tr. 67.) Further, the Hearing Officer specifically stated that the post-hearing briefs were "due by close of business on July 12." (*Id.*) A simple review of the 69-page hearing transcript—delivered electronically to all counsel on Monday, July 9, 2012—would have corrected the Employer's previous deadline miscalculation. (Union Ex. 3.) As such, the Union objects to the Board's consideration of any argument raised in the Employer's untimely post-hearing brief and its request for review based on the same arguments.

CONCLUSION

Based on the foregoing arguments, the Employer's request for review should be denied.

Respectfully submitted,

MANGANO LAW OFFICES CO., L.P.A.

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rkymore@bmanganolaw.com

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Memorandum in Opposition was served this 3rd day of August 2012 upon the Board and Regional Director Gary Muffley, Region 9, via electronic filing and by email upon the following:

Ron Mason, Esq.
Aaron Tulencik, Esq.

Counsel for the Employer

/s/Ryan K. Hymore

Ryan K. Hymore

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

In the Matter of :

Case No. 9-RC-83978

THE ARDIT COMPANY

Employer

and

INTERNATIONAL UNION OF BRICKLAYERS
& ALLIED CRAFTWORKERS, OHIO KENTUCKY
ADMINISTRATIVE DISTRICT COUNCIL,
LOCAL UNION NO. 18

Petitioner

**PETITION TO REVOKE SUBPOENA DUCES TECUM
DIRECTED TO PETITIONER**

Pursuant to Section 102.66(c) of the Rules and Regulations of the National Labor Relations Board, International Union of Bricklayers & Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18 requests the Regional Director and/or hearing office to revoke the attached subpoena duces tecum. The reasons for this petition are set forth in the attached memorandum.

Respectfully submitted,

MANGANO LAW OFFICES CO., L.P.A.



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MEMORANDUM

I. THE SUBPOENA HAS NOT BEEN TIMELY AND PROPERLY SERVED.

At 7:13 p.m. on Tuesday, July 3, 2012—the day before a Federal holiday and less than two business hours before commencement of the hearing in this matter—the Employer, by and through counsel, served a courtesy copy, upon Petitioner’s counsel by email, of an unreasonable and unduly burdensome subpoena duces tecum requesting irrelevant information. (Ex 1.) The Employer is currently attempting so-called private delivery service upon the Petitioner, namely Federal Express.¹ (*Id.*) But that service, improper in and of itself, is unlikely to be returnable before the hearing commences.

The National Labor Relations Act (“the Act”) and associated regulations dictate precisely how to serve subpoenas. In this regard, Section 11(4) of the Act provides, in pertinent part:

Complaints, orders and other process and papers of the Board, its member, agent, or agency, *may be served either personally or by registered or certified mail or by telegraph or by leaving a copy thereof at the principal office or place of business of the person required to be served.* The verified return by the individual so serving the same setting forth the manner of such service shall be proof of the same, and *the return post office receipt or telegraph receipt therefore when registered or certified and mailed or when telegraphed as aforesaid shall be proof of service of the same.* Witnesses summoned before the Board, its member, agent, or agency, shall be paid the same fees and mileage that are paid witnesses in the courts of the United States, and witnesses whose depositions are taken and the persons taking the same shall severally be entitled to the same fees as are paid for like services in the courts of the United States.

¹ Neither Petitioner nor its counsel agreed to accept informal service of the subpoena duces tecum.

29 U.S.C. § 161(4) (emphasis added). “Subpoenas shall be served upon the recipient either *personally* or by *registered or certified mail* or by *telegraph*, or by *leaving a copy* thereof at the principal office or place of business of the person required to be served.” 29 CFR 102.113(c) (emphasis added). *See* 29 U.S.C. § 156 (granting the National Labor Relations Board (“Board”) authority, among other things, to promulgate rules and regulations). There are, thus, only five ways to properly serve a subpoena—personal service, certified mail service, registered mail service, telegraph service, and leaving a copy at a place of business. *Id.* Here, the Employer did not elect to follow the Act or its regulations. Rather, it simply utilized a private delivery service, namely Federal Express, to attempt service of the subpoena. (Ex. 1.) Although the regulations permit service of certain documents in certain situations by private delivery service, subpoena service is not one of them. *E.g.*, 29 CFR 102.113(d) (“Other documents may be served by the Agency by any of the foregoing methods as well as regular mail or private delivery service. Such other documents may be served by facsimile transmission with the permission of the person receiving the document.”). Thus, the subpoena duces tecum should be revoked because it was not served and returnable prior to the hearing and, even if served, it was not served properly.

II. THE DOCUMENTS REQUESTED ARE NOT RELEVANT.

This matter is set for a representation hearing on July 5, 2012. The documents requested by the Employer, namely international, district council, and local constitutions, bylaws, rules of order, current collective bargaining agreements throughout Ohio, internal union correspondence, and descriptions of geographic jurisdiction throughout Ohio, are not relevant to the issues to be determined by the Regional Director or the Board during a representation hearing. The Board has revoked subpoenas duces tecum just like this one

under similar circumstances. *Alden Press, Inc.*, 212 NLRB 580, 580 (1974) (revoking a subpoena duces tecum, in the context of a representation matter, that requested production of, among other things, constitutions, bylaws, and collective bargaining agreements). *Cf. CCI Construction Co., Inc.*, 326 NLRB 1319, 1319 (1998) (holding that evidence of a union’s geographical jurisdiction is not relevant to a unit determination), citing *Groendyke Transportation, Inc.*, 171 NLRB 997, 998 (1968); *Building Construction Employers Assn.*, 147 NLRB 222, 224 (1964). Thus, even if served properly, the subpoena should be revoked because it requests production of irrelevant documents.

III. THE SUBPOENA IS UNREASONABLE AND UNDULY BURDENSOME.

“The Board has held that in questions regarding the enforcement or revocation of subpoenas the Federal Rules of Civil Procedure, although not binding on [the] Agency, provide useful guidance” *Marian Manor for the Aged and Infirm, Inc.*, 333 N.L.R.B. 1084 (2001), citing *Brink’s Inc.*, 281 N.L.R.B. 468 (1986). The Federal Rules of Civil Procedure permit a court to quash a subpoena for various reasons, including if the subpoena “fails to allow a reasonable time to comply” and “subjects a person to undue burden.” Fed. R. Civ. P. 45(c)(3)(i), (iv). Here, the Employer has known about the hearing date presumably since the Union has, that is, Wednesday, June 27, 2012. The Employer should not have waited until 7:13 p.m. on Tuesday, July 3, 2012 to serve a courtesy copy upon counsel. Further, the Employer should not have waited until July 5, 2012—the day of the hearing—to attempt (improper) private delivery service of the subpoena duces tecum upon the Petitioner. Even if service were proper on July 5, 2012 by Federal Express and the documents were relevant to the issues to be determined, there is no conceivable way all the documents could be compiled prior to the 10:00 a.m. hearing on July 5, 2012. The subpoena duces tecum

should be revoked because the timing is unreasonable and, given the timing, collecting all the documents over a Federal holiday and within less than two business hours of the hearing is unduly burdensome.

Respectfully submitted,

MANGANO LAW OFFICES CO., L.P.A.



Ryan K. Hymore
10901 Reed Hartman Hwy., Ste. 207
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T. (513) 255-5888/F. (216) 397-5845
rkymore@bmanganolaw.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition to Revoke Subpoena Duces Tecum was served this 5th day of July 2012 via facsimile upon the following:

Gary Muffley, Regional Director
NLRB REGION 09 – CINCINNATI
F: (513) 684-3946

And

RON MASON, ESQ.
AARON T. TULENCIK, ESQ.
F: (614) 734-9451



Ryan K. Hymore

Ryan Hymore

From: Aaron Tulencik [atulencik@maslawfirm.com]
Sent: Tuesday, July 03, 2012 7:13 PM
To: Ryan Hymore
Cc: Aaron Tulencik
Subject: The Ardit Co. -- Case No. 9-RC-83978
Attachments: Local 18 subpoena and cover letter.pdf

Importance: High

Ryan:

See the attached subpoena regarding the matter referenced above



AARON T. TULENCIK | Mason Law Firm Co., L.P.A. | 425 Metro Place North, Suite 620 | Dublin, Ohio 43017
P 614.734.9442 | F 614.734.9451 | atulencik@maslawfirm.com | www.maslawfirm.com

*****NOTICE from Mason Law Firm, Co., LPA*****
This message may be protected by the attorney-client privilege. If you believe that it has been sent to you in error, do not read, print or forward it. Please reply to the sender that you have received the message in error. Then delete it. Thank you.

IRS Circular 230 Disclosure: To ensure compliance with requirements imposed by the IRS, we inform you that any tax advice contained in this communication (including any attachments) was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. Thank you.

Principal:

Ronald L. Mason 614 734 9454



Of Counsel:

Aaron T. Tulencik 614 734 9442

July 3, 2012

VIA FEDEX OVERNIGHT DELIVERY

Fred Hubbard

And/or Custodian of Records

International Union of Bricklayers & Allied Craftworkers, Ohio Kentucky Administrative
District Council, Local Union No. 18.

1550 Chase Ave.

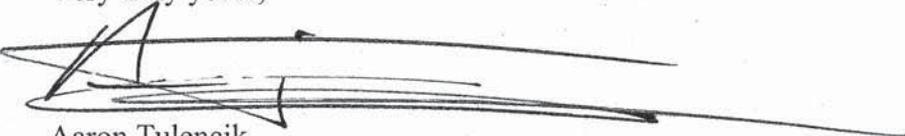
Cincinnati, Ohio 45223

**Re: Center The Ardit Company
Case No. 9-RC-83978**

Mr. Hubbard and/or Custodian of Records:

Please find enclosed a Subpoena Duces Tecum regarding the above referenced matter. As you well know, Mason Law Firm Co., LPA represents The Ardit Company ("Ardit"). Please produce all responsive as soon as possible. Said documents should be produced at the following address: Mason Law Firm Co., LPA, Suite 620, Dublin, Ohio 43017. Thank you for your cooperation in this matter.

Very truly yours,


Aaron Tulencik

Encl.

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

To International Union of Bricklayers & Allied Craftworkers, Ohio Kentucky
Administrative District Council, Local Union No. 18-ATTN: Fred Hubbard or
Custodian of Records

As requested by Aaron Tulencik, Esq., Counsel for The Ardit Company

whose address is 425 Metro Place North, Suite 620, Dublin, Ohio 43017
(Street) (City) (State) (ZIP)

YOU ARE HEREBY REQUIRED AND DIRECTED TO APPEAR BEFORE _____

a Hearing Officer of the National Labor Relations Board

at a hearing to be held at Room 305 of the Potter Stewart U.S. Courthouse
in the City of Cincinnati, Ohio 45202 at 100 East Fifth Street

on the 5th day of July 20 12 at 10 (a.m.) (~~pm~~) or any adjourned

or rescheduled date to testify in THE ARDIT COMPANY Case 9-RC-083978
(Case Name and Number)

See Exhibit A attached hereto

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 - 887441

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

Issued at Dublin, Ohio

this 3rd day of July 2012



Lesfer A. Welzer

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.

DEFINITIONS AND INSTRUCTIONS

1. The term "document" means any written, recorded or graphic matter, or matter existing on computer software or hardware, whether previously erased or not, including but not limited to memoranda, notes, minutes, business records, telephone contacts, correspondence, telegrams, diaries, bookkeeping entries, receipts, work orders, contracts, financial statements, tax returns, checks, check stubs, reports, records, summaries, lists, charts, compilations, graphs, statements, notebooks, handwritten notes, applications, agreements, files, addenda, books, pamphlets, periodicals, appointment calendars, recordings of oral conversations, voice mail messages, electronic mail and pictures.

2. The term "the union" refers to the International Union of Bricklayers & Allied Craftworkers, Ohio Kentucky Administrative District Council, Local Union No. 18.

3. (a) Unless otherwise specified, copies may be produced in lieu of originals, provided that such copies are exact and complete copies of original documents and that the original documents be made available at the time of production for the purposes of verifying the accuracy of such copies.

(b) Any copies of original documents which are different in any way from the original, whether by interlineations, receipt, stamp, notations, indication of copies sent or received, or otherwise, shall themselves be considered original documents and must be produced separately from the originals or copies of originals satisfying the requirements of paragraph 3(a).

4. "Any", "each", and "all" shall be read to be all inclusive and to require the production of each and every document responsive to the request in which such terms appear.

5. "Any" and "or" and any other conjunctions or disjunctions used herein shall be read both conjunctively and disjunctively, so as to make the request inclusive rather than exclusive and to require the enumeration of all information responsive to all or any part of each request in which any conjunction or disjunction appears.

6. The terms "refer," "regarding," "in relation to," "relating to," "reflect," or "involving" shall mean to constitute, contain, refer to, reflect, mention, concern, pertain to, summarize, analyze or in any way logically or factually connect with the matter discussed.

7. Documents subpoenaed shall include all documents in the union's physical possession, custody or control, its present or former supervisors, agents, attorneys, accountants, advisors, investigators, and any other persons and companies directly or indirectly employed by, or connected with the union.

8. If any documentation responsive to any request herein was, but no longer is, in the union's possession, custody or control, identify the document (stating its date, author,



subject, recipients and intended recipients); explain the circumstances by which the document ceased to be in your possession, custody or control, and identify (stating the person's name, employer title, business address and telephone number, and home address and telephone number) all persons known or believed to have the document or a copy thereof in their possession, custody or control.

9. If any document responsive to any request herein was destroyed, discarded, or otherwise disposed of for whatever reasons, identify the document (stating the date, author, addressee(s), recipients and intended recipients, title and subject matter); explain the circumstances surrounding the destruction and discarding or disposal of the document, including the timing of the destruction, identify all personnel who authorized the destruction, discarding or disposal of the document, and identify all persons known or believe to have the document or a copy thereof in their possession, custody or control.

10. If any document responsive to any request herein was withheld from production on the asserted ground that it is privileged, identify and describe with respect to each document:

- (a) the author;
- (b) the recipient;
- (c) the date of the original document;
- (d) the subject matter of the document;
- (e) the asserted ground of privilege.

11. This request is continuing in character and if additional responsive documents come to your attention following the date of production, such documents must be promptly produced.

12. This request contemplates production of responsive documents in their entirety, without abbreviation or expurgation.

13. All documents produced pursuant to this subpoena should be organized by the subpoena paragraph/s each document/s is responsive to, and labels referring to that subpoena paragraph should be affixed to each document or set of documents.

For the production of:

1. The Constitution and Rules of Order of the International Union of Bricklayers and Allied Craftworkers.
2. The Bylaws of the International Union of Bricklayers and Allied Craftworkers.
3. The Bylaws of the International Union of Bricklayers and Allied Craftworkers, Ohio Kentucky Administrative District Council (OKADC”).
4. The Bylaws of the union.
6. Correspondence between the International Union of Bricklayers and Allied Craftworkers and the OKADC relating to the areas of jurisdiction for its local unions located in the state of Ohio.
7. Correspondence between the International Union of Bricklayers and Allied Craftworkers and the union relating to the areas of jurisdiction for its local unions located in the state of Ohio.
8. Correspondence between the OKADC and the union relating to the areas of jurisdiction for its local unions located in the state of Ohio.
9. A copy of the current contract in effect for each local union of the International Union of Bricklayers and Allied Craftworkers in the state of Ohio.
10. A list of each local union of the International Union of Bricklayers and Allied Craftworkers in the state of Ohio and the geographic area(s) covered by each local.

MASON LAW FIRM CO., L.P.A.
OPERATING ACCOUNT
425 METRO PLACE NORTH, SUITE 620
DUBLIN, OH 43017
614-734-9450

EXPLANATION	AMOUNT

25-3-440

4500

PAY Forty-seven and 77/100 DOLLARS

CHECK AMOUNT  Security Features Included. Details on back.

DATE	TO THE ORDER OF	DESCRIPTION	CHECK NO.
7-3-12	International Union Bricklayers Allied Craftworkers / OH / Ry / Administrative District Council Local Union 18	witness fee/subpoena	4500

\$ 47.77

McBee

JPMorgan  JPMorgan Chase Bank, N.A.
Private Bank Columbus, Ohio

Ronald Z. Mason



1 MR. HYMORE: That depends on what the
2 Hearing Officer states, or the Regional Director
3 states.

4 We would prefer oral argument; however, if
5 the Employer's given an opportunity to brief it, we
6 would, as well, like that opportunity.

7 HEARING OFFICER DUFFEY: Well, they
8 -- they clearly want to brief it, so I -- I think it'd
9 probably be best if -- if both parties brief the
10 issue.

11 And we do have some case law that we're
12 going to be looking at, so I -- I think that'll
13 probably be the best way to handle things.

14 All right. So briefs are due by close of
15 business on July 12. Any Motion for Extensions should
16 be addressed to the Regional Director.

17 And the parties are reminded that they
18 should request an expedited copy of the transcript
19 from the court reporter.

20 Late receipt of the transcript will not be
21 grounds for an extension of time to file briefs, if
22 you fail to do so.

23 Okay. Is there anything further, for the
24 Petitioner? All right. It looks like the court
25 reporter has some.

Ryan Hymore

From: Kim [molerracewaypark@aol.com]
Sent: Monday, July 09, 2012 2:34 PM
To: Ryan Hymore
Subject: Fwd: 7-5-12 NLRB Hearing
Attachments: 9-7-5-12-THE_ARDIT_COMPANY_9-RC-083978.pdf; 9-7-5-12-THE_ARDIT_COMPANY_9-RC-083978wordindex.pdf; invoice-Hymore.rtf

-----Original Message-----

From: Kim <molerracewaypark@aol.com>
To: atulencik <atulencik@maslawfirm.com>; rmason <rmason@maslawfirm.com>
Sent: Mon, Jul 9, 2012 2:31 pm
Subject: 7-5-12 NLRB Hearing

Attached please find transcript, word index and invoice for NLRB Hearing. Transcripts are usually sent COD so please get check out as soon as possible and please confirm receipt.

Thank you,

Kim B. Moler