UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

VOITH INDUSTRIAL SERVICES, INC.

and **Cases 09-CA-075496**
09-CA-078747
09-CA-082437

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

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

and **Cases 09-CB-075505**
09-CB-082805

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

ORDER

The Acting General Counsel's request for special permission to appeal the ruling of Administrative Law Judge Bruce Rosenstein granting in part Respondent Voith's petition to quash Subpoena Duces Tecum B-643335 as it applies to paragraph 23 is granted. On appeal, the judge's ruling is reversed.

In granting the petition to quash paragraph 23,[1] the judge found that Respondent Voith did not have sufficient time to compile the information sought and prepare its

[1] Paragraph 23 seeks, in relevant part:

> [t]rue copies of all emails and other correspondence among and between Respondent's managers and supervisors and/or between Respondent's managers and/or supervisors and managers, supervisors, agents or employees of Aerotek, Ford, and/or UAW pertaining to [Charging Party] Teamsters 89, the

petition to quash, and that the information sought was unduly burdensome. The judge therefore granted Respondent Voith's petition to revoke this aspect of the subpoena.

It is well established that the party seeking to avoid compliance with a subpoena bears the burden of demonstrating that it is unduly burdensome or oppressive. See *FDIC v. Garner*, 126 F.3d 1138, 1145 (9th Cir. 1997). A party satisfies that burden by showing that producing the subpoenaed information "would seriously disrupt its normal business operations." *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996) (quoting *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986)). Further, the mere fact that a subpoena will require the production of a large number of documents is insufficient to establish that it is unduly burdensome. *NLRB v. G.H.R. Energy Corp*., 707 F.2d 110, 114 (5th Cir. 1982) (citation omitted).

We find that by relying on bare assertions and a misreading of the subpoena, Respondent Voith has not met its burden,[2] and the judge therefore erred by granting the petition to quash. Respondent Voith is accordingly directed to provide all responsive documents and communications available, without resort to analysis of email backup

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> Respondent's employees performing yard work at LAP or the unionization of Aerotek's employees performing yard work at LAP during the period October 1, 2011 through the present."

[2] With regard to timing, Respondent Voith's petition claims that searching for the required documents would take "far in excess" of the two weeks between its receipt of the subpoena and the commencement of the hearing because it would need to locate documents "created in early 2011 or before," and that it would need additional time to review potentially responsive documents to determine if any privileges applied. Paragraph 23, however, only requires documents from October 1, 2011 "to the present." Further, Respondent Voith has not submitted any evidence supporting its assertion that the time required to locate and review the documents would exceed two weeks. We note, however, that our decision is not intended to limit the judge's discretion to grant Respondent Voith additional time to produce documents responsive to paragraph 23. Respondent Voith's petition to quash also claims that complying with paragraph 23 would substantially impact its business operations, but once again the petition does not offer any evidence in support of this claim.

tapes, subject to the Acting General Counsel having the opportunity to persuade the judge that an additional search is necessary and the Respondent having the opportunity to demonstrate that such additional search would be unduly burdensome. Finally, our denial of the motion to quash is without prejudice to Respondent Voith renewing its assertion that certain subpoenaed documents it has specifically identified may be exempt from disclosure due to attorney-client privilege.[3]

Dated, Washington, D.C., August 27, 2012

RICHARD F. GRIFFIN., JR, MEMBER

SHARON BLOCK, MEMBER

MEMBER HAYES, dissenting:

I would deny the Acting General Counsel's request for special permission to appeal. In the normal course, a party's challenges to a judge's rulings are reserved for the Board to resolve on exceptions. See Sec. 102.26, Board's Rules and Regulations. But in all cases, even those in which special permission to appeal is granted, "the Board affirms an evidentiary ruling of an administrative law judge unless it constitutes an abuse of discretion." See *Aladdin Gaming, LLC,* 345 NLRB 585, 587 (2005), petition for review denied sub nom. *Local Joint Executive Board of Las Vegas v. NLRB*, 515 F.3d 942 (9th Cir. 2008); see also *Consumers Distributing*, 274 NLRB 346, 346 (1985) (denying interim appeal of a judge's ruling under Sec. 102.26 because "the judge did not act arbitrarily or capriciously or otherwise abuse his discretion"). Here, the Acting

[3] In the Acting General Counsel's August 20, 2012 request for special permission to appeal, the Acting General Counsel has made an adequate preliminary showing that the requested information is part of a relevant and necessary inquiry in this case.

General Counsel effectively investigated this case for more than five months before issuing the investigative subpoena duces tecum to the Respondent a mere two weeks before the hearing was scheduled to begin. Paragraph 23 of the subpoena requires the Respondent to produce, within a very short timeframe, potentially voluminous e-mails and other communications exchanged among four entities. Under these circumstances, far from acting arbitrarily or capriciously the judge properly exercised his discretion in ruling that complying with Paragraph 23 of the subpoena would be unduly burdensome for the Respondent.

Moreover, I find troubling that the Acting General Counsel issued the "investigative" subpoena after having filed the complaint, a time when the investigation should have been complete and the litigation phase of the proceedings underway. Issuing a post-complaint investigative subpoena so close to the hearing is more akin to the pretrial discovery of documents than to a legitimate use of investigatory authority. The Board denies all other parties pretrial discovery rights. See *Offshore Mariners United*, 338 NLRB 745, 746 (2002). Neither should it permit the Acting General Counsel to abuse its investigative subpoena power under Sec. 11(1) of the Act to overwhelm a party with burdensome discovery requests during the litigation phase of unfair labor practice proceedings.

BRIAN E. HAYES, MEMBER