

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

In the Matter of

VOITH INDUSTRIAL SERVICES, INC.

and

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS LOCAL UNION NO. 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

Cases 9-CA-075496
9-CA-078747
9-CA-082437

and

UNITED AUTOMOTIBLE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, AFL-CIO

and

UNITED AUTOMOBILE, AEROSPACE AND
AGRICULTURAL IMPLEMENT WORKERS
OF AMERICA, LOCAL UNION NO. 862, AFL-CIO

And

GENERAL DRIVERS, WAREHOUSEMEN &
HELPERS, LOCAL UNION 89, AFFILIATED
WITH THE INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

9-CB-0755075
9-CB-082805

**RESPONDENT, VOITH INDUSTRIAL SERVICES, INC.'S RESPONSE IN
OPPOSITION TO COUNSEL FOR THE ACTING GENERAL COUNSEL'S REQUEST
FOR SPECIAL PERMISSION TO APPEAL**

Pursuant to Section 102.26 of the Board's Rules and Regulations, Respondent, Voith Industrial Services, Inc., hereby responds to Counsel for the Acting General Counsel's Request for Special Permission to Appeal to the Board Administrative Law Judge Bruce Rosenstein's

Order Revoking Counsel for the Acting General Counsel's Subpoena Duces Tecum. For the reasons stated below, Respondent Voith respectfully requests that Counsel's Request for Special Appeal be denied or, in the alternative, if the Board grants Counsel's request for special appeal, that the August 19, 2012, order of Administrative Law Judge Bruce Rosenstein be upheld.

I. Factual and Procedural Background

On August 7, 2012, Counsel for the Acting General Counsel served by mail upon Respondent Voith a Subpoena Duces Tecum, which is attached as Exhibit A. Because it was served by mail, Respondent Voith did not receive the subpoena until, at the earliest, August 8, 2012, less than two weeks before trial in this matter.

The initial charge in this matter was filed on February 28, 2012 – nearly six months ago – alleging that Respondent Voith engaged in unfair labor practices in violation of Sections 8(a)(1), (2), (3) and (5) of the National Labor Relations Act. The Region began its investigation shortly after the filing of the charge and has undertaken to thoroughly investigate this matter since the outset. During the Region's investigation, Respondent Voith has produced thousands of pages of documents pursuant to requests made by the Region's investigator. Despite the long and painstaking investigation conducted by the Region, at no point did it request the documents sought by Item No. 23 of the subpoena duces tecum. It made this burdensome request, for the first time, within two weeks of the beginning of trial in this matter.

As a result of the untimely and burdensome nature of the subpoena duces tecum, Respondent Voith moved to quash certain of the requests made. Administrative Law Judge Rosenstein issued an order on August 19, 2012, quashing Items 6-10, 14-16, and 19, to the extent they are duplicative. On the first day of the hearing, Counsel for the Acting General Counsel and Voith were able to resolve these issues through consultation. In his August 19, 2012 order,

Judge Rosenstein held in abeyance any ruling with respect to Items 18 and 22. At the hearing, Voith produced responses to Item 18 and Judge Rosenstein revoked the subpoena with respect to Item 22.

Concerning Item 23, Administrative Law Judge Rosenstein wrote:

With respect to the information sought in Item 23 of the Subpoena Duces Tecum, I note that the subject charges were filed in February, April, and June 2012, and the Amended Second Consolidated Complaint issues on August 3, 2012. Thus, the charges have been pending investigation for over a five month period. In agreement with Respondent Voith, I find that the Acting General Counsel's request for documents in Item 23 (October 1, 2011 to the present) while mailed on August 7, 2012 were not received by Respondent Voith until after that date. Accordingly, this did not permit sufficient time prior to the scheduled August 21, 2012 hearing for Respondent Voith to compile the information and prepare its Petition to Quash the Subpoena Duces Tecum. Additionally, the information sought is unduly burdensome by seeking all e-mails and other correspondence among and between Respondent Voith's managers and supervisors, agents, or employees of Aerotek, Ford and/or the United Auto Workers pertaining to Teamsters Local 89 and the unionization of Aerotek's employees. Under these circumstances, I grant Respondent Voith's request to quash the Subpoena Duces Tecum regarding the documents sought in Item 23.

(ALJ Rosenstein's Aug. 19, 2012 Order, Exhibit B).

II. Argument

Requests for special appeals are discouraged by the Board. *See How to Take a Case Before the NLRB*, 8th Ed., Ch. 16. VIII.C. (2008). Ordinarily, trial proceeds and a judge's rulings are challenged through exceptions to the ultimate decision. *See NLRB Rules and Regulations* § 102.26. A similar process should be followed here.

Administrative Law Judge Rosenstein issued this order pursuant to sec. 102.31 of the Board's Rules and Regulations, which calls for the revocation of a subpoena by an administrative law judge "if in his/her opinion the evidence whose production is required does

not relate to any subject matter under investigation or question, or the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid.”

An administrative law judge’s interlocutory decision is not subject to special appeal unless the judge acted arbitrarily or capriciously or otherwise abused his discretion in reaching the decision. *See Pueblo Sheet Metal Workers*, 292 NLRB 855 (1989); *Consumers Distrib.*, 274 NLRB 346 (1985). Counsel for the Acting General Counsel asserts that Administrative Law Judge Rosenstein abused his discretion in reaching his decision on Respondent Voith’s petition to quash. However, sec. 102.31, explicitly states that administrative law judges may quash subpoenas if, in their opinion, the subpoena is invalid. Here, Administrative Law Judge Rosenstein formulated such an opinion. As such, special appeal is inappropriate.

Counsel for the Acting General Counsel argues that special appeal is appropriate because more time could have been granted for Respondent Voith to respond and, accordingly, Administrative Law Judge Rosenstein abused his discretion in failing to grant more time if it was needed. However, such grants of additional time are within the sound discretion of the administrative law judge. *See N.L.R.B. v. Glacier Packing Co., Inc.*, 507 F.2d 415 (9th Cir. 1974). Here, Counsel for the Acting General Counsel essentially asks that a continuance be granted, or at least that additional time be provided so that it may obtain documents which it had more than five months to request but sought for the first time within two weeks of the hearing. In addition, this new willingness to allow more time runs contrary to Counsel for the Acting General Counsel’s adamant opposition to any delays at every turn up to this point in the process. Administrative Law Judge Rosenstein was well within his discretion to quash such a request.

Counsel for the Acting General Counsel also posits that Administrative Law Judge Rosenstein abused his discretion because he decided that Item 23 was unduly burdensome without adequate showing of burdensomeness from Respondent Voith. First, Administrative Law Judge Rosenstein's order succinctly acknowledges that the timing of the service of the subpoena jeopardized Respondent Voith's ability to prepare a petition to quash. The timing limited Respondent Voith's ability to undertake a thorough analysis of just how arduous a process searching for the correspondence outlined in Item 23 would be. Second, and perhaps more importantly, Item 23, on its face, is unduly burdensome. This fact was clearly recognized by Administrative Law Judge Rosenstein.

A request for "all" records should be avoided wherever possible pursuant to the NLRB Case Handling Manual sec. 11776. Item 23 seeks all e-mail communications and documents between Respondent Voith, Aerotek, Ford and the UAW dating back more than a year from the date of the subpoena concerning the unionization of Voith and Aerotek employees. An adequate search of all of the relevant databases and drives would take well in excess of the thirteen days Respondent Voith had to respond to this request before the start of trial in this matter. Administrative Law Judge Rosenstein recognized the burdensomeness of the request and acknowledged as much in his order.

Counsel for the Acting General Counsel argues that Voith did not provide "sufficient grounds" for asserting that the subpoena would be overly broad and unduly burdensome. To the contrary, Item 23 is overly broad and unduly burdensome on its face. The request seeks:

True copies of all emails and other correspondence among and between Respondent's managers supervisors and/or between Respondent's managers and/or supervisors and managers, supervisors, agents or employees of Aerotek, Ford, and/or UAW pertaining to Teamsters 89, the unionization of Aerotek's

employees performing yard work at LAP during the period from October 1, 2011 through the present.

Voith Industrial Services has approximately 2000 employees spread throughout the world, about half of which are union employees. Emails are management's primary means of communication. Managers involved in this case estimate that they average over 200 emails a day. Obviously, it would be physically impossible for even a large team of reviewers to actually review such a vast array of emails. Accordingly, the only feasible method of performing the search that Counsel for the Acting General Counsel has demanded is through advanced electronic discovery techniques, which cannot be developed and executed in a few days. Even assuming that electronic discovery techniques were employed, the request remains overwhelming. For example, a search for the terms "union" or "UAW" would undoubtedly result in hundreds of thousands of emails during the period identified in the request.

Even after documents are captured by searching for certain key terms, the process of electronic discovery does not end there. Voith's counsel would then have to manually read through every email which the key-word search found to locate relevant documents, not to mention screen the documents for attorney-client and work-product protection. To have Voith's counsel undertake such a task in the last two weeks before the hearing would have severely hampered Voith's ability to prepare its defense. Even worse, Counsel for the Acting General Counsel now suggests as a solution that Voith's counsel conduct such a review during the hearing. This request is the very definition of overly broad and unduly burdensome from a manpower perspective, not to mention the astronomical expense which it would impose on Voith. Like Counsel for the General Counsel, Voith's attorneys are entitled to focus their full

attention on presenting their case at hearing. Item 23 would be unreasonable had it been made during the investigative phase. Just before and during the hearing it is absurdly unfair.

Moreover, the request is nothing more than an unauthorized request for discovery, to which parties are not entitled in Board proceedings. *See Emhardt Ind. V. NLRB*, 907 F.2d 372, 378 (2d Cir. 1990); *David Webb Co.*, 311 NLRB 1135-36 (1993); *see also Kenrich Petrochemical, Inc. v. NLRB*, 893 F.2d 1468, 1483 (1990) (neither the NLRA nor the Administrative Procedures Act confers the right of discovery in federal administrative proceedings).

The breadth of Counsel's request seeks documents dating to well before the filing of the initial charge in this matter, in some cases more than a year ago. Despite this, at no point prior to the service of this subpoena did Counsel or the Region request the documents that are the subject of Item 23. Apparently, at this late date, Counsel is still searching for a discriminatory motive in this action – something that should have been established long before the matter reached this stage. *See SOS Staffing Services, Inc.*, 331 NLRB 815, 816 (2000) (discriminatory motive is a necessary element of any violation of Sec. 8(a)(3)).

Because it appears that Counsel has no support for any discriminatory motive theory, it has embarked upon a fishing expedition less than two weeks before trial in an effort to obtain heretofore undiscovered evidence that any such discriminatory motive existed. Fishing expeditions of this nature should not be allowed. *See Great Atl. & Pac. Tea Co. (Cranston, R. I.)*, 118 NLRB 1280, 1283 (1957) (broad or blind fishing expeditions will not be tolerated); *see also Jencks v. United States*, 353 U.S. 657, 667 (1957); *Bowman Dairy v. United States*, 341 U.S. 214, 221 (1951). Accordingly, Administrative Law Judge Rosenstein acted within his discretion in granting Respondent Voith's petition to quash Counsel's Subpoena Duces Tecum.

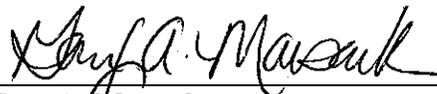
Therefore, special appeal is unnecessary and, even if deemed necessary, Judge Rosenstein's order should be upheld.

III. Conclusion

Administrative Law Judge Rosenstein properly considered and granted Respondent Voith's petition to quash Counsel for the Acting General Counsel's Subpoena Duces Tecum, specifically with respect to Item 23 of the subpoena which is untimely, unduly burdensome, and constitutes unauthorized pretrial discovery in a Board proceeding. Judge Rosenstein was well within his discretion to order that Item 23 be quashed given the nature and timing of the request. Accordingly, Counsel for the Acting General Counsel's request for special appeal should be denied. Alternatively, if Counsel's request is granted, the appeal should be denied and Administrative Law Judge Rosenstein's order quashing portions of Counsel's Subpoena Duces Tecum should be upheld.

Respectfully submitted this 22nd day of August, 2012.

By:



Gary A. Marsack
Lindner & Marsack, S.C.
411 E. Wisconsin Avenue, Suite 1800
Milwaukee, WI 53202-4498
(414) 273-3910
(414) 273-0522 (FAX)
gmarsack@lindner-marsack.com

Stephen Richey
Thompson Hine LLP
312 Walnut Street, Suite 1400
Cincinnati, OH 45202
(513) 352-6768
(513) 241-4771
Stephen.richey@thompsonhine.com
Attorneys for Respondent Voith Industrial Services, Inc.

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Respondent, Voith Industrial Services, Inc.'s Response in Opposition to Counsel for the Acting General Counsel's Request for Special Permission to Appeal was served upon the National Labor Relations Board by electronic filing in PDF format using the Agency's E-filing system on this 22nd day of August, 2012.

I further certify that a copy of the foregoing was served upon the following by email in accordance with CFR 102.11(4) on this 22nd day of August, 2012:

MICHELE HENRY, ATTORNEY
PRIDDY CUTLER MILLER & MEADE, PLLC
800 REPUBLIC BUILDING
429 W MUHAMMAD ALI BOULEVARD
LOUISVILLE, KY 40202-2348
henry@pcmmlaw.com

STEPHEN RICHEY, ATTORNEY
THOMPSON & HINE, LLP
312 WALNUT ST, STE 1400
CINCINNATI, OH 45202-4029
stephen.richey@thompsonhine.com

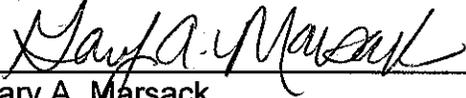
JAMES F. WALLINGTON, ATTORNEY BAPTISTE &
WILDER
1150 CONNECTICUT AVE NW, STE 315
WASHINGTON, DC 20036-4104
jwallington@bapwild.com

ROBERT M. COLONE, GENERAL COUNSEL
3813 TAYLOR BLVD.
LOUISVILLE, KY 40215
rmcolone@teamsters89.com

WILLIAM J. KARGES, ESQ.
ASSOCIATE GC
INTERNATIONAL UNION, UNITED AUTOMOTIVE,
AEROSPACE, AND AGRICULTURAL IMPLEMENT
WORKERS OF AMERICA, UA
8000 EAST JEFFERSON AVENUE
DETROIT, MI 48214-3963
wkarges@uaw.net

THOMAS R. FREEMAN
FREEMAN & FREEMAN, P.C.
100 PARK AVENUE, STE 250
ROCKVILLE, MD 20850
tfreeman@erols.com

JONATAN D. DUFFEY
REGION 9, NATIONAL LABOR RELATIONS BOARD
3003 JOHN WELD PECK FEDERAL BUILDING
CINCINNATI, OH 45202-327
Jonathan.duffey@nrlrb.gov



Gary A. Marsack
Attorney for Respondent Voith Industrial Services, Inc.