Case No. 09-2245

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Appellant,

v.

INTERBAKE FOODS, LLC,

Appellee.

On Appeal from the United States District Court for the District of Maryland

REPLY BRIEF OF APPELLANT NATIONAL LABOR RELATIONS BOARD

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases--Cont'd: Page(s)

Cases--Cont'd: Page(s)

Statutes and Regulations:

ARGUMENT

From the beginning, Appellee Interbake Foods, LLC, has made no serious effort to justify its privilege designations in this subpoena enforcement case. Even at this late stage in the litigation, Interbake does not attempt to substantiate its claim that the materials sought by Counsel for the General Counsel for *in camera* inspection meet the threshold for attorney-client privilege or work product protection. Instead, at the close of briefing, two primary issues are presented to this Court for consideration: (1) whether NLRB administrative law judges ("ALJs") have the authority to conduct *in camera* review to effectuate their statutory power to rule on petitions to revoke Agency subpoenas, and (2) whether the Board has waived the argument that *in camera* review is justified under the circumstances of the present case. As shown below, these questions must be answered in the Board's favor. Therefore, the order under review should be vacated and the case remanded with instructions to enforce the Board's subpoena.[1]

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[1] For reasons explained in its opening brief (*see* Appellant's Br. at 24) the NLRB maintains that the proper standard of review in this case is de novo, not abuse of discretion, as Interbake suggests.

I. *In camera* review by an ALJ is an appropriate and authorized procedure to effectuate the Board's statutory power to rule on petitions to revoke Agency subpoenas.

A. By empowering the Board to revoke Agency subpoenas upon the filing of a timely petition, Congress created a procedure in Section 11(1) of the Act that enables parties to challenge subpoenas—and permits the Board to narrow or limit them accordingly—without immediately enmeshing district courts in ancillary litigation concerning matters arising under the NLRA, a statute as to which district courts, by design, play "a very very minor role." *Bokat v. Tidewater Equip. Co.*, 363 F.2d 667, 673 (5th Cir. 1966). In this regard, the Section 11(1) petition to revoke procedure encourages and facilitates administrative dispute resolution and voluntary compliance without burdening the judicial system. Indeed, for a subpoenaed party, filing a petition to revoke with the Board is a risk-free proposition. At worst, the Board can only deny the party's objections and uphold the subpoena as written, but the Board still cannot compel compliance on its own. On the other hand, the Board may find merit to the subpoenaed party's objections and either narrow the subpoena or revoke it outright. If the Board revokes the subpoena, the matter is at an end. There is no

disclosure of subpoenaed materials to any other party to the proceeding—let alone use of those materials in the pending matter—and there is no need to seek judicial assistance to compel compliance. But even if the Board only narrows the subpoena, that outcome might be sufficient to persuade the subpoenaed party to comply, thereby averting the need to seek recourse before a judicial forum.

In addition to conserving judicial resources, the petition to revoke procedure fosters the development of institutional Agency expertise in addressing evidentiary disputes. Such expertise inevitably leads to better and more informed decision-making, which again reduces the likelihood of resorting to subpoena enforcement litigation in federal court. But should enforcement proceedings ultimately be necessary, a ruling on a petition to revoke ensures that the judiciary will have the benefit of evaluating arguments that have already been considered and addressed by a neutral adjudicator. This, too, enhances the decision-making process.

Moreover, exhaustion of the subpoena revocation procedure will, in certain circumstances, lead to the development of a factual record. This is particularly so in cases where privilege objections serve as the basis

for a petition to revoke because the resolution of many privilege questions, such as those at issue here, is often "fact-specific." *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 125 (2d Cir. 2006). The development of a factual record then facilitates any subsequent judicial enforcement proceeding because such litigation is designed to be summary in character. *See, e.g.*, *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 451 (6th Cir. 1941) (holding that agency subpoena enforcement proceedings "are of a summary nature not requiring the issuance of process, hearing, findings of fact, and the elaborate process of a civil suit").

It is, then, no surprise that this Court has strongly endorsed administrative exhaustion of the subpoena revocation procedures supplied by Congress in Section 11(1) of the Act. Specifically, in *Maurice v. NLRB*, 691 F.2d 182 (4th Cir. 1982), this Court vacated a preliminary injunction preventing the NLRB from enforcing a subpoena directed to a newspaper editor whose testimony was sought in a pending unfair labor practice proceeding. The lower court concluded that the issuance and existence of the subpoena irreparably harmed First Amendment interests and that enforcement of the subpoena would

do further harm to those interests. Despite the presence of constitutional objections to the subpoena, this Court vacated the injunction and reversed the case, noting that the editor "failed to invoke the procedure provided by the NLRB regulations to challenge a subpoena" and that she could "make any defense to the subpoena in the provided for administrative proceeding that she could make in the district court." *Id.* at 183.[2] Other courts have similarly required administrative exhaustion as a prerequisite to judicial consideration of objections to Board subpoenas. *See, e.g.*, *NLRB v. Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir. 1975); *NLRB v. Baywatch Sec. & Investigations*, No. 04-220, 2005 WL 1155109, at *2 (S.D. Tex. Apr. 28, 2005); *NLRB v. Bacchi*, No. 04-28, 2004 WL 2290736, at *3 (E.D.N.Y. June 16, 2004) (citing *Maurice*); *NLRB v. McDermott*, 300 B.R. 40, 46 (D. Colo. 2003) (citing *Maurice*); *see also EEOC v. Cuzzens of Ga., Inc.*,

[2] This Court so held notwithstanding the fact that the Board does not have subject-matter expertise in resolving First Amendment objections to administrative subpoenas. *Maurice* therefore answers Interbake's argument that exhaustion of the Board's revocation procedures is not appropriate to address privilege issues here because "the NLRB has no expertise or 'special competence' concerning such issues." (Appellee's Br. at 33.)

608 F.2d 1062, 1062-63 (5th Cir. 1979) (per curiam); *EEOC v. County of Hennepin*, 623 F. Supp. 29, 31-32 (D. Minn. 1985).[3] Indeed, as the Fifth Circuit has noted, Section 11 "contemplates Board action on a motion to revoke a subpena *before* the jurisdiction of a district court, with its underlying contempt sanction, be invoked in an enforcement proceeding." *Hortex Mfg. Co. v. NLRB*, 364 F.2d 302, 303 (5th Cir. 1966) (emphasis added).[4]

Congress has therefore prescribed a clear procedural path. The Board is to have the first review of objections to Agency subpoenas by ruling on a petition to revoke. If a controversy remains after the Board has spoken, the NLRB may seek to have its subpoena enforced, and in that enforcement proceeding, the district court will conduct its own

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[3] The subpoena powers of both the NLRB and the EEOC derive from Section 11 of the NLRA. *See EEOC v. Md. Cup Corp.*, 785 F.2d 471, 476 & n.3 (4th Cir. 1986). Therefore, EEOC subpoena enforcement cases are generally persuasive authority in NLRB subpoena enforcement cases and vice versa.

[4] Interbake is therefore wrong when it argues that the commencement of subpoena enforcement proceedings eliminates the duty to exhaust. (*See* Appellee's Br. at 31-32.) Were that true, the cases cited above would have been decided differently.

review of the matter.[5] However, in this case, exhaustion of the Board's revocation procedures has not yet been permitted to proceed beyond Judge Clark's legitimate determination that *in camera* review is necessary to resolve the privilege claims Interbake raised in its petition to revoke. To effectuate the procedure that Congress set forth in Section 11(1), Interbake should be ordered to comply with Judge Clark's direction of *in camera* review, so he can rule on the company's petition. If Judge Clark finds the materials in question to be privileged after conducting the *in camera* inspection, that will be the end of the matter. If he instead orders Interbake to produce some but not all of the documents—or even portions thereof—that result might be acceptable to Interbake and moot further subpoena enforcement litigation. And finally, if Judge Clark finds that none of the materials are privileged, Interbake can still refuse to turn the documents over to Counsel for the

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[5] Interbake criticizes the NLRB for using the term "court review" when describing a district court's role in a subpoena enforcement case. (Appellee's Br. at 24 n.6.) To be sure, in a subpoena enforcement proceeding, the district court "reviews" the subpoenaed party's objections, not the Board's ruling on those objections per se. Of course, that Section 11(2) judicial review may be narrowed to the extent of any dispute not already resolved by the Board in the subpoenaed party's favor under Section 11(1).

General Counsel.[6] At that time, the NLRB can decide whether further subpoena enforcement proceedings are necessary and desirable, and if so, Interbake will be able to present its privilege arguments to the district court on the merits. Such is the procedure that Congress has provided, and therefore it must be given effect.

B. Interbake complains that following this statutorily-prescribed procedure will somehow remove district courts from the subpoena enforcement process. (*See* Appellee's Br. at 13, 16.) As the facts of this very case demonstrate, Interbake's claim is simply not true. If a subpoenaed party believes that an ALJ's *in camera* review order is unjustified, that party can refuse to comply, as Interbake did here. Then, if the NLRB applies to the district court under Section 11(2) to compel compliance with the *in camera* order, the question before the district court will be whether *in camera* review is necessary. If the question is answered in the affirmative, the district court will issue an order requiring the subpoenaed party to submit the documents to an

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[6] The foregoing assumes that neither party asks the Board for interlocutory review of Judge Clark's post-*in camera* disposition of the disputed documents. *See* 29 C.F.R. § 102.26 (2009). If such review is requested and granted, the Board's resolution will trump Judge Clark's.

ALJ for *in camera* review. After the ALJ performs the *in camera* review, as described above, it is again within the control of the subpoenaed party to require further enforcement proceedings before documents found by the Board not to be privileged are disclosed to the party at whose request the subpoena originally issued—here, that is Counsel for the General Counsel. On that second application for subpoena enforcement, the district court may conduct its own *in camera* review and consideration of the subpoenaed party's privilege arguments, and either enforce or decline to enforce the subpoena. At no time in this whole process can the NLRB require materials to be disclosed to an ALJ, the Board, the General Counsel, or a third-party without district court consideration of the subpoenaed party's arguments for resisting enforcement. Therefore, as shown, the district courts' enforcement authority is not bypassed or circumvented. Indeed, absent voluntary compliance, district courts are integral to the process.

C. In a related argument, Interbake repeats the district court's erroneous claim that federal courts have the "exclusive authority to determine privilege issues before the NLRB." (Appellee's Br. at 15-16; *see also* App. at 283 (framing the question presented as whether the

district court "has the exclusive authority to determine if certain documents subpoenaed by the National Labor Relations Board are privileged").) This contention suffers from two notable flaws. First, it does not accord with precedent, which is replete with examples of Board ALJs making privilege determinations. *See, e.g., NLRB v. Indep. Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 145 (2d Cir. 1978) (reviewing ALJ's initial determination of whether oral statements were privileged), *overruled on other grounds by Charles D. Bonanno Linen Serv., Inc. v. NLRB*, 454 U.S. 404 (1982); *Nat'l Football League Mgmt. Council*, 309 N.L.R.B. 78, 97 (1992) (ALJ conducted *in camera* review regarding claims of attorney-client privilege and work product protection); *Farm Fresh, Inc.*, 301 N.L.R.B. 907, 917 (1991) (ALJ ruling that neither the attorney-client privilege nor work product protection applied to a logbook); *Patrick Cudahy, Inc.*, 288 N.L.R.B. 968 (1988) (ALJ conducted *in camera* review regarding attorney-client privilege claim). Indeed, the Fifth Circuit enforced a Board unfair labor practice decision in which an ALJ had conducted an *in camera* review to resolve a privilege claim. *See Chromalloy Mining & Minerals*, 238 N.L.R.B. 688, 691 (1978), *enf'd in part*, 620 F.2d 1120 (5th Cir. 1980). Second, Interbake's argument is

inconsistent with the company's own actions in this case.[7] If only federal courts can rule on privilege issues, why did the company petition the Board, without reservation, to revoke the subpoena on privilege grounds?

Still, Interbake presses this contention and relies heavily on a nineteenth century Supreme Court case, *ICC v. Brimson*, 154 U.S. 447 (1894). (Appellee's Br. at 16, 26-27.) However, *Brimson* sheds no light on either NLRB administrative law judges' authority to resolve privilege disputes, or the tools at their disposal to do so. Rather, the question presented in that case was whether, as a constitutional matter, federal courts could "use their process in aid of inquires before the [ICC]." *Id.* at 468. The Court concluded that federal courts were so empowered because subpoena enforcement proceedings bear the hallmarks of a justiciable Article III "case or controversy." *See id.* at 477-489. The case does not purport to address, as either a statutory or

[7] Indeed, elsewhere in its brief, Interbake appears to backpedal from its sweeping assertion of "exclusive" federal court authority over privilege determinations. (*See* Appellee's Br. at 34 (noting that ALJs can "review [subpoena] objections based on privilege" and limit the subpoena accordingly if merit is found).)

constitutional matter, whether agencies may perform *in camera* inspections to address privilege claims in the first instance.

Nonetheless, in an effort to recast *Brimson* as controlling authority that decides this case, Interbake seizes upon language contained in the opinion where the Court noted that compliance with an administrative subpoena "cannot be committed to a subordinate administrative or executive tribunal for final determination." *Id.* at 485. As an initial matter, the quoted language is entirely beside the point because the Board does not assert the authority to make "*final* determination[s]" of questions arising in response to administrative subpoenas. As has been repeatedly emphasized, the Board only seeks to effectuate its power to make *initial* determinations of such questions, subject to judicial oversight in enforcement proceedings. Furthermore, Interbake takes the *Brimson* statement out of context. The quoted language appears in a section of the Court's opinion addressing the argument that subpoena enforcement proceedings were akin to other non-justiciable matters where Congress impermissibly "impose[d] upon the courts . . . duties not strictly judicial." *Id.* The Court rejected this contention because subpoena enforcement cases involve the exercise of the power to compel

obedience under threat of fine or imprisonment, and such power is inherently judicial in nature. Thus, when read in the proper light, the Court's dictum serves only to underscore its conclusion that enforcing compliance with agency subpoenas is "a legitimate exertion of judicial authority." *Id.* at 489.

Similarly inapposite is Interbake's reliance on *Upjohn Co. v. United States*, 449 U.S. 383 (1981). In that case, the IRS issued a summons, pursuant to 26 U.S.C. § 7602, demanding the production of certain records by Upjohn. *Id.* at 387-88. The company refused to produce these records on the same grounds asserted here—namely, attorney-client privilege and work product protection. *Id.* at 388. The IRS commenced enforcement proceedings, ultimately resulting in a decision by the Sixth Circuit that rejected Upjohn's privilege arguments. *Id.* The Supreme Court granted certiorari, accepted Upjohn's attorney-client privilege claim, *id.* at 395, and reversed the court of appeals. Interbake finds significance in the Supreme Court's disposition of the case because "the Court did not compel production of the materials to allow the federal agency to decide whether the materials were privileged." (Appellee's Br. at 28 (emphasis removed).) But Interbake

reads too much into this outcome. The question of the IRS's authority to decide privilege questions in the first instance was not considered or decided by the Supreme Court or any other court that heard the case.[8] In addition, unlike Section 11 of the NLRA, the statute providing the IRS with the authority to issue summonses—significantly—does not contain an administrative revocation provision. *Compare* 29 U.S.C. § 161(1) *with* 26 U.S.C. §§ 7602, 7604. Furthermore, the summons in *Upjohn* appears to have been returnable before an investigatory agent of the IRS. *See United States v. Upjohn Co.*, No. K77-7 Misc. CA-4, 1978 WL 1163, at *2 (W.D. Mich. Feb. 23, 1978) (magistrate's report). In other words, the statutory procedures were different, and there was no agency neutral, like an ALJ, appointed to analyze the company's defenses to the summons. For these reasons, *Upjohn* is distinguishable and provides no guidance for the resolution of the instant case.

[8] The same is true of this Court's decision in *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965). Again, Interbake reads far too much into that case's outcome while ignoring the fact that the issue simply was not presented to the Court for consideration. Therefore, *Harvey* cannot be understood to address "[t]he precise issue raised" here. (Appellee's Br. at 21.)

D. Interbake further claims that the Board overstates the adverse impact of the Sixth Circuit's decision in *NLRB v. Detroit Newspapers*, 185 F.3d 602 (6th Cir. 1999), on the "enforcement gears" of the NLRB. (Appellee's Br. at 35.) However, recent experience shows otherwise. In addition to the instant case, recently in three cases—*Douglas Autotech Corp.*, No. 7-CA-51428, 2010 WL 667127 (N.L.R.B. Div. of Judges Jan. 5, 2010), *CNN America, Inc.*, 353 N.L.R.B. No. 94, at 4 n.22 (Feb. 13, 2009), and *Naples Cmty. Hosp., Inc.*, No. 12-CA-25689, 2009 WL 311173 (NLRB. Div. of Judges Feb. 4, 2009)—the rationale of *Detroit Newspapers* has been raised to impede *in camera* inspections ordered by ALJs to resolve privilege disputes. This has consequently frustrated the Board's ability to decide the underlying unfair labor practice cases on fully resolved evidentiary records.

E. Finally, Interbake attempts to downplay what it refers to as the "policy" ramifications of *Detroit Newspapers* and the opinion of the court below on the *in camera* procedures employed extensively throughout the Federal Government. Interbake's primary answer—namely, that this Court should disregard these harmful effects because "nothing in the NLRA (or its regulations) provide for such a procedure"

(Appellee's Br. at 36 n.11)—does not address whether other agencies' *in camera* review procedures survive or are invalidated after *Detroit Newspapers* and rings hollow in light of the company's extensive reliance on *Brimson* and *Upjohn*, neither of which concern the statutory or regulatory powers of the NLRB. As much as anything, *Detroit Newspapers*' limited impact to date is a testament to the still widely recognized authority of administrative law judges to resolve evidentiary privilege disputes and, where necessary, to conduct *in camera* inspections. But other federal agencies are not immune to *Detroit Newspapers*' reasoning just because there appear to be no reported instances of that case's application outside the context of NLRB proceedings.

To sum up, *in camera* review by Judge Clark is not only permissible, it is necessary to fully effectuate the Board's Section 11(1) power to rule on Interbake's petition to revoke on privilege grounds. The power to initially rule on petitions to revoke subpoenas is evident from Congress's statutory design in Section 11, and it has been strongly endorsed by this Court and others. Therefore, it was error for the district court to conclude that Judge Clark lacks the authority to resolve

Interbake's privilege claims by conducting an *in camera* review because only an Article III court can do so.

II. The NLRB properly raised and preserved its contentions regarding the necessity of *in camera* review due to the manifest defects in Interbake's prima facie showing of privilege.

A. Interbake claims that the NLRB never challenged the sufficiency of the company's privilege assertions until filing its reply in the district court. On this basis, Interbake advances a waiver argument. However, this argument lacks merit because the record shows that, at all relevant times, the NLRB properly put Interbake on notice of the patent deficiencies in the company's privilege showing. Indeed, Interbake's contention is belied by a statement made by the company's own attorney during the unfair labor practice hearing before Judge Clark. Specifically, counsel for Interbake summarized his own understanding of Counsel for the General Counsel's challenge to Interbake's prima facie showing: "Counsel for the General Counsel claims we're trying to [argue] . . . a blanket attorney-client privilege without any analysis as to whether or not the privilege applie[s]." (7/30/09 NLRB Hr'g Tr. 4014:7-10; App. at 114.) Thus, Interbake's

attorney plainly comprehended that Counsel for the General Counsel viewed as inadequate the company's prima facie showing of privilege.

Interbake's waiver theory is further undermined by arguments made on the record by NLRB Counsel at the July 29th session of the unfair labor practice hearing. In particular, at that hearing, Counsel for the General Counsel argued that Interbake's privilege log failed to show that the e-mails at issue in this case were sent for the threshold purpose of seeking "legal advice." (*See* 7/29/09 NLRB Hr'g Tr. 3984:20-3985:8; App. at 98-99.)

Moreover, the record shows that Counsel for the General Counsel first requested *in camera* review by Judge Clark at the very moment a good faith basis arose to question the company's privilege designations. Jill Slaughter, Interbake's human resources representative, repeatedly testified before Judge Clark that the earliest she communicated with anyone about the subject of the underlying NLRB proceeding—that is, Interbake's investigation and termination of employee Melissa Jones—was February 13, 2009. (*See* 7/28/09 NLRB Hr'g Tr. 3586:17-3587:1; App. at 184.) Yet, Interbake's log asserts that Slaughter sent two e-mails about the "Missy Jones [i]nvestigation" on February 9, 2009. (*See*

App. at 89.)[9] The unexplained conflict between the log's factual assertions and Slaughter's sworn testimony rendered both declarations suspect, raised serious doubts about other statements made in the log, and provided a good faith basis for Counsel for the General Counsel to request *in camera* review. *Cf. Hawkins v. Stables*, 148 F.3d 379, 384 (4th Cir. 1998).[10]

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[9] This discrepancy about when the e-mails were sent is not *de minimis* in nature for two reasons. First, until the close of the hearing in *Interbake I* on February 10, 2009, Interbake's contact with Slaughter regarding the content of Jones's testimony, where Jones admitted secretly recording conversations with coworkers, was prohibited by a witness sequestration order. *See* (12/12/08 NLRB Hr'g Tr. 2491:11-12, 14-15; App. at 178 (MR. KEENAN: "In order to tell [Slaughter] what needs to be investigated . . . we have to violate the sequestration order.")); (App. at 196 ("[T]he parties agree that the sequestration order remains in full force and effect."). There is no explanation of how Slaughter learned of Jones's conduct as of February 9, the date listed on the privilege log. Second, Interbake expressly agreed not to undertake "any investigation" into Jones's recording conduct until the hearing in *Interbake I* closed. (App. at 196.)

[10] Interbake selectively quotes from the administrative transcript in an effort to make it appear that Counsel for the General Counsel sought *in camera* review merely because the documents at issue were presumed to have probative value. (Appellee's Br. at 8-11.) Of course, it is hornbook law that privileged materials do not cease to be privileged solely because they are relevant and material to issues in a pending case. But that is not what Counsel for the General Counsel argued. Indeed, counsel repeatedly emphasized the factual discrepancy between (con't)

Thus, as shown, Interbake's waiver argument does not withstand scrutiny because, from the outset of the pending unfair labor practice proceeding, Counsel for the General Counsel raised to Judge Clark the insufficiency of Interbake's privilege claims.[11]

Equally without merit is Interbake's contention that the NLRB did not raise the issue before the district court in a timely fashion. As an

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Slaughter's testimony and Interbake's description of her disputed e-mails on its privilege log, which was provided that very same day. *See* (7/28/09 NLRB Hr'g Tr. 3587:11-20; App. at 184); (*id.* 3611:6-11; App. at 187.) Particularly given the limited time Counsel for the General Counsel had to examine the log, their prompt objections to Interbake's privilege arguments were well advanced. Accordingly, the stray remarks in the administrative record that Interbake points to do not supply a basis for a finding of waiver.

[11] Interbake repeatedly mischaracterizes statements made by Judge Clark at the unfair labor practice hearing. First, Judge Clark did not deny the *in camera* request before granting it, as Interbake contends. (*Contra* Appellee's Br. at 11.) Rather, he deferred ruling on the request until the parties prepared and presented arguments for his consideration. (*See, e.g.*, 7/28/09 NLRB Hr'g Tr. 3593:11-18; App. at 185; *see also* 7/30/09 NLRB Hr'g Tr. 4009:21-4010:2; App. at 109-10.) In addition, Judge Clark never ruled that Interbake had established a prima facie showing of privilege. (*Contra* Appellee's Br. at 4, 11, 14, 17-18.) The hearing transcript reveals that Judge Clark was inquiring—not ruling—as to whether the elements of privilege had been met with respect to the e-mails at issue in this case. (7/29/09 NLRB Hr'g Tr. 3984:14-15; App. at 98.) Counsel for the General Counsel accurately responded that "the mere fact that an attorney is included on a list [of recipients] . . . doesn't make it privileged." (*Id.* 3984:17-18; App. at 98.)

initial matter, both the Board's application for subpoena enforcement and the application's supporting memorandum anticipate Interbake's privilege arguments. (*See* App. at 4-5, 14-15.) More to the point, it was not necessary for the Board's application to contain arguments disputing the company's defenses to subpoena enforcement. Rather, the burden of raising such defenses belonged to Interbake in the first instance. Indeed, this Court has stated that "[c]ourts should generally enforce administrative subpoenas where, as an initial matter, the administrative agency shows that (1) it is authorized to make such investigation; (2) it has complied with statutory requirements of due process; and (3) the materials requested are relevant. The party subpoenaed may then defeat enforcement by showing that the agency's request is excessive or unduly burdensome." *EEOC v. Am. & Efird Mills, Inc.*, 964 F.2d 300, 302-03 (4th Cir. 1992) (per curiam) (citations omitted). Furthermore, the NLRB's reply brief fully and properly responded to the company's privilege defense. (*See* App. at 206-09.) And plainly, the court below did not consider the argument to be waived because the district court addressed it on the merits without reservation. (*See* App. at 286.) Thus, under these circumstances, the

NLRB's challenge to Interbake's prima facie showing of privilege has been appropriately preserved for appellate court review. *See Volvo Constr. Equip. N. Am., Inc. v. CLM Equip. Co.*, 386 F.3d 581, 604 (4th Cir. 2004) ("In assessing whether an issue was properly raised in the district court, we are obliged on appeal to consider any theory plainly encompassed by the submissions in the underlying litigation."); *United States v. City of Chi.*, 869 F.2d 1033, 1036 (7th Cir. 1989) ("It is folly . . . to assert that an appeals court on review of a district court judgment cannot consider the merits of each and every theory the district judge relied upon in deciding the case."); *see also Negron-Almeda v. Santiago*, 528 F.3d 15, 26 (1st Cir. 2008) ("The rule is that if an argument is raised belatedly in the district court but that court, without reservation, elects to decide it on the merits, the argument is deemed preserved for later appellate review.").

B. In fact, if any party has waived arguments relevant to this case, it is Interbake. On the privilege log submitted to Judge Clark, which was included as an attachment to the Board's application in the court below, Interbake never disclosed the existence of replies to Slaughter's two e-mails. (*See* App. at 89.) Indeed, it was not until

Interbake filed its response to the Board's application for subpoena enforcement in district court that the company casually mentioned in a parenthetical the existence of such replies. (*See* App. at 140 ("and replies").) But, in disregard of "its burden of establishing the applicability of the . . . privilege," *Zeus Enters., Inc. v. Alphin Aircraft*, 190 F.3d 238, 244 (4th Cir. 1999), Interbake made no effort to address why the replies were protected from disclosure. Those replies were not legally subsumed into the original message for purposes of the privilege log. *See In re Universal Serv. Fund Tel. Billing Practices Litig.*, 232 F.R.D. 669, 672 (D. Kan. 2005); *Thompson v. Chertoff*, No. 06-004, 2007 WL 4125770, at *2 (N.D. Ind. Nov. 15, 2007). Similarly, before this Court, Interbake has made no effort to explain why those replies are entitled to protection from disclosure. Accordingly, at minimum, Interbake should be ordered to comply with Judge Clark's *in camera* order as to those messages.

C. But, beyond those "replies," the numerous other defects in Interbake's privilege showing remain wholly unaddressed. As previously set forth in the NLRB's opening brief (*see* Appellant's Br. at 46-52), Interbake has not established, as it must, that any of the

materials encompassed by the three log entries at issue in this case are properly protected from disclosure by the attorney-client privilege or work product doctrine. Indeed, notably absent from Interbake's brief is any assertion, let alone citation to record evidence, supporting a necessary element of attorney-client privilege—namely, that the purpose of the withheld materials was to seek or provide "legal advice." Nor does Interbake attempt to substantiate the necessary elements of attorney work product protection. (*See* Appellant's Br. at 49-51 (noting that Interbake has not shown that the materials at issue in this case were prepared "because" of the prospect of litigation, as required for attorney work product protection).) Moreover, as explained above, *see supra* pp. 18-20, the NLRB has cited a good faith basis for doubting the accuracy of representations made on Interbake's log. (*See also* Appellant's Br. at 52-54 (describing Slaughter's contradiction, in sworn testimony, of assertions made in privilege log).) Consequently, the district court's footnote conclusion that *in camera* review is unnecessary in this case does not withstand scrutiny.

CONCLUSION

For these reasons, and for those previously given in the NLRB's opening brief, the order of the district court should be vacated and the case remanded with instructions to enforce the Board's subpoena as requested.

Respectfully Submitted,

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Dated: May 17, 2010

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Appellee.	)	

CERTIFICATE OF COMPLIANCE WITH RULE 28.1(e) or 32(a)

1. This brief complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2) or 32(a)(7)(B) because this brief contains 5,069 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2003 in 14-point Century.

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Assistant General Counsel

Dated: May 17, 2010

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NATIONAL LABOR RELATIONS BOARD,	)	
Appellant,	)	
v.	)	Case No. 09-2245
INTERBAKE FOODS, LLC,	)	
Appellee.	)	

CERTIFICATE OF SERVICE

I hereby certify that on May 17, 2010, the Reply Brief of Appellant National Labor Relations Board was served by CM/ECF (with courtesy copies sent by first-class mail) to each of the following:

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