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

CNN AMERICA, INC. and TEAM VIDEO SERVICES, LLC, Joint Employers

and Case 5-CA-31828

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 31, AFL-CIO

and Case 5-CA-33125
(formerly 2-CA-36129)

NATIONAL ASSOCIATION OF BROADCAST EMPLOYEES & TECHNICIANS, COMMUNICATIONS WORKERS OF AMERICA, LOCAL 11, AFL-CIO

SPECIAL MASTER'S REPORT AND RECOMMENDATIONS

On May 30, 2008, the Board granted CNN America's (CNN's) request for permission to appeal the denial of a petition to revoke subpoenas issued by the General Counsel and the National Association of Broadcast Employees & Technicians, Local 11 (the Union). The Board's order directed the chief administrative law judge to designate an administrative law judge to serve as a special master to facilitate the resolution of a significant issue regarding those subpoenas. *CNN America, Inc.,* 352 NLRB No. 85 (2008). The chief administrative law judge has appointed me to act in that capacity.

A. Procedural History

This case was initiated by the filing of various charges by the Union during 2004. The General Counsel issued a consolidated complaint on April 4, 2007. Approximately 4 months later, on August 1, 2007, the General Counsel addressed a subpoena duces tecum to CNN, requiring it to produce a variety of documents and electronically stored information. There can be no doubt that the subpoena sought a very broad range of information as indicated by its 47-page length containing 243 separately enumerated paragraphs listing the information to be identified, compiled, and provided. Ten days later, the Union issued its own subpoena duces tecum requiring CNN to produce documents and electronically stored information. CNN filed a petition to revoke these subpoenas.

Trial in this case commenced on November 7, 2007, before Administrative Law Judge Arthur J. Amchan. Judge Amchan denied CNN's petition to revoke. While this ruling has prompted considerable additional litigation, the hearing on the unfair labor practice charges has continued apace. In this complex case, the trial of those issues proved to be a lengthy matter, ranging over 82 days and concluding on July 21, 2008. On November 19, 2008, Judge Amchan issued his decision recommending that the Board find that CNN had violated the Act in a variety

of ways and that it impose a range of remedies to address those violations. See, *CNN America, Inc.,* 5-CA-31828, JD-60-08.

On three separate occasions during the course of the trial, the Board granted requests for special permission to appeal rulings made by the trial judge. On March 20, 2008, the Board issued a decision regarding certain evidentiary rulings involving the testimony of a key management witness. *CNN America, Inc.,* 352 NLRB No. 40 (March 20, 2008) (hereinafter referred to as *CNN I*). This decision is of little relevance to the matter before me.

Less than 2 months later, the Board issued its order in *CNN America, Inc.,* 352 NLRB No. 64 (May 9, 2008) (hereinafter referred to as *CNN II*). As will be discussed in some detail later in this report, this second order is somewhat pertinent to the matter before me as it concerns CNN's petition to revoke the subpoenas. Specifically, the Board granted the General Counsel's motion to sustain the trial judge's ruling that CNN must produce the documents listed on CNN's second revised privilege and redaction logs for in camera inspection by the administrative law judge.[1]

To date, CNN has not complied with the Board's order in *CNN II* by producing the materials described in its privilege and redaction logs for in camera inspection by the administrative law judge. On June 19, 2008, the General Counsel filed an application for an order enforcing the Board's directive in the United States District Court for the Southern District of New York. *NLRB v. CNN America, Inc.,* Case 08 M-36. CNN opposed the application and the matter came before District Judge Richard J. Sullivan on August 12, 2008. The District Judge stayed that proceeding pending the Board's resolution of the remaining issues concerning the materials being sought. The Court noted that these issues consisted of the matters that the Board had initially committed to the special master as described immediately below.

Turning now to the subject matter of my mandate as special master, on May 30, 2008, the Board issued a decision granting CNN's request for special permission to appeal the trial judge's denial of its petition to revoke on the basis that "the subpoena requests are overbroad and unduly burdensome to produce."[2] *CNN, America, Inc.,* 352 NLRB No. 85 (May 30, 2008), slip op. at p. 1 (hereinafter referred to as *CNN III*). Observing that CNN had made "a plausible argument" that the lengthy and detailed subpoenas at issue "could be disruptive of its business operations," the Board directed that a special master be appointed to assess the claim of undue burdensomeness. A primary purpose of this action was to minimize interference with the ongoing trial and permit the trial judge to focus on the unfair labor practice allegations. *CNN III,* slip op. at p. 2. The special master was instructed to pursue two objectives. In the first instance, the master was directed to work with the parties in order to "aid them in resolving their disputes." *CNN III*, slip op. at p. 2. Subsequently, if issues remained unresolved, the master was directed to make recommendations to the Board concerning the appropriate resolution of those issues.

Regarding any portions of the items in controversy that could not be resolved through the negotiating process, the Board instructed the master to apply a balancing of interests

[1] The Board also denied the General Counsel's motion to bifurcate consideration of the issue of payroll records that were also sought by the subpoena.

[2] At the same time, the Board denied CNN's appeal of the trial judge's ruling requiring the production of subpoenaed information despite CNN's contention that some of that information was protected by a reporter's privilege. *CNN III,* slip op. at pp. 3—5.

analysis using the methodology described in the Federal Rules of Civil Procedure and *The Sedona Principles*.[3] Specifically, the analysis requires the assessment of "the competing interests of the parties in the relevancy and necessity of the [subpoenaed] information and the potential cost and burdensomeness of its production in the form requested." *CNN III,* slip op. at p. 2.

In furtherance of this mandate, I conducted a conference on July 1-2, 2008, in Washington, D.C. This was attended by counsel for all the relevant parties.[4] At the conclusion of the conference, the parties and I believed that a series of agreements in principle had been reached that would dispose of all of the matters within the ambit of the special master's responsibility. Over the course of the following months, under my supervision, the lawyers for the parties made a conscientious effort to reduce these agreements to final written form. Although many telephonic negotiating sessions were held and numerous detailed drafts were circulated, it unfortunately developed that the proverbial "devil" lurked in the details. Ultimately, although the discussions served to elucidate the parties' concerns and focus their attention on their essential goals and objectives, they were unable to conclude an overall agreement as to the issues before me.

Once it became apparent that the litigants would be unable to reach agreement, I directed that they submit written position statements to me outlining their final views concerning the balance of interest analysis that I must apply. I directed the proponents of the subpoenas to begin the process. Upon receipt of the positions of the General Counsel and the Union, CNN was given the opportunity to respond. On October 23, 2008, counsel for the General Counsel filed the position statement on behalf of both proponents of the subpoenas. The key portion of that document consisted of the decisions to greatly narrow the matters remaining in controversy by the virtually complete withdrawal of the Union's subpoena[5] and the similar withdrawal of all of the General Counsel's subpoena except those portions seeking "production of only those documents identified in CNN's second revised privilege and redaction logs" which fall within the ambit of paragraphs 26, 36, 40, and 43 of the subpoena.[6] (General Counsel's Position Statement, p. 1.) On November 10, 2008, CNN filed its responsive statement objecting to the production of any of the remaining items being sought by the General Counsel and the Union.[7]

---

[3] As the Board explained, *The Sedona Principles: Best Practices, Recommendations & Principles for Addressing Electronic Document Production,* Second Edition (The Sedona Conference Working Group Series, 2007), is a publication of the Sedona Conference, a nonprofit organization that has created a working group of judges, lawyers, and technologists with expertise in issues related to electronic discovery. *CNN III*, slip op. at fn. 7.

[4] The conference consisted of an introductory plenary discussion, a series of caucuses during which I conferred with the lawyers for each side separately, and a final plenary meeting. I wish to thank all counsel for their active, creative, and diligent participation throughout.

[5] The Union merely requests that it be provided with copies of the same materials being sought by the General Counsel in its Position Statement. As counsel for CNN correctly expresses it, "Local 31 has withdrawn its subpoena except to the extent it overlaps with the [General Counsel's] subpoena." (CNN's Position Statement, p. 7, fn. 9.)

[6] At the conclusion of the position statement, counsel makes it clear that what is being sought is the submission of the materials related to these four paragraphs for in camera inspection by the administrative law judge in order to determine whether they contain privileged material. (General Counsel's Position Statement, p. 2.) Only materials found to be nonprivileged would be subject to disclosure.

[7] CNN also asserts that the General Counsel has not actually withdrawn his other demands for production because counsel for the General Counsel has, at various times, asked the trial

Continued

B. The Scope of the Special Master's Mandate

In conducting the required analysis, I find it useful at the outset to take specific note of those matters that are not properly before me under the terms of the Board's set of instructions. This is necessary because, somewhat surprisingly, there are some areas of dispute as to the parameters within which I must operate.

Section 11(1) of the Act grants the Board the authority to issue subpoenas requiring the production of evidence that relates to any matter in question. Subpoenas seeking material that does not relate to the issues involved in the proceeding are subject to revocation by the Board on proper application. The standard is whether the items being sought are "reasonably relevant."[8] *Perdue Farms, Inc. v. NLRB,* 144 F.3d 830, 834 (DC Cir. 1998). In this case, the Board applied this test to the items sought by the General Counsel and the Union. In definitive language, the Board found that, "the documents requested by the subpoenas are plainly related to the matters under litigation." *CNN III,* slip op. at p. 2. As a result, I need not, and cannot, endorse any restriction on the matters being sought based on their supposed lack of relevance.

In petitioning for revocation of the subpoenas, CNN has advanced various claims that material is protected by privilege. The contention that a reporter's privilege shields any of the subpoenaed information from disclosure was decisively rejected by the Board in *CNN III,* slip op. at p. 3, where the Board held that,

> even assuming that the information sought is covered by a qualified privilege, we conclude that the General Counsel's need for the information outweighs any possible intrusion on the newsgathering process.

Similarly, the Board has already ruled on CNN's assertions of attorney-client privilege and work-product privilege, upholding the trial judge's order and requiring "in camera examination of documents to evaluate [the] claims of privilege." *CNN II,* slip op. at p. 2. From this, it is clear that my mandate does not extend to the assessment of whether any subpoenaed item is shielded from disclosure by any privilege.[9]

---

judge to draw adverse inferences from CNN's failure to produce evidence demanded in the original subpoena. As the D.C. Circuit has noted, the application of the adverse inference is based on "the willingness of a party to defy a subpoena in order to suppress the evidence." *International Union, United Auto, Aerospace, and Agricultural Implement Workers of America v. NLRB,* 459 F.2d 1329, 1338 (DC Cir. 1972). Where the demand for production has been withdrawn, there can be no act of defiance in refusing to provide the materials. Thus, the propriety of any adverse inference will depend entirely on the Board's ultimate resolution as to the extent of production it will require from CNN and CNN's subsequent compliance.

[8] In *Perdue Farms,* 323 NLRB 345, 348 (1997), the Board cautioned against construing the relevance requirement too narrowly. It held that materials properly obtainable by subpoena include items that, while they do not relate directly to a specific alleged unfair labor practice, constitute background material or items that could lead to other potentially relevant evidence.

[9] As will be addressed later in this report, CNN contends that the fact that issues of privilege have already been addressed by the Board constitutes a basis on which to reject the General Counsel's present position in this matter because all of the remaining information being sought is subject to an assertion of privilege. For reasons to be discussed, I cannot agree with this proposition.

Finally, while there is no dispute among the parties regarding my task of assessing the degree of burdensomeness of compliance with the demand for production, there is a contention that I must ignore the final positions taken by the proponents of the subpoenas. For reasons that I find difficult to comprehend, CNN takes the position that I "should address the enforceability of the Subpoena as a whole, not merely a few paragraphs taken in isolation." (CNN's Position Statement, p. 7.) While counsel for the Company recognizes that the General Counsel has withdrawn any request for further enforcement of "239 paragraphs" of its subpoena, he urges that I reject this major revision of its position. (CNN's Position Statement, p. 14.) As to these hundreds of concessions, he refuses to take "yes" for an answer.[10]

The attempt to induce me to perform an analysis of the degree of burdensomeness involved in complying with the demands for production made in the now-withdrawn 239 paragraphs must be rejected as contrary to any notions of administrative efficiency, common sense, and, most importantly, the terms of my mandate and the governing legal authority. As to administrative efficiency, CNN is demanding that I analyze and resolve 239 hypothetical problems in civil procedure in a manner that I have not been called on to do since I graduated from law school more decades ago than I wish to remember. If I were to accept this invitation, presumably the same demand would be made upon the Board to evaluate the results of my labor in the field of hypothetical problem solving. I feel quite certain that, in creating the Board, Congress intended it to use its limited time and resources to set national labor relations policy and adjudicate real disputes affecting interstate commerce. I feel equally confident that the Board would not desire its judges, special master, or other professional employees to devote time and effort to the resolution of controversies that no longer exist.

Beyond issues of administrative policy and allocation of resources, CNN's position offends common sense. This is best illustrated by engaging in a mental exercise. If I were to accede to CNN's demand, it is, of course, entirely possible that I would conclude that some or all of the material being sought in the 239 withdrawn paragraphs of the subpoena was not unduly burdensome to produce in light of the analytical criteria established by the Board. It is equally possible that the Board would accept some or all of my recommendations in this respect. It is not difficult to imagine that CNN would make vociferous and entirely justifiable arguments to an appellate court that the Board had abused its discretion by directing the production of materials that no party was presently seeking. By inviting such a possible result, CNN's position as to this aspect of the proceeding simply defies logic.

While I have rejected CNN's position for reasons of logic and efficiency, I recognize that the ultimate basis on which I must evaluate that position is the governing law. In that regard, my lodestar must be the Board's mandate to me. In my view, that mandate placed significant emphasis on the value of the special master's efforts to "aid [the parties] in resolving their disputes," and on "work[ing] with the parties concerning production of subpoenaed

---

[10] Counsel for CNN also argues that the General Counsel's failure to include an explicit discussion about any possible undue burdensomeness of compliance with its revised position must lead to a finding that he has "conceded the issue as a matter of law." (CNN Position Statement, p. 6.) I cannot agree. In the first place, such a conclusion would shift the burden of proof. The Board has already found that the General Counsel is seeking relevant material. It is CNN's burden to show why such relevant material should not be produced. *CNN III,* slip op. at p. 2. Secondly, I find the General Counsel's revisions to constitute a powerful argument in favor of his position on this issue. By making these carefully crafted and sweeping revisions to his position, the General Counsel has allowed his actions to speak louder than words.

documents."[11] *CNN III,* slip op. at p. 2. It is because of this emphasis on facilitating the narrowing of the issues by the parties themselves, that the Board took care to instruct the master to file recommendations for the disposition of issues that cannot otherwise be resolved, only "[i]f necessary." *CNN III,* slip op. at p. 2. I can perceive of no necessity that would justify my involvement in assessing the propriety of demands for production of evidence that have been voluntarily relinquished by the General Counsel and the Union.

Furthermore, giving effect to evolution in parties' positions based on efforts to meet and confer about the issues is entirely consistent with the principles described in the Federal Rules of Civil Procedure and *The Sedona Principles*. See, Fed. R. Civ. P. 26 (f) and Principle 3 of the Sedona Principles ("Parties should confer . . . and seek to agree on the scope of each party's rights and responsibilities.") Where, in the course of discussions among all concerned, a party unilaterally agrees to reduce its demand for information, sound policy requires that such efforts be acknowledged and given effect. For all of these reasons, I emphatically decline CNN's invitation to ignore the substantially and meaningfully revised positions now being taken by the General Counsel and the Union. Consideration of any demands for production that have been withdrawn falls well outside the boundaries of my mandate from the Board.[12]

C. The Significance of the Privilege Logs

I have already noted that the General Counsel and the Union have withdrawn 239 of the 243 paragraphs originally at issue.[13] In simple arithmetic terms, this represents a greater than

---

[11] Such a reading of this language in the mandate is consistent with what the Board has referred to as its "longstanding policy of encouraging compromises and settlements." *Human Development Association,* 344 NLRB 902, 903 (2005). [Internal punctuation and citation omitted.]

[12] Paradoxically, while CNN demands that I assess far more than what actually remains at issue in this matter, it also asserts that I lack a mandate from the Board to address any of the items described in the General Counsel's revised demand for production. Counsel argues that this must be true because the revised demand is limited to material contained in the privilege and redaction logs. Since the Board has already affirmed the trial judge's order for in camera inspection of those logs, counsel contends that there is nothing left for me to consider. In this regard, I share the view of the District Judge who has stayed the resolution of the in camera inspection issue until the Board makes a final determination on the question of undue burdensomeness that is before me in the first instance. As Judge Sullivan put it, "certainly I would be deciding overbreath before I would be marching into issues of privileges." (Transcript, p. 5, submitted to me by CNN as Attachment 3 to its Position Statement.) As the Board noted in its order as to attorney-client privilege, CNN has raised "the broader issue" of burdensomeness. (*CNN II*, slip op. at p. 2.) If any or all of the material indexed on the logs is found to be too burdensome to produce, CNN will not be required to submit it for in camera inspection. As the District Judge has indicated, the overarching issue of undue burdensomeness must be resolved before consideration of the narrower question regarding in camera inspection of those items that are not deemed unduly burdensome to produce. Indeed, a contrary reading would hardly be to CNN's benefit as the General Counsel's revised position would then be viewed as having completely eliminated the issue of burdensomeness from the case. Not even the General Counsel draws such a conclusion about the Board's intentions. If the Board had, in fact, intended the in camera inspection to go forward regardless of any possible undue burdensomeness of production, I believe it would have said so explicitly.

[13] Actually, the proponents of the subpoena have withdrawn more than that. First, the Union has withdrawn its entire subpoena in so far as it sought material not already produced or

Continued

98 percent reduction in the amount of the materials being sought. Of course, simple math is not the standard by which I must assess the burdensomeness of the remaining demands. In fact, the General Counsel's revised position contains an additional limitation which has overwhelming significance on the issue of undue burdensomeness.

In its response to the General Counsel's revised position, CNN places a sinister interpretation on the restriction of material being sought to only those items listed on its privilege logs. Counsel for the Company characterizes this limitation as follows:

> The General Counsel's demand makes clear that the General Counsel and Local 31 are interested primarily in invading CNN's privileges, not in obtaining discoverable information. They seek production of information only if it is privileged. Such an effort to invade the privilege by a government prosecuting entity strikes at the heart of the privilege protections, and is therefore severely burdensome.

(CNN's Position Statement, pp. 14—15.)

In my view this represents a complete misreading of the General Counsel's intent. Despite the rhetorical flourishes, CNN cannot point to a single item of assertedly privileged material that General Counsel is now seeking that it has not already sought. There is no doubt that General Counsel and the Union, with the conditional approval of the Board, are demanding an in camera inspection of the items designated as privileged by CNN. They have gone so far as to seek on order from the District Court compelling such submission for inspection. However, the fact remains that the General Counsel's revised position in this proceeding, far from increasing its demands, serves to significantly reduce the amount of allegedly privileged information being sought. As matters now stand, the General Counsel seeks the submission for inspection of only those items listed in the privilege logs that are responsive to four enumerated paragraphs of its subpoena.

In my opinion, these revisions in the General Counsel's position constitute a very substantial effort to address the Board's concern that the scope of the original demand for production raised plausible issues of undue burdensomeness. To understand why this is so, it is necessary to examine the nature and purpose of the concept of a privilege log.

As Magistrate Judge Facciola has observed, privilege logs are "the universally accepted means of asserting privileges in discovery in the federal courts." *Avery Dennison Corp. v. Four Pillars,* 190 F.R.D. 1 (1999). The requirement for an explanatory description of documents being withheld on the basis of a claimed privilege arises from the language of Fed. R. Civ. P. 26(b)(5)(A)(ii) which requires the withholding party to, "describe the nature of the documents, communications, or tangible things not produced or disclosed—and do so in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the claim." Compliance with the rule requires more than a cursory description of each item. Instead, the privilege log should contain a specific explanation of the basis for the assertion of the privilege. See, *U.S. v. Construction Products Research, Inc.,* 73 F.3d 464, 473 (2d Cir.

---

encompassed in the General Counsel's remaining demands. Second, even as to the four paragraphs of the subpoena under which information continues to be sought, the scope of the information has been materially restricted by the limitation of the demand to only those materials described in CNN's revised privilege and redaction logs.

1996), cert. denied 519 US 927 (1996).

Turning now to the procedures applied by the Board, analysis must begin with the recognition that the Board greatly values the principles underlying the attorney-client privilege. Thus, the Board has characterized the privilege as "fundamental," noting that, "[w]ithout the protection afforded by this privilege, the open communication necessary for accurate and effective legal advice would be virtually impossible."[14] *The Smithfield Packing Co.,* 344 NLRB 1, 13 (2004), enf. 447 F.3d 821 (DC Cir. 2006). In the process of adjudicating issues arising when the privilege is asserted in its proceedings, the Board has observed that, "the Federal Rules of Civil Procedure provide useful guidance although they are not binding on this Agency." *Brinks, Inc.,* 281 NLRB 468 (1986). In fact, in *Brinks*, the Board placed specific reliance on Rule 26.

The Board's published Bench Book sets out additional details regarding the procedures for evaluation of issues of attorney-client privilege, including the requirement for a detailed privilege log. It provides:

> In an unpublished order (*Tri-Tech Services*, 15-CA-16707 (July 17, 2003)), the Board set forth the following general principles and procedures for presenting and deciding attorney-client privilege issues . . . . [including] the requirement that the party asserting the privilege must provide an index, identifying the allegedly privileged documents and the parties to each of the communications and providing sufficient detail to permit an informed decision as to whether the document was at least potentially privileged . . . . Specifically, the index must include "(1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document; and (4) if applicable, the name and job title of the recipient(s) of the document."

NLRB Division of Judges Bench Book, 2005 Supplement, § 8-410.[15]

As the Board stated in *CNN II*, slip op. at p. 1, "[o]n February 29, 2008, CNN produced to the General Counsel and the judge its 'Second Revised Privilege and Redaction Logs' describing documents that it is withholding or redacting based on the assertion of attorney-client and/or work-product privileges."[16] I am unaware of any contention that these privilege logs lack the detail required for such documents.

---

[14] Similarly, the Board has noted that a failure to honor the work-product privilege would "hinder the ability of lawyers to advise their clients" and undermine the achievement of important goals involved in labor relations policy. *Sprint Communications,* 343 NLRB 987, 990 (2004).

[15] The Bench Book may be accessed at www.nlrb.gov/publications/manuals and is cited in Westlaw at FLB-NLRBJB Ch. 8.

[16] The subpoena itself directed CNN to prepare a privilege log for any material, including electronically stored information, which was claimed to be subject to privilege. The instructions specified the degree of detail required in creating such a log, including a description of the subject matter and purpose for which any such item had been created and, the "factual and legal basis for claimed privilege." (Subpoena, Instruction K.)

My purpose in providing this degree of background concerning the concept of privilege logs and CNN's use of them to protect materials it believes are privileged is to illustrate a key point regarding the issue of burdensomeness that is before me for evaluation. In order to prepare its privilege and redaction logs, counsel for CNN, of necessity, had to identify, locate, examine, evaluate, and describe each and every item that was selected for inclusion on those logs. In reaching this conclusion regarding CNN's preparation of the logs, I need not simply rely on the content of the logs themselves or inferences about the amount of effort required to produce those logs. The record contains probative statements from CNN regarding the steps it has taken to prepare the logs.

In a letter written by counsel for CNN to Judge Amchan and submitted to me as Attachment 8 to CNN's Position Statement, at pp. 2—3, counsel reported that, "[a] team of more than 15 attorneys and paralegals was then assembled to review each document for relevance to the issues in this case, and to identify whether those documents contained confidential or privileged information." The extent of CNN's effort to locate and examine documents was confirmed by testimony of the corporate official to whom the subpoenas in this case were addressed, Cynthia Patrick, executive vice president of news division operations for CNN. In *CNN I*, slip op. at p. 1., the Board reported that, "Patrick testified that she had reviewed thousands of documents with the Respondent's attorneys several weeks before the hearing, for the purpose of identifying for counsel which documents contained confidential business-related information."

An even more detailed description of the degree of effort expended by CNN's attorneys in the preparation of the privilege logs is contained in CNN's reply brief in support of its request for special permission to appeal. In that brief, counsel provides compelling insight into the quality of CNN's research in compiling the privilege logs. As he describes it,

> According to Counsel for the General Counsel and Local 31, CNN has applied a blanket attorney-client privilege to any document sent or received by CNN in-house counsel Lisa Reeves. That is simply not true, and Counsel for the General Counsel and Local 31 know it. CNN has carefully reviewed responsive documents and emails to and from Ms. Reeves and only asserted the attorney-client privilege where those communications relate to seeking or providing legal advice. CNN then provided Counsel for the General Counsel and Local 31 with a detailed privilege log, identifying each document that CNN claims is subject to the attorney-client privilege and providing the basis for the assertion of the privilege. [Internal citations to the record omitted.]

(CNN's Reply in Support of its Request and Supplemental Request for Special Permission to Appeal, p. 6.)

It is in light of these considerations about the overall nature of privilege logs and the degree of effort involved in the creation of the specific logs involved in this case, that the General Counsel's revised position limiting its request for production solely to materials contained in the logs assumes great significance. In performing my assessment of the degree of burdensomeness that would be involved in requiring the production of the material now being sought, I am highly mindful that all such items have already been located, evaluated, and indexed by counsel for CNN. This salient fact has obvious implications when one considers the degree of additional burden that would be imposed on CNN if the General Counsel's remaining demands for production were granted.

D. The Balancing of the Interests on the Issue of Undue Burdensomeness

I will now perform the analysis mandated by the Board. At the outset, it is important to note that the Board has placed the burden of proof on the issue of undue burdensomeness squarely on the shoulders of CNN, holding that, "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." *CNN III,* slip op. at p. 2. [Citations omitted.] This flows from the pertinent observation of the Fifth Circuit in another case arising under the Act that, "the fact that parties must comply with subpoenas is incident to every sort of trial and is part of the social burden of living under government." *NLRB v. G.H.R. Energy Corp.,* 707 F.2d 110, 114 (5th Cir. 1982). [Internal punctuation and citations omitted.]

As previously noted, the Board has directed that I refer to two authoritative sources that provide the framework for the analysis, the Federal Rules of Civil Procedure and *The Sedona Principles, Second Edition* (hereinafter *Sedona).* Of the two, it is appropriate to begin with the standard articulated in Fed. R. Civ. P. 26(b)(2)(C) because that standard is specifically incorporated into the balancing test described by the Sedona Working Group. See, S*edona*, Principle 2, p. 35 ("[w]hen balancing the cost, burden, and need for electronically stored information, courts and parties should apply the proportionality standard embodied in Fed. R. Civ. P. 26(b)(2)(C)).

At its heart, the balancing test of Rule 26 provides that the adjudicator must limit requests for discovery where:

> the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C)(iii). I will now examine each of these considerations.

The General Counsel and Union's revised position limits the demand for information to certain specified topics. They seek materials related to the reasons for denying employment to job candidates who received an interview (Subpoena, par. 26); information regarding an important management meeting held in July 2003[17] (Subpoena, par. 36); information regarding communications made prior to that meeting concerning the issues involved in CNN's redefinition of its operations (Subpoena, par. 40); and, more generally, material that addresses the rationale for CNN's decision to terminate its contracts with the employer of the bargaining unit members (Subpoena, par. 43).

A review of the consolidated complaint and the answer to that complaint quickly establishes that the topics described in the General Counsel's revised position go to the heart of the litigation. The key contentions in the complaint have been described by the Board as, "complex allegations regarding successor or joint employer status, unlawful withdrawal of recognition, unlawful unilateral changes, unlawfully motivated cancellation of news-gathering agreements with [Team Video Services], and discrimination based on union activity and

[17] CNN contends that the key reorganization plan that resulted in this litigation was recommended during this meeting. Shortly thereafter, the employer made the decision to adopt this recommendation. See, *CNN America, Inc.,* 5-CA-31828, JD-60-08, at pp. 139—140.

membership." *CNN II*, slip op. at p. 2. (See also the order consolidating cases, consolidated complaint and notice of hearing, pars. 22 through 26.) It is clear from the descriptions provided in the specific paragraphs of the subpoena that the topics being selected for production of information relate directly to these core allegations. The information being sought is particularly and narrowly designed to elicit evidence regarding the reasons underlying the decision to reorganize the Company's operations in a manner that caused the employer to terminate any relationship with the Union and regarding the hiring determinations that the employer made concerning the applications of former bargaining unit members seeking employment within the new organizational structure.

I have no difficulty in determining that the sharply delineated class of materials being sought is of the utmost importance to the needs of this particular litigation. Without doubt, the key inquiry before the Board on the merits of this case is the nature of the employer's motivation and the intent underlying the business decisions that are in question. It is noteworthy that CNN does not attempt to dispute the central significance of the materials being sought in the four paragraphs. In addition, I have considered the Board's pertinent discussion of the relative probative values of documentary evidence created while the events under scrutiny were taking place as compared to possibly self-serving accounts provided on the witness stand years later. See *Domsey Trading Corp.,* 351 NLRB No. 33 (2007), slip op. at p. 13 (in such circumstances, documentary evidence is "entitled to greater weight than contradictory testimonial evidence").[18] This factor plainly cuts in favor of the General Counsel and the Union.

The next factor is the amount in controversy. While none of the parties have explicitly addressed this factor in their submissions to me, it is apparent that the amount of money involved in this case is very large, particularly by reference to the nature of labor law litigation. In the event the General Counsel and Charging Parties prevail in this case, it must be expected that the Board would order reinstatement of numerous employees, backpay for employees who had been wrongfully discharged or whose employment applications had been improperly denied, and a resumption of the collective-bargaining relationships that had been unilaterally terminated by CNN.[19] This last point is of particular significance because such a remedial measure would have potentially vast consequences affecting very many aspects of CNN's operations and the careers and financial prospects of the numerous individuals who have been gravely impacted by the employer's actions. CNN has never contended that the amount at issue in this case does not justify the demand for the specific information now being sought. This factor weighs in favor of the General Counsel and the Union.

Rule 26 next requires assessment of the respondent's resources. This goes to the heart of the matter as it would be an abuse of the subpoena process to require a party to impoverish itself in order to carry out its responsibilities as a respondent in this litigation. The Sedona Working Group's Principle 3 makes this even clearer by observing that Rule 26 requires consideration of the "realistic costs of preserving, retrieving, reviewing, and producing electronically stored information." (*Sedona,* Principle 3, at p. 35.) It is apparent to me that the

---

[18] Judge Amchan repeatedly commented to the effect that "there is little credible documentation of what occurred," and that CNN's management witnesses "had trouble remembering what transpired." (*CNN America, Inc.,* 5-CA-31828, JD-60-08, at p. 140.) This makes it particularly useful to examine any non-privileged materials of the types being sought in order to compare their contents with the testimony given at trial.

[19] Judge Amchan's recommended order provides for precisely these forms of relief, including a make-whole remedy for scores of employees. (*CNN America, Inc.,* 5-CA-31828, JD-60-08, at p. 149.)

Board placed particular emphasis on this consideration in finding that it was "plausible" that CNN could be faced with an undue burden in complying with the demands set forth in the 243 paragraphs of the General Counsel's original subpoena. The Board made specific reference to the fact that CNN had provided an expert vendor's estimate stating that the cost of compliance would be "over 8 million dollars." (*CNN III,* slip op. at fn. 5.)

In its Position Statement offered in response to the General Counsel's revised demands, CNN again submitted this estimate and accompanying explanatory declarations from an official of the vendor and its own vice president of technology services. See, CNN's Position Statement, Attachments 9 & 10. These only serve to underscore the deficiencies in CNN's current position regarding the expense of compliance with the General Counsel's demands. The documents address the costs of compliance with the original 243-paragraph subpoena. They do not in any way attempt to quantify the costs of compliance with the greatly revised request for limited production of materials that are responsive to four paragraphs of the subpoena. Beyond that, they do not address the significance of the fact that the only materials being sought consist of items that have been previously identified, examined, characterized, and indexed by counsel for CNN.

In striking contrast to the situation encountered by the Board in *CNN III*, I am asked to find that the revised demand for production is unduly burdensome based purely on speculation and conjecture. The absence of any particularized allegation regarding the cost or effort involved in compliance is dispositive. The current situation is remarkably similar to that faced by the Board very recently in *Local One-L, Amalgamated Lithographers of America,* 352 NLRB No. 114 (2008). In that case, the respondent defended a refusal to provide information on the basis of burdensomeness.[20] The Board adopted the administrative law judge's rejection of this defense because the burdensomeness claim was raised "without identifying with particularity which requests would impose such a burden or why . . . . Nor did Respondent substantiate at the hearing, in any quantifiable way, the time, expense or resources necessary . . . to comply." 352 NLRB No. 114, slip op. at p. 16. Similarly, CNN has offered no information concerning the degree of effort or expense necessary to comply with the sharply revised demand for information that is now before me. The absence of such particularized information constitutes a complete failure of proof as to this factor in the assessment.

The remaining two considerations contained in Rule 26 are the importance of the issues at stake and the importance of the material being sought in resolving those issues. My prior discussion has already shed light on these factors. It is clear that the issues at stake in this case are of far-reaching importance from a governmental viewpoint in the administration of the nation's labor relations policies, the Union's institutional viewpoint as a representative of employees working in the broadcast industry, and from the highly personal viewpoint of the members of the bargaining unit who lost their means of earning a livelihood. Furthermore, the highly refined and sharply narrowed revised demands for production go directly to the heart of the controversy. If not found to be shielded by privilege during in camera inspection, information produced in response is reasonably likely to yield probative evidence regarding CNN's degree

---

[20] The context in that case was an employer's demand for information from a union pursuant to Section 8(b)(3) of the Act. I do not see this as a meaningful distinction. The Board typically disfavors assertions made by parties in litigation that are purely conclusory and lack evidentiary support. See, for example, *Mission Foods,* 345 NLRB 788, 791 (2005), where the Board held that an employer's conclusory confidentiality defense to production of information was insufficient since, "a blanket claim of confidentiality will not satisfy the respondent's burden of proof."

of compliance with the Act and will likely have a significant impact on the private interests of the Union and the individual bargaining unit employees. These factors favor the General Counsel's position.

The balancing test propounded by the Sedona Working Group is fundamentally identical to and derivative of the test in Rule 26. However, the Working Group's formulation does raise some additional worthwhile factors. For instance, it mandates evaluation of the "technological feasibility" of production of electronically stored information as a consideration on the question of undue burden. (*Sedona,* Principle 3, p. 35.) With one exception, CNN fails to provide any specific objection to production based on such technological issues. This is hardly unexpected given that the demand for production is now limited to items that CNN has already identified, retrieved, and indexed.

The one exception that has been cited concerns electronically stored information that CNN has preserved only for disaster recovery purposes. Under certain circumstances, the General Counsel's original subpoena did seek retrieval and production of material "restored from backup tapes." (Subpoena, Attachment A, pars. E & Q.) CNN's Position Statement, at p. 11, observes:

> While the General Counsel has abandoned all but four of its Subpoena requests, it has not stated that it has abandoned the demand for review of back-up tapes.

This is a source of legitimate concern to CNN. The Sedona Working Group has noted that electronically stored materials subject to production under Rule 26 are limited to reasonably accessible sources such as desktop computers or a company's network. Conversely, materials whose production may require "undue burden or cost" include "backup tapes that are intended for disaster recovery purposes." (*Sedona,* Comment 2.c, at p. 42.)

While counsel for CNN is correct in asserting that the General Counsel has not explicitly withdrawn the demand for production of backup tapes in certain limited circumstances, this is not the end of the story. As is true in other aspects of this inquiry, CNN fails to come to grips with the full implications of the General Counsel's revised position. By limiting the entire demand for production to materials that have already been indexed on CNN's privilege and redaction logs, the General Counsel's current position constitutes an implicit withdrawal of any demand for material on backup tapes. In other words, all the materials being sought have already been identified, located, and reviewed by counsel for the employer. There is nothing being sought that would require resort to expensive methods for recovery of information from backup systems.[21]

In its Position Statement, CNN has not specifically raised any issue regarding the General Counsel's demand for production of metadata. Nevertheless, I have chosen to consider this question in light of the teachings of the Sedona Working Group. The subpoena calls for production of certain electronically stored items in "native form, with all metadata and

[21] In the unforeseen event that an issue regarding production from backup tapes could still arise in some context, I am sympathetic to CNN's concerns. Principle 8 of the Sedona Working Group shifts the burden to the requesting party when backup tapes are being sought. The General Counsel has not provided any evidence establishing that the costs and burden of producing such material is outweighed by the need for, and relevance of, any items being sought from such secondary sources of electronically stored information.

attachments intact." (Subpoena, Attachment A, par. E.) As explained in the commentary to *Sedona,* this refers to "hidden text, formatting codes, formulae, and other information associated with the file." (*Sedona,* Comment 12.a., at p. 185.) The Sedona principle addressing metadata states that the scope of required production should take into account, "the need to produce reasonably accessible metadata that will enable the receiving party to have the same ability to access, search, and display the information as the producing party." (*Sedona,* Principle 12, at p. 185.) A key consideration is, "the needs of the case." (*Sedona,* at p. 186.) This factor requires an evaluation of the potential probative value of the metadata and the extent to which production will enhance the functional utility of the electronic information being produced.

In my view, the breadth of the demand for production of metadata would have been highly significant on the overall question of undue burdensomeness if the General Counsel had elected to press for the vast range of information sought in the original subpoena. As with so much else that is before me, the dramatic narrowing of focus represented by the General Counsel's revised position greatly alters the calculus of potential reward versus undue burden. I have already noted that the revised request consists of a laser-like attention to a search for evidence on the key issues at the heart of the unfair labor practice allegations. The narrow scope of the demand makes it appropriate to recommend that the material responsive to that demand be produced in a highly functional format that will increase the utility of this material. This is particularly true since the revised demand is limited to the types of material that are likely to yield probative evidence as to dispositive issues in the case.

Both because CNN fails to make any specific claim that production of the material sought in native format with metadata will be unduly burdensome, and because my own review of the evaluative criteria in *Sedona* leads me to conclude that the likely benefits to the adjudicative process of such production outweigh the reasonable additional burden involved, I recommend that the Board refrain from altering the scope of the demand regarding metadata.

Finally, the Sedona Working Group has specifically addressed an aspect of the appropriate inquiry that lurks within the framework of the Rule 26 analysis. Thus, Sedona's Principle 3 calls for the examination of the "nature of the litigation." I view this as very important. Throughout my work with the parties in this matter, I have stressed the unique nature of the Board's processes and the resulting implications for enforcement of the General Counsel's original 243-paragraph demand. Very recently, the Board has again reiterated its longstanding position regarding pretrial discovery:

> Board proceedings do not provide for [discovery] procedures, and parties to such proceedings do not possess rights to pretrial discovery . . . . It is well settled that parties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of constitutional right. Furthermore, the Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings. Moreover, the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures.

Bashas', Inc., 352 NLRB No. 82 (2008), slip op., at p. 1. [Citations omitted.]

The Board's aversion to importing the complex rules of civil discovery into its administrative processes is not arbitrary. It flows from careful assessment of important realities involved in labor law litigation. Some of these realities were discussed by the Board in *Offshore Mariners United,* 338 NLRB 745 (2002), including the recognition that pretrial discovery is a

primary source of delay in civil litigation and creates abundant opportunities for collateral disputes that distract from the essential goals and functions that Congress intended the Board to perform. In addition, the Board has pointed to the peculiar nature of labor litigation with its special capacity for intimidation and reprisals on the part of both labor and management as a reason to avoid protracted and intrusive discovery procedures.[22]

Even taking into account the size and complexity of this case, I have expressed concern that the General Counsel's original 243-paragraph subpoena posed some of the hazards that the Board has cited. The tone and content of that document certainly flirted with the imposition of pretrial discovery processes in this labor law case. This is yet another example, however, of how the ground has shifted in light of the General Counsel's revised position. That revised position is consistent with the usual practice involving subpoenas that require a respondent to produce documents and materials directly related to the key issues involved in the trial. As a result, I find that the revised position is consistent with the nature of the litigation. This factor now favors the General Counsel.

I conclude that the General Counsel's revised position is well supported through application of the analytical techniques contained in Rule 26 and *Sedona*. Taking into account the needs of the case, the importance of the issues involved, the likely value of the material being sought in resolving those issues, and the absence of any evidence of undue cost or burden resulting from the production of the limited range of materials being demanded, the revised position should be upheld. Put another and more precise way, I find that CNN has failed to meet its burden of demonstrating that the materials being demanded in the revised position are so burdensome or expensive to produce as to outweigh the potential benefit likely to be obtained by their production.

Finally, in reaching this ultimate conclusion, I have been mindful that the Board's fundamental concern is whether an order requiring production of subpoenaed information would "seriously disrupt" CNN's normal business operations. *CNN III,* slip op. at p. 2, citing *NLRB v. Carolina Food Processors, Inc.,* 81 F.3d 507, 513 (4th Cir. 1996). A count of the number of pages that are enumerated on the updated redaction log is 493. The figure for the privilege log is 582.[23] Of these numbers, it must be recalled that the revised demand for production only

---

[22] On a personal note, I have come to labor law late in my legal career, having previously served for a time as a judicial officer who managed and adjudicated discovery disputes on a civil docket. In my current role, I am often struck by how much the labor law bar appears to enjoy its work. In discussions with practitioners, the absence of discovery procedures is often cited as a factor in this favorable climate for job satisfaction. That is consistent with my experience. Civil discovery, while offering a means of obtaining much probative information, is also subject to a tremendous amount of unpleasant controversy and abusive behavior. While the Board does not exist for the enjoyment of those lawyers who appear in its cases, I would be loathe to see it import a system of discovery that, in my opinion, has degraded the quality of life for many members of our profession. A review of the Board's precedents clearly demonstrates that our litigants do not lack the means and ability to make full and effective presentations of their cases despite the absence of interrogatories, depositions, and the other weapons in the arsenal of discovery.

[23] The privilege log, at page 32, lists four other entries without specifying the number of pages. These entries are all for correspondence between CNN and outside counsel. It is certainly possible that they could consist of many pages, but they also appear to be the sort of material that is particularly easy to locate and produce as it would be maintained in the files of both sender and recipient.

calls for submission of those items responsive to four paragraphs of the Subpoena. It is likely that this number will be less than the full total of 1075 enumerated pages.

The Board has emphasized that a subpoena is not unduly burdensome merely because it requires the production of a large number of documents. *McAllister Towing & Transportation Co.,* 341 NLRB 394, 397 (2004), enf. 156 Fed. Appx. 386 (2d Cir. 2005). This echoes the observations made years ago by a Circuit Court in another labor law case:

> The mere fact that compliance with the subpoenas may require the production of thousands of documents is also insufficient to establish burdensomeness . . . . While it may be true that these subpoenas will require the production of a large number of records and documents, it must be remembered that this investigation involves complaints by a substantial number of union members. The mere size of Respondent's operation is no excuse for its refusal to give information relative to possible unfair labor practices. It is presumed, by the very fact that Respondent has such a large number of employees, that it is sufficiently equipped to handle the records of its employees. [Citation omitted.]

NLRB v. G.H.R. Energy Corp., 707 F.2d 110, 114 (5th Cir. 1982). See also *NLRB v. Baker,* 166 F.3d 333 (4th Cir. 1998). In this matter, I have been shown no indication whatsoever that CNN is unable to respond to the General Counsel's revised demand for production without serious (or, indeed, any) disruption of its business operations.

Recommendations

For the foregoing reasons, I recommend that the Board:

1. Accept the General Counsel's withdrawal of Paragraphs 1 through 25; 27 through 35; 37 through 39; 41; 42; and 44 through 243 of its subpoena duces tecum to the extent that those paragraphs require the production of any documents or electronically stored information that have not already been provided by CNN.

2. Accept the General Counsel's limitation of the documents and electronically stored information being sought pursuant to Paragraphs 26, 36, 40 and 43 of its subpoena duces tecum to only those documents and electronically stored information that have already been provided by CNN and to the documents and electronically stored information listed on CNN's Revised Privilege and Redaction Logs, dated February 29, 2008, that are responsive to those paragraphs.

3. Accept the Union's withdrawal of its subpoena duces tecum to the extent that its subpoena requires the production of any documents or electronically stored information not already provided by CNN or being sought in the General Counsel's revised demand for production.

4. Find that CNN has failed to meet its burden of demonstrating that any of the documents and electronically stored information being sought in the General Counsel's Position Statement of October 23, 2008 would be unduly burdensome to produce or that their production would cause a serious disruption of CNN's normal business operations.

5. Order that CNN forthwith identify those items listed on its Revised Privilege and Redaction Logs that are responsive to Paragraphs 26, 36, 40, and 43 of the subpoena duces tecum and submit those items to the administrative law judge for in camera inspection pursuant to the Board's Order in *CNN America, Inc.,* 352 NLRB No. 64 (2008).

Dated, Washington, D.C. December 1, 2008

_____
Paul Buxbaum
Administrative Law Judge