UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 14-4523

NATIONAL LABOR RELATIONS BOARD

v.

UPMC PRESBYTERIAN SHADYSIDE,
Appellant

Nos. 14-4524 & 14-4525

NATIONAL LABOR RELATIONS BOARD

v.

UPMC,
Appellant.

On Appeal from the United States District Court for the Western District of Pennsylvania
D. Ct. Nos. 2-14-mc-109, - 110, - 111

BRIEF FOR APPELLEE NATIONAL LABOR RELATIONS BOARD

RICHARD F. GRIFFIN, JR.
General Counsel

JENNIFER ABRUZZO
Deputy General Counsel

RICHARD BOCK
Deputy Associate General Counsel

BARBARA A. O'NEILL
Assistant General Counsel

NANCY E. KESSLER PLATT
Deputy Assistant General Counsel

DALFORD D. OWENS, JR.
Attorney

National Labor Relations Board
1099 14th Street, NW
Washington, DC 20570
(202) 273-2930

National Labor Relations Board

TABLE OF CONTENTS

Page(s)

STATEMENT OF THE ISSUE…..1

STATEMENT OF RELATED CASES.....1

STATEMENT OF THE CASE.....1

STATEMENT OF FACTS… 3

A. Board Proceedings……. 3

B. The District Court Subpoena Enforcement Proceeding.....9

C. Appellate Court Proceedings.....11

SUMMARY OF ARGUMENT.....11

ARGUMENT.....12

I. STANDARD OF REVIEW.....12

II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ENFORCING THE BOARD'S SUBPOENAS 13

A. The Subpoenas Were Issued for a Legitimate and Proper Purpose....14

1. The subpoenas were issued in order to aid in the General Counsel's prosecution of single employer allegations properly asserted pursuant to an unfair labor practice charge……..…...14

2. There has been no showing that the Board issued the subpoenas for an improper purpose or that it is abusing this judicial process…..15

B. The Board's Subpoenas Seek Information Relevant to Its Unfair Labor Practice Proceeding 19

C. The Subpoenas Are Not Unreasonably Broad or Burdensome 22

III. THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE LAW 26

A. The *Kronos* Cases Were Appropriately Instructive in the District Court's Analysis.....26

B. The District Court Appropriately Reviewed the Board's Subpoenas……...29

CONCLUSION……..…….……..…….31

TABLE OF AUTHORITIES

Cases: **Page(s)**

675 West End Owners Corp.,
345 NLRB 324 (2005) 19

Black v. Cutter Labs.,
351 U.S. 292 (1956)..... 16, 25

California v. Rooney,
483 U.S. 307 (1987).....16

Camelot Terrace,
357 NLRB No. 161, 2011 WL 7121892 (2011).....19

Carpenters Local Union No. 1846 v. Pratt-Farnsworth, Inc.,
690 F.2d 489 (5th Cir.1982) 20

Chao v. Cmty. Trust Co.,
474 F.3d 75 (3d Cir. 2007) 13

Dole v. Trinity Indus., Inc.,
904 F.2d 867 (3d Cir. 1990) 19, 20

EEOC v. A.E. Staley Mfg. Co.,
711 F.2d 788 (7th Cir. 1983) 23

EEOC v. Children's Hospital,
719 F.2d 1426 (9th Cir. 1983) 28

EEOC v. Citicorp Diners Club, Inc.,
985 F.2d 1036 (10th Cir. 1993) 23

EEOC v. Kronos Inc.,
620 F.3d 287 (3d Cir. 2010) ..... passim

EEOC v. Kronos Inc.,
694 F.3d 351 (3d Cir. 2012) ..... passim

EEOC v. Maryland Cup Corp.,
785 F.2d 471 (4th Cir. 1986) 14, 23

EEOC v. UPMC,
No. 11-2869, 471 F. Appx. 96 (3d Cir. March 27, 2012).....13

Endicott Johnson Corp. v. Perkins,
317 U.S. 501 (1943).....20

FDIC v. Wentz,
55 F.3d 905 (3d Cir. 1995) 12, 14

FTC v. Texaco, Inc.,
555 F.2d 862 (D.C. Cir. 1977)..... 22, 23, 25, 28

FTC v. Invention Submission Corp.,
965 F.2d 1086 (D.C. Cir. 1992).....23

FTC v. Rockefeller,
591 F.2d 182 (2d Cir. 1979) 23

Grane Health Care v. NLRB,
712 F.3d 145 (3d Cir. 2013) 20

Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Local 283 v. Scofield,
382 U.S. 205, 219 (1965).....5

Jennings v. Stephens,
135 S. Ct. 793 (2015).....16

Livornese v. Medical Protective Co.,
No. 03-2116, 136 Fed. Appx. 473 (3d Cir. June 9, 2005).....16

New Orleans Public Service, Inc. v. Brown,
507 F.2d 160 (5th Cir. 1975) 23

NLRB v. Al Bryant, Inc.,
711 F.2d 543 (3d Cir. 1983) 21

NLRB v. Browning-Ferris Indus. of Pa., Inc.,
691 F.2d 1117 (3d Cir.1982) 20

NLRB v. Carolina Food Processors, Inc.,
81 F.3d 507 (4th Cir. 1996) 23, 24, 25

NLRB v. Dutch Boy, Inc.,
606 F.2d 929 (10th Cir. 1979) 13

NLRB v. Emsing's Supermarket, Inc.,
872 F.2d 1279 (7th Cir.1989) 20

NLRB v. Frazier,
966 F.2d 812 (3d Cir. 1992) 13, 16

NLRB v. G.H.R. Energy Corp.,
707 F. 2d 110 (5th Cir. 1982) 22, 23, 25

NLRB v. Interstate Dress Carriers.,
610 F.2d 99 (3d Cir. 1979) 17

NLRB v. North Bay Plumbing, Inc.,
102 F.3d 1005 (9th Cir. 1996) 13

NLRB v. Rohlen,
385 F.2d 52 (7th Cir. 1967) 28

NLRB v. United Food & Commercial Workers Union, Local 23,
484 U.S. 112 (1987).....15

Peanick v. Morris,
96 F.3d 316 (8th Cir. 1996) 16

Petroleum Exploration v. Pub. Serv. Comm'n of Kentucky,
304 U.S. 209 (1938).....23

Radio and Television Broadcast Technicians, Local Union 1264 v. Broadcast Service of Mobile, Inc.,
380 U.S. 255 (1965).....21

SEC v. Wheeling-Pittsburg Steel Corp.,
648 F.2d 125 (3d Cir. 1981) 17, 19

Sandsend Fin. Consultants v. Federal Home Loan Bank Board,
878 F.2d 875 (5th Cir. 1989) 28

United States v. Armstrong,
517 U.S. 456 (1996).....19

United States v. Chemical Found.,
272 U.S. 1 (1926).....19

United States v. Chevron U.S.A., Inc.,
186 F.3d 644 (5th Cir. 1999) 23

United States v. Cortese,
614 F.2d 914 (3d Cir. 1980) 17

United States v. Garden State Nat'l Bank,
607 F.2d 61 (3d Cir. 1979) 16

United States v. Markwood,
48 F.3d 969 (6th Cir. 1995) 28

United States v. McGovern,
87 F.R.D. 584 (M.D. Pa. 1980) 17

United States v. Morton Salt Co.,
338 U.S. 632 (1950).....13

United States v. O'Neill,
619 F.2d 222 (3d Cir. 1980) 14

United States v. Powell,
379 U.S. 48 (1964)..... 14, 28

United States v. Taylor,
777 F.3d 434 (7th Cir. 2015) 16

United States v. Westinghouse Elec. Corp.,
638 F.2d 570 (3d Cir. 1980) 14

Univ. of Med. & Dentistry of New Jersey v. Corrigan,
347 F.3d 57 (3d Cir. 2003) 13, 14

UPMC & Its Subsidiaries UPMC Presbyterian Shadyside, d/b/a/ Shadyside Hosp.,
2014 WL 6808989 (NLRB Div. of Judges Nov. 14, 2014) 18

In re Wingerter,
594 F.3d 931 (6th Cir. 2010) 18

Statutes:

National Labor Relations Act, as amended
(29 U.S.C. § 151 et seq.)

29 U.S.C. § 153(a) 3, 4

29 U.S.C. § 153(d) 3, 14

29 U.S.C. § 158(a)(1)..... 4, 8, 20

29 U.S.C. § 158(a)(2).....9

29 U.S.C. § 158(a)(3)..... 4, 9, 20

29 U.S.C. § 158(a)(4)..... 4, 9, 20

29 U.S.C. § 159.....3

29 U.S.C. § 160(a) 3

29 U.S.C. § 160(b) 15

29 U.S.C. § 161 1

29 U.S.C. § 161(1) 2, 5, 19

29 U.S.C. § 161(2) 2, 10

Regulations:

29 C.F.R. § 102.31(d) 15

29 C.F.R. § 102.38 5

29 C.F.R. § 102.66(c).....7

STATEMENT OF THE ISSUE

Whether the District Court abused its discretion in enforcing subpoenas issued by the National Labor Relations Board, pursuant to Section 11 of the National Labor Relations Act, 29 U.S.C. § 161.

STATEMENT OF RELATED CASES

Appellee National Labor Relations Board ("the Board" or "NLRB") previously filed with this Court motions for summary affirmance and to lift the District Court's stay of its Order at issue here. Those motions were denied on March 9, 2015. There are no other related proceedings before this Court or any other court. As described below, the related unfair labor practice proceeding out of which the instant subpoena enforcement proceeding arises remains pending before the Board (NLRB Case Nos. 6-CA-102465 *et al.*).

STATEMENT OF THE CASE

The Board applied to the United States District Court for the Western District of Pennsylvania for enforcement of three subpoenas duces tecum issued to Appellants UPMC ("UPMC") and its subsidiary UPMC Presbyterian Shadyside ("Presbyterian") (collectively "Appellants") for the purpose of resolving alleged unfair labor practices under the National Labor Relations Act ("the Act"), 29 U.S.C. § 151 *et seq.* These cases are before this Court on appeal from an Order of

the United States District Court for the Western District of Pennsylvania, granting the Board's applications for enforcement.

The Board issued the three subpoenas pursuant to Section 11(1) of the Act, 29 U.S.C. § 161(1), to obtain documents in connection with a hearing before an administrative law judge. (JA33-63). The purpose of the hearing was to resolve unfair labor practice charges filed against UPMC and Presbyterian, and the administrative law judge ordered Appellants to comply with the subpoenas. (JA289-93). Appellants contumaciously refused to comply.

On March 20, 2014, the Board filed applications in the District Court seeking enforcement of its subpoenas pursuant to Section 11(2) of the Act, 29 U.S.C. § 161(2). (JA287, JA313, JA320). On August 22, 2014, the District Court issued its Order Granting the Board's Application for Enforcement of Subpoenas Duces Tecum (JA18), and amended its Order on September 2, 2014 (JA64). In its supplemental/amended opinion, the District Court was critical of the Circuit Court's application of the standard for review of administrative subpoenas and expressed its desire to deny enforcement of these subpoenas by making a narrower and more restrictive application of that standard, which this Court has rejected. (JA29-32). Nevertheless, the District Court concluded that the subpoenas met the standard for enforcement as articulated by this Court and ordered enforcement, but

sua sponte stayed its enforcement to permit an appeal. (JA65). The District Court subsequently denied Appellants' motion for reconsideration. (JA66-68).

On November 18, 2014, UPMC and Presbyterian filed Notices of Appeal. (JA1-6). The Board filed with this Court motions for summary affirmance and to lift the stay, which, as noted above, were denied on March 9, 2015.

STATEMENT OF FACTS

A. Board Proceedings

In April 2013, the SEIU Healthcare Pennsylvania, CTW, CLC ("Union") filed 22 administrative charges with the Board's Regional Office in Pittsburgh, Pennsylvania, alleging, *inter alia*, that UPMC and Presbyterian are a single employer which engaged in numerous unfair labor practices. On September 30, 2013, following an administrative investigation, the Regional Director for Region 6 of the Board, on behalf of the General Counsel of the Board,[1] issued an Order

[1] The Act, as amended, separates the Agency's prosecutorial and adjudicatory functions. Section 3(d) of the Act establishes the position of General Counsel and vests him with "final authority, on behalf of the Board, in respect of the investigation of [unfair labor practice] charges and issuance of complaints . . . , and in respect of the prosecution of such complaints before the Board." 29 U.S.C. § 153(d). Section 3(a) of the Act, *id.* § 153(a), creates within the Agency a five-member Board, which is empowered by Section 10(a), *id.* § 160(a), to adjudicate unfair labor practice complaints brought by the General Counsel, and by Section 9, *id.* § 159, to process petitions for union representation elections and to certify the results of such elections.

Consolidating Cases and Consolidated Complaint and Notice of Hearing.[2] The Consolidated Complaint alleged numerous violations of Section 8(a)(1), (3), and (4) of the Act, 29 U.S.C. § 158(a)(1), (3), and (4). While that administrative complaint did not allege that UPMC and Presbyterian are a single employer, on January 9, 2014, the Regional Director issued a Second Order Further Consolidating Cases and Amended Consolidated Complaint ("Complaint") (JA96-121), which did make the single employer allegation (JA105).[3] In answering the Complaint, UPMC and Presbyterian denied all allegations relating to their status as a single employer.

On January 27, 2014, Appellants filed a motion to dismiss with the Board,[4] requesting that the Board dismiss the amendments to the Complaint reflecting the single employer allegations, and that Respondent UPMC be dismissed as a party to

[2] On September 27, 2013, the Union filed amendments to the 22 charges, *inter alia*, withdrawing the allegation that Appellants were a single employer. On December 18, 2013, the Union again amended the charges, this time re-alleging Appellants were a single employer.

[3] Previously, on December 13, 2012, the Regional Director issued a complaint alleging UPMC and a subsidiary as a single employer, based on five unfair labor practice charges. (JA374-75). However, as part of a partial settlement, the complaint was amended to withdraw the single employer allegation. Accordingly, the single employer issue was not resolved by that proceeding. *Id.*

[4] While the term "the Board" used herein refers to the agency as a whole, as to this discussion of the motion to dismiss, we refer to the five-member body created by Section 3(a) of the Act. *See supra* n.1.

the unfair labor practice proceeding. (JA294). The Board denied that motion on February 7, 2014. (JA311).

On or about January 14, 2014, Counsel for the General Counsel served upon Presbyterian Board subpoena duces tecum B-720565 (JA33-39), and served upon UPMC Board subpoena duces tecum B-720563 (JA40-46), directing each one's respective "Custodian of Records" to produce documents at the hearing to aid the General Counsel in the prosecution of the unfair labor practice complaint. Pursuant to a request from the Union, Board subpoena duces tecum B-720504 was also issued (JA47-63), and the Union served that subpoena upon UPMC for the purpose of aiding the Union during the hearing on the Board's Complaint.[5] The three subpoenas seek, for the time period January 1, 2012 to the service date, information relating to the business relationship between UPMC and Presbyterian,

[5] Under Section 11(1) of the Act (29 U.S.C. § 161(1)), "any party" to Board proceedings may apply for a subpoena for witnesses or the production of evidence, and the Board "shall . . . forthwith issue" the subpoena requested. The Charging Party Union in this case is a party in the unfair labor practice hearing, with the "right to appear at such hearing in person, by counsel, or by other representative, to call, examine, and cross-examine witnesses, and to introduce into the record documentary or other evidence, except that the participation of any party shall be limited to the extent permitted by the administrative law judge." 29 C.F.R. § 102.38. When the General Counsel issues a complaint and the proceeding reaches the adjudicative stage, the course the hearing will take is in the agency's control, but the charging party is accorded formal recognition, with "vital 'private rights.'" *Int'l Union, United Auto., Aerospace & Agr. Implement Workers of Am., Local 283 v. Scofield*, 382 U.S. 205, 219 (1965).

relevant to resolving the single employer allegations in the Board's Complaint.[6]

Each of the two subpoenas served by Counsel for the General Counsel provided

[6] Following is a description of the documents requested by the two subpoenas served by Counsel for the General Counsel on Presbyterian and UPMC. Unless noted otherwise, the descriptions refer to the subpoena to Presbyterian (JA33-39), which omits a paragraph 16, but is substantially the same as the subpoena served by Counsel for the General Counsel upon UPMC (JA40-46). The requests are for documents showing: incorporation/ partnership (¶¶ 1, 2); transactions/ relationships/investments between the company and shareholders/partners (¶¶3, 6, 7, 11, 12); customers/suppliers (¶¶ 4-5); relationship/affiliation between the companies, including financial ownership (¶¶ 8, 46); annual reports (¶ 9); financial statements (¶ 10); directors/officers/ stockholders (¶¶ 13-15); organizational structures (¶ 17); real estate and equipment rental payments between UPMC and Presbyterian (¶¶ 18-22); agreements and payments by one company to the other for employee or other services (¶¶ 23-28); health and pension plan documents showing the identity of the covered employee groups (¶¶ 29-30, 37); tax returns (¶ 31); telephone numbers assigned to the operations and company letterhead (¶¶ 32-33); advertisements for business (¶ 34); applications for public funding (¶ 36); real property ownership (¶¶ 38, 45); ethics/compliance/audit service/utilization review policies (¶¶ 39-41); bids for contracts by companies (¶ 42); loans/lines of credit between the companies (¶¶ 43-44); agreement between UPMC-owned affiliate and Presbyterian for human resource services (¶ 47); UPMC system-wide policies (subpoena to UPMC, ¶¶ 40-41); revenue bonds (subpoena to UPMC ¶¶ 42, 43).

The subpoena served by the Union upon UPMC (JA47-63) requested documents showing: common offers/owners/directors/ management (¶ 5); labor or employment policies applicable to Presbyterian (¶ 6); shared facilities (¶ 7); services provided by one company to the other (¶¶ 8-9); revenue bonds with joint and several liability for companies (¶ 12); joint or common ownership of leases, real property, bank accounts and other financial instruments (¶ 13, 15); benefit plans administered for employees of Presbyterian (¶ 14); liability insurance provided to Presbyterian (¶ 16); agreements for security services for Presbyterian (¶ 18); UPMC's implementation, delegation, or withdrawal of delegation of labor/human resources functions to Presbyterian (¶¶ 22-25); UPMC's formulation or approval of strategic plans/financial or property transactions for Presbyterian (¶¶ 29-31); UPMC corporate documents and UPMC's approval of corporate document/structure amendments for Presbyterian (¶¶ 32, 35, 38); UPMC's involvement in hiring senior management at Presbyterian (¶ 33); UPMC's approval

that in lieu of the original records requested, Appellants could instead submit compilations and/or analyses made from original documents. (JA39, JA46). On January 23 and 27, 2014, respectively, UPMC and Presbyterian filed petitions with the administrative law judge seeking revocation of all three subpoenas duces tecum (JA192-206),[7] asserting that the subpoena requests were overly broad, unduly burdensome, vague, ambiguous, and harassing.

The unfair labor practice hearing before the administrative law judge commenced on February 12, 2014. On February 24, 2014, during the course of the hearing, the administrative law judge issued an order granting the petitions to revoke in part. (JA288-93). In balancing the need for the subpoenaed information, its relevancy, and the burden of production, the administrative law judge found 31 paragraphs overly broad.[8] With respect to the remaining paragraphs, the judge

---

management services/information systems/contracts for Presbyterian (¶¶ 34, 36-37); identities of common members of the Boards of Directors and common corporate officers (¶¶ 40-42); the interpretation, application, dissemination, and enforcement of various UPMC policies and directions to Presbyterian managers concerning such policies (¶¶ 43-48, 54-56); disciplinary documents concerning individuals named in the NLRB complaint (¶¶ 58-59); information concerning the UPMC Infonet website and its joint operation with Presbyterian (¶ 66).

[7] *See* 102.66(c) of the Board's Rules and Regulations, 29 C.F.R. § 102.66(c).

[8] The judge revoked Paragraph 35 in Subpoena No. B-720565 (Board subpoena to Presbyterian); Paragraph 35 in Subpoena No. B-720563 (Board subpoena to UPMC); and 29 paragraphs in Subpoena No. B-720504 (Union subpoena to UPMC) (Paragraphs 1-4, 10-11, 17, 19-21, 26-28, 39, 49-53, 57, 60-65, and 67-69). (JA288-293).

found the subpoenas proper and denied the petitions to revoke. UPMC and Presbyterian refused to comply with the order from the administrative law judge.

In the meantime, the administrative law judge found that a complete delay of the hearing as a result of Appellants' refusal to comply with the subpoenas would harm the efficient administration of the Act. *UPMC & Its Subsidiaries UPMC Presbyterian Shadyside, d/b/a/ Shadyside Hosp.*, 2014 WL 6808989, *2-3 (NLRB Div. of Judges Nov. 14, 2014). Accordingly, the administrative law judge decided to defer consideration of the single employer issue and instead take evidence and consider the underlying alleged unfair labor practices committed by Presbyterian first, which would enable him to issue a decision on those issues alone. Accordingly, he issued an order severing the single-employer allegations from the unfair labor practice allegations in the Complaint. *Id.* at *2. The judge determined that once subpoena enforcement proceedings before the District Court and potentially this Court concluded, a hearing could be held on the single employer allegations of the Complaint, based upon which a supplemental decision regarding whether UPMC and Presbyterian constitute a single employer would issue. *Id.* at *2-3. The hearing on the substantive unfair labor practice allegations concluded on April 8, 2014.

On November 14, 2014, the administrative law judge, without reaching the single employer issue, issued a decision and order, concluding that Presbyterian

committed numerous violations interfering with employee Section 7 rights under the Act.[9] *Id.* at *112-13. He further found that Presbyterian disciplined, suspended, and discharged employees in retaliation for their support and activities on behalf of the Union,[10] and retaliated against employees for having participated in a prior Board proceeding.[11] *Id*. at *113-14.

B. The District Court Subpoena Enforcement Proceeding

On March 20, 2014, in the absence of compliance with the subpoenas, the Board filed applications in the United States District Court for the Western District

[9] The administrative law judge found that Presbyterian violated Section 8(a)(1) of the Act by interfering with employee access to nonwork areas of its facility, surveilling its employees' protected union activities, discriminatorily prohibiting employees from wearing union insignia, discriminatorily prohibiting employees from posting union materials on bulletin boards, coercively interrogating employees regarding their union activities, threatening to discipline employees for refusing to participate in unlawful interrogations, impliedly threatening an employee with reprisal because of her union activities, instructing employees they were not allowed to post any union materials on bulletin boards, coercively requiring employees to write a statement regarding their union activities, demanding employees' consent to be photographed and photographing employees engaged in union activities, and making other coercive statements. The judge also found that Presbyterian violated Section 8(a)(2) of the Act by dominating, interfering with the formation and administration of, and rendering unlawful assistance to a labor organization.

[10] The administrative law judge found that Presbyterian violated Section 8(a)(3) of the Act by disciplining two employees, and disciplining and discharging three other employees, in response to the employees' union activities.

[11] The administrative law judge found that Presbyterian violated Section 8(a)(3) and (4) by discharging one employee, and by issuing discipline to another employee, in response to their union activities and because they were named in a prior Board charge.

of Pennsylvania, pursuant to Section 11(2) of the Act, 29 U.S.C. § 161(2), seeking orders requiring UPMC and Presbyterian to comply with the subpoenas duces tecum as ordered by the administrative law judge. (JA87-326). The Board did not seek enforcement of those paragraphs revoked by the administrative law judge.

On August 22, 2014, the District Court issued an opinion and order granting the Board's application for enforcement of the three subpoenas (JA7-19), which it amended on September 2, 2014 (JA20-65). In granting enforcement, the District Court observed that it believed compliance with the subpoenas would be "extensive, expensive, time-consuming, and potentially disruptive of the daily business activities of the [Appellants], as well as requiring the disclosure of highly confidential and proprietary information," and thus, it would deny enforcement. (JA29-30). However, it felt "constrained in the current case" to enforce, in light of this Court's decisions in *EEOC v. Kronos Inc*., 620 F.3d 287 (3d Cir. 2010) (*Kronos I*), and *EEOC v. Kronos Inc*., 694 F.3d 351 (3d Cir. 2012) (*Kronos II*) (JA30-31), in which certain limitations placed upon an EEOC subpoena by the District Court were reversed by this Court. In this regard, the District Court expressed its desire to apply the narrower and more restrictive test of enforcement that it utilized in the *Kronos* cases, but was rejected by this Court. (JA31-32). Nonetheless, the District Court appropriately enforced the subpoenas because Appellants failed to demonstrate that the subpoenas were improper or that the

record in this case met the standard for burdensomeness. Despite granting enforcement, without any request from Appellants, the District Court stayed its Order pending a prospective appeal by them. (JA64-65).

Appellants filed a motion for reconsideration of the District Court's order, arguing that the enforcement should be revoked because the Union "grossly abused" the administrative subpoena process by seeking through the NLRB proceeding documents to support other (non-NLRB) tax exemption litigation against them. (JA340-357). The District Court denied Appellants' motion for reconsideration on October 27, 2014. (JA66).

C. Appellate Court Proceedings

On November 18, 2014, UPMC and Presbyterian filed a Notice of Appeal. (JA1-6). The Board subsequently moved this Court for summary affirmance of the District Court's decision, and to lift the District Court's stay of its enforcement order. These motions were denied on March 9, 2015.

SUMMARY OF ARGUMENT

The District Court acted within its discretion in enforcing the Board's subpoenas. The Regional Director, on behalf of the General Counsel, issued a Complaint alleging, *inter alia*, that Appellants UPMC and Presbyterian are a single employer for purposes of the Act, an allegation denied by both companies. (JA96-183). The subpoenaed documents are relevant to the business relationship between

UPMC and its subsidiary Presbyterian in order to resolve the single employer issue. Congress has plainly given the Board the authority to investigate and conduct proceedings; this clearly encompasses resolving the single employer allegations in the Complaint. The subpoenaed information is reasonably relevant to that purpose, and the demand is not unreasonably broad or burdensome.

The District Court reviewed the Board's subpoenas and expressed its desire to deny enforcement based on its preferred, but overly restrictive, application of the standard of review. Nevertheless, the District Court correctly concluded that when applying the appropriate standard articulated by this Court, the Board satisfied the necessary requirements for enforcement of its subpoenas and Appellants failed to carry their burden of demonstrating that the subpoenas were improper. The District Court's unconventional request that this Court abandon its standard of review, without fully enunciating or justifying a more constrictive one, does not warrant a different conclusion than the one it reached. Accordingly, the judgment of the District Court enforcing the Board's subpoenas should be affirmed.

ARGUMENT

I. STANDARD OF REVIEW

This Court reviews orders enforcing administrative subpoenas for abuse of discretion. *Kronos I*, 620 F.3d at 295; *FDIC v. Wentz*, 55 F.3d 905, 908 (3d Cir.

1995). "Abuse of discretion occurs when 'the district court's decision rests upon a clearly erroneous finding of fact, an errant conclusion of law or an improper application of law to fact.'" *Chao v. Cmty. Trust Co.*, 474 F.3d 75, 79 (3d Cir. 2007) (quoting *NLRB v. Frazier*, 966 F.2d 812, 815 (3d Cir. 1992)).

II. THE DISTRICT COURT ACTED WITHIN ITS DISCRETION IN ENFORCING THE BOARD'S SUBPOENAS

Congress has given the Board broad investigatory powers. Section11(1) of the Act authorizes the Board to subpoena "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." 29 U.S.C. § 161(1); *see also NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007 (9th Cir. 1996); *NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 933-34 (10th Cir. 1979). This broad subpoena power enables the Board "to get information from those who best can give it." *United States v. Morton Salt Co.*, 338 U.S. 632, 642 (1950). Having no independent subpoena enforcement authority, the Board must seek enforcement with the district courts.

Congress granted district courts jurisdiction to enforce Board subpoenas in Section 11(2) of the Act. The scope of judicial review of the Board's exercise of its broad subpoena authority is limited. *See EEOC v. UPMC*, No. 11-2869, 471 F. Appx. 96, 100 (3d Cir. March 27, 2012) ("a district court's role in a subpoena enforcement proceeding is limited"); *see also Univ. of Med. & Dentistry of New Jersey v. Corrigan*, 347 F.3d 57, 64 (3d Cir. 2003) (judicial review of

administrative subpoenas is "strictly limited"); *United States v. O'Neill*, 619 F.2d 222, 228 (3d Cir. 1980). As the District Court correctly stated, an administrative subpoena should be enforced where (i) the inquiry is for a legitimate and proper purpose, (ii) the inquiry is reasonably relevant to that purpose, and (iii) the demand is not unreasonably broad or burdensome. (JA27) (citing *United States v. Powell*, 379 U.S. 48, 57-58 (1964)).[12] *See also Wentz*, 55 F.3d at 908; *United States v. Westinghouse Elec. Corp.*, 638 F.2d 570, 574 (3d Cir. 1980); *Univ. of Med. & Dentistry of New Jersey*, 347 F.3d at 64. Parties resisting compliance with agency subpoenas bear a heavy burden to establish that the subpoenas are improper. *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 477 (4th Cir. 1986). Where, as here, the agency inquiry is authorized by law, and the materials sought are relevant to the inquiry, that burden "is not easily met." *Id*.

A. The Subpoenas Were Issued for a Legitimate and Proper Purpose

1. The subpoenas were issued in order to aid in the General Counsel's prosecution of single employer allegations properly asserted pursuant to an unfair labor practice charge.

As stated above, this proceeding arises out of administrative unfair labor practice charges that were filed by the Union alleging violations of Section 8 of the Act. In accord with the Board's congressional mandate, the Region investigated the

[12] The District Court also noted from *Kronos I*, 620 F.3d at 296 n.4, that the agency must not already possess the information, and that it must have complied with relevant administrative requirements, neither of which is in dispute here. (JA27).

allegations pursuant to the investigative authority granted to the General Counsel.[13] The Regional Director subsequently issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing, pursuant to Section 10(b) of the Act, 29 U.S.C. § 160(b), which was later amended to include allegations that UPMC and Presbyterian are a single employer, which Appellants denied. In support of the prosecution of that Complaint, and in particular, the allegations of single employer, the Board issued the three subpoenas at issue here, including one upon request of the Union pursuant to the Board's Rules and Regulations (29 C.F.R. § 102.31(d)). Accordingly, the Board's purpose in issuing the subpoenas was proper, satisfying this criterion for enforcement.

2. There has been no showing that the Board issued the subpoenas for an improper purpose or that it is abusing this judicial process.

While the District Court cast aspersions on the Board's seeking evidence of a single employer relationship between UPMC and Presbyterian,[14] this Court should nonetheless affirm the District Court's enforcement. An appellate court "reviews judgments, not statements in opinions," and accordingly, as long as this

[13] Section 3(d) of the Act, 29 U.S.C. § 153(d), vests in the General Counsel the responsibility to investigate unfair labor practice charges. *See NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 118-19 (1987).

[14] In its order enforcing, the District Court stated, without support or explanation, that "the unfair labor practices are being used, under the guise of the 'single employer' rubric, to legitimize a massive document request." (JA29).

Court finds the Board's seeking information to be legitimate and proper, it should affirm. *California v. Rooney*, 483 U.S. 307, 311 (1987) (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)); *see also Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015) ("[t]his Court, like all federal appellate courts, does not review lower courts' opinions, but their judgments"); *Livornese v. Medical Protective Co.*, No. 03-2116, 136 Fed. Appx. 473, 481 n.8 (3d Cir. June 9, 2005); *In re Wingerter*, 594 F.3d 931, 942 (6th Cir. 2010); *Peanick v. Morris*, 96 F.3d 316, 322 (8th Cir. 1996); *United States v. Taylor*, 777 F.3d 434, 443-44 (7th Cir. 2015). And, as shown above, the Board properly sought evidence in support of factual issues that were alleged by the General Counsel and denied by Appellants.

As below, Appellants contend here that the Board's subpoena process was illegitimately used to further a lawsuit filed by the City of Pittsburgh. (UPMC Br. 11, 31). Yet, Appellants' recitation of the tax-exemption litigation between UPMC and the City of Pittsburgh provides not a scintilla of evidence that points to and/or suggests involvement by the Board in that litigation, nor does it show that the Board's administrative subpoenas were issued for the sole purpose of somehow aiding that litigation. A party seeking to evade a subpoena must present "facts suggesting that the *subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the issuing agency*." *Frazier*, 966 F.2d at 819 (emphasis added); *see also United States v. Garden State Nat'l Bank*, 607 F.2d 61,

71 (3d Cir. 1979) (the opposing party has the burden "to negate the existence of a proper civil purpose").[15]

Appellants' evidence in this regard shows only that a civil action brought by the City of Pittsburgh occurred simultaneous with the Board's processing the Union's unfair labor practice charges pursuant to its statutory mandate. The fact that there are two separate proceedings that Appellants assert address similar issues is of no consequence for establishing the government's purported bad faith. *See NLRB v. Interstate Dress Carriers*, 610 F.2d 99, 112 (3d Cir. 1979) ("the mere fact that a criminal investigation is underway simultaneous to the agency's subpoena motion does not, without more, demonstrate that the subpoena was intended to serve (an) impermissible purpose"); *see also United States v. McGovern*, 87 F.R.D. 584, 587-88 (M.D. Pa. 1980) (simultaneous activity by the Nuclear Regulatory Commission and the Justice Department does not establish that NRC's subpoenas were aimed at funneling information to the grand jury). Appellants must show *more*, and particularly "more than simultaneous activity," to establish that the

[15] Critically, the motives of a third party are largely irrelevant to a subpoena enforcement proceeding. *United States v. Cortese*, 614 F.2d 914, 921 (3d Cir. 1980) (motivations of third parties should have no bearing on the question of agency good faith); *see also SEC v. Wheeling-Pittsburgh Steel Corp.*, 648 F.2d 118, 125 (3d Cir. 1981) (in a subpoena enforcement proceeding, "inquiry to the motivations of third parties and their illicit use of the agency's authority to investigate [would be] misdirected"). The focus for the Court should remain on the government's motive. Accordingly, Appellants' suggestion that the subpoenas served the Union's improper purpose (UPMC Br. 31) are irrelevant.

subpoenas were issued by the Board and sought to be enforced for an improper purpose. *Id.*[16]

Appellants' assertions are wholly speculative, without any evidentiary support, and inconsistent with the history of the single employer issue. As described above (*see supra* n.3), the Board wrestled with the single employer issue long before the City of Pittsburgh initiated its investigation and civil action against UPMC.[17] In May 2012, well in advance of the tax-exemption litigation that commenced in March 2013, the Union filed the first of five unfair labor practice charges raising the single employer issue as to UPMC and Presbyterian. The Board investigated the charges, and on December 12, 2012, issued a complaint alleging Appellants were a single employer. The single employer issue was not resolved by that proceeding, and the issue was subsequently raised again by the charges leading to the current dispute. Appellants have not presented evidence either refuting that the documents sought in the subpoenas at issue are relevant to the single employer allegations in the unfair labor practice proceeding, or establishing that the Board

[16] Similar unwarranted, and entirely irrelevant, statements are made by amici, who have taken the opportunity of the instant subpoena enforcement dispute to interject various criticisms of the NLRB into this proceeding. (Amicus Br. 12-15). It should go without saying that none of these statements, which largely concern other matters not before this Court, have any bearing on the instant appeal.

[17] According to Appellants' motions, Mayor Luke Ravenstahl initiated his investigation of UPMC's tax-exempt status in January 2013, and the City filed its civil action on March 20, 2013 (JA 344 ¶ 14; JA346 and ¶ 21).

issued its subpoenas and sought judicial enforcement to serve a purpose outside the purview of the Agency's jurisdiction.[18]

B. The Board's Subpoenas Seek Information Relevant to Its Unfair Labor Practice Proceeding

As set forth above, Section 11 of the Act grants the Board broad subpoena power to examine and copy "any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question." 29 U.S.C. § 161(1). The courts are charged to order production of the subpoenaed materials unless it can be shown that the information sought is "plainly incompetent or irrelevant to any lawful purpose." *Dole v. Trinity Indus., Inc.*, 904

[18] We note that federal defendants are entitled to a presumption of regularity. Courts will presume that public officials have properly discharged their official duties, absent "clear evidence to the contrary." *E.g., United States v. Chemical Found.*, 272 U.S. 1, 14-15 (1926); *United States v. Armstrong*, 517 U.S. 456, 464 (1996).

Moreover, this Court has observed that a court's role in a subpoena enforcement proceeding, where allegations of abuse of process have been raised, is not to examine the underlying administrative process, because that is for the administrative agency to police. Instead, a court should focus on and determine whether the judicial enforcement process is being abused. *Wheeling-Pittsburgh Steel Corp.*, 648 F.2d at 125. When allegations are made that the Board's processes are being abused, the Board defends the integrity of its administrative process and will, in *its own* proceedings, address such allegations. *See, e.g., Camelot Terrace*, 357 NLRB No. 161, 2011 WL 7121892 (2011) (awarding litigation expenses where there was extreme bad-faith conduct in unfair labor practice litigation); *675 West End Owners Corp.*, 345 NLRB 324, 326 n.11 (2005), enf'd, No. 07-2695-ag, 304 Fed. Appx. 911 (2d Cir. Dec. 19, 2008) (awarding litigation costs against a respondent which disobeyed the judge's instructions that a revoked subpoena should not be served again, and proceeded to issue a subpoena after the close of the hearing).

F.2d 867, 872 (3d Cir. 1990) (quoting *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943)). As this Court recognized, the information need only be "reasonably relevant" to the inquiry authorized by Congress. *See Dole v. Trinity Industries, Inc.*, 904 F.2d at 872; *see also Kronos I*, 620 F.3d at 296 ("[t]he relevance requirement is not particularly onerous"). The Board's subpoenas here, which were issued in aid of the prosecution of the Complaint, meet this threshold.

As noted, the Complaint alleges that UPMC and Presbyterian constitute a single employer that violated Section 8(a)(1), (3), and (4) of the Act. "The single employer doctrine is a creation of the Board which allows it to treat two or more related enterprises as one employer within the meaning of the [Act]." *Grane Health Care v. NLRB*, 712 F.3d 145, 150 (3d Cir. 2013) (quoting *Carpenters Local Union No. 1846 v. Pratt–Farnsworth, Inc.*, 690 F.2d 489, 504 (5th Cir.1982)). Where sufficient evidence exists to find two ostensibly separate entities to be a single employer, they are held jointly and severally liable for remedying unfair labor practices committed by either. *NLRB v. Browning–Ferris Indus. of Pa., Inc.*, 691 F.2d 1117, 1122 (3d Cir.1982); *Grane Health Care*, 712 F.3d at 150; *NLRB v. Emsing's Supermarket, Inc.*, 872 F.2d 1279, 1283 (7th Cir.1989).

Single employer status is determined, among other factors, by a factual examination of the interrelation of operations, common management, centralized control of labor relations, and common ownership or financial control of the

entities at issue. *See Radio and Television Broadcast Technicians, Local Union 1264 v. Broadcast Service of Mobile, Inc.*, 380 U.S. 255, 256 (1965); *NLRB v. G.H.R. Energy Corp.*, 707 F. 2d 110, 113 (5th Cir. 1982); *NLRB v. Al Bryant, Inc.*, 711 F.2d 543, 551 (3d Cir. 1983) ("the single employer question is primarily factual"). The documents sought by the subpoenas seek information relevant to those factors. For example, the subpoenas seek documents showing directors, officers, and management (JA36 ¶¶ 13-14; JA52, JA57 ¶¶ 5, 40-42); operational relationships between the companies, including services performed by one of the companies for the other (JA36-38 ¶¶ 3, 18-21, 23-28, 42; JA52-62 ¶¶ 7-9, 13, 15, 18, 29, 31, 34, 36, 66); centralized control of labor and human resource functions (JA39 ¶ 47; JA53-56 ¶¶ 14, 22-25, 33); ownership and financial control of the two companies (JA36-37, 39 ¶¶ 1, 2, 8, 11, 12, 15, 46); organizational structure and control of organizational structure (JA56-57 ¶¶ 32, 35, 38); financial transactions between the companies (JA39 ¶¶ 43-44; JA53-55 ¶¶ 12, 16, 30); employment policies implemented by UPMC for Presbyterian employees (JA45 ¶¶ 40-41; JA57-60 ¶¶ 43-44, 48, 54-56); and organizational structure of the companies (JA36-39 ¶¶ 7, 17, 46). As UPMC and Presbyterian both have denied single employer status, subpoenas seeking to establish those allegations are more than "reasonably" relevant to the Board's inquiry; they are in fact directly on point, and

in aid and support of the legitimate purpose of determining the single employer issue in the unfair labor practice litigation.[19]

In sum, the Complaint alleges that UPMC and Presbyterian are a single employer and the documents sought by the subpoenas relate to that issue. The Board has acted within its statutory authority to seek relevant records and transactions between UPMC and Presbyterian which are necessary for resolving the single employer issue.

C. The Subpoenas Are Not Unreasonably Broad or Burdensome

The breadth of the subpoenas is consistent with the requirements for establishing single employer status. Courts have recognized that determining single employer status requires a broad examination. Thus, "the Board must necessarily undertake a fairly wide-ranging investigation into the day-to-day affairs of the two companies." *G.H.R. Energy*, 707 F. 2d at 113; *see also FTC v. Texaco, Inc.*, 555 F.2d 862, 882 (D.C. Cir. 1977) ("[t]here is no doubt that these subpoenas are broad in scope, but the FTC's inquiry is a comprehensive one -- and must be so to serve its purposes"). Accordingly, the subpoenas necessarily seek documents that pertain to various aspects of the business relationship between UPMC and Presbyterian.

[19] For this reason, it is remarkable that the District Court stated that it found "minimal or no relationship" between the subpoenas and the unfair labor practice charges. (JA29). As stated above, however, this Court should affirm the judgment nonetheless as the Court properly enforced the subpoena. As described more fully below, the Court ultimately concluded that application of this Court's standard for enforcement required the subpoenas to be enforced.

See G.H.R. Energy, 707 F. 2d at 113 (rejecting overly broad defense to subpoena enforcement where respondents "put their entire business relationship into question by denying that they constitute a 'single employer' for purposes of the Act").

When considering the burdens of subpoena compliance, the relevant question is whether compliance by the subpoenaed party "would seriously disrupt its normal business operations." *Maryland Cup Corp.*, 785 F.2d at 477.[20] This standard reasonably balances the informational needs of a federal agency and the operational concerns of a subpoenaed party. In considering whether subpoenas are unduly burdensome or unreasonably broad, "[s]ome burden on subpoenaed parties is to be expected and is necessary in furtherance of the agency's legitimate inquiry and the public interest." *FTC v. Texaco, Inc.*, 555 F.2d at 882. The Supreme Court has observed that "the expense and annoyance of litigation is 'part of the social burden of living under government'." *Petroleum Exploration v. Pub. Serv. Comm'n of Kentucky*, 304 U.S. 209, 222 (1938). This social burden encompasses compliance with government subpoenas. *New Orleans Public Service, Inc. v. Brown*, 507 F.2d 160, 165 (5th Cir. 1975).

[20] *Accord NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 513 (4th Cir. 1996); *FTC v. Rockefeller*, 591 F.2d 182, 190 (2d Cir. 1979); *United States v. Chevron U.S.A., Inc.*, 186 F.3d 644, 649 (5th Cir. 1999); *EEOC v. A.E. Staley Mfg. Co.*, 711 F.2d at 788; *EEOC v. Citicorp Diners Club, Inc.*, 985 F.2d 1036, 1040 (10th Cir. 1993); *FTC v. Invention Submission Corp.*, 965 F.2d 1086, 1090 (D.C. Cir. 1992).

While the District Court noted that compliance with the subpoenas would be "potentially disruptive of the daily business activities of the [Appellants]," (JA29), it nonetheless enforced the subpoenas, apparently concluding, correctly, that any such *potential* "disruption" was not sufficiently demonstrated to require denial of enforcement. Appellants presented to the District Court only conclusory statements and general claims that the Board's subpoenas are burdensome, without any evidentiary support. Appellants' entire presentation to the District Court concerning the burdens it would face in complying with these subpoenas consisted of the following legal argument:

> [Appellants are] still required to produce a voluminous number of documents at significant monetary and labor costs. If [Appellants are] forced to comply with this oppressive subpoena, substantial amounts of money and hours will necessarily be expended. This is the "serious[] disrupt[ion of] normal business operations" that the Fourth Circuit Court of Appeals found would make a Board subpoena unduly burdensome. *See Carolina Food Processors*, 81 F.3d 507, 512 (4th Cir. 1996).

(JA332). These claims do not establish that Appellants' respective business operations will be seriously disrupted by compliance with the Board's subpoenas. Therefore, the District Court could only speculate as to the *potential* burdens of compliance, which does not meet the "would seriously disrupt" test for denying enforcement. Indeed, the District Court's statement amounts to mere hyperbole, rather than a discussion of factual findings. In these circumstances, where "the atmosphere in which an opinion is written may become so surcharged that

unnecessarily broad statements are made," a court has the "duty to look beyond the broad sweep of the language." *Black v. Cutter Labs.*, 351 U.S. at 298.[21]

Here, while the subpoenas seek a wide range of documentation, the mere fact that a subpoena is broad or that compliance may require the production of thousands of documents is insufficient to establish burdensomeness. *Carolina Food Processors*, 81 F.3d at 513-14; *FTC v. Texaco,* 555 F.2d at 882; *G.H.R. Energy Corp.*, 707 F.2d at 113. And, as set forth above, courts have recognized that determining single employer status requires a broad examination. Agency proceedings, conducted in furtherance of statutory objectives, would be frustrated if parties could defend against disclosure merely by asserting a burden imposed by compliance. Since Appellants have failed to demonstrate how compliance would significantly disrupt its business, the Board's subpoena is not unduly burdensome.[22]

[21] Similarly, while the District Court stated that production of the subpoenaed materials would cause the disclosure of "highly confidential and proprietary information," (JA29), Appellants did not make that argument to the District Court, and the Court failed to elaborate upon that conclusion or provide its rationale.

[22] Additionally, as set forth above, the subpoenas served by Counsel for the General Counsel provided that Appellants could submit compilations of information, lessening any burden. In this regard, Appellants also could have stipulated to certain undisputed information, such as the directors and officers of each organization.

III. THE DISTRICT COURT DID NOT ERR IN ITS APPLICATION OF THE LAW

A. The *Kronos* Cases Were Appropriately Instructive in the District Court's Analysis

Appellants contend that the District Court abused its discretion by enforcing the subpoenas based upon its mistaken belief that this Court's recent decisions in *Kronos* displaced long-standing Circuit precedent, leaving district courts "constrained to essentially 'rubber stamp' the enforcement of the Subpoenas at hand." (JA31). However, the District Court found the legal test for subpoena enforcement, based on long-standing precedent, remained "sound law." (JA31). The Court's discussion of *Kronos I and II* (JA30-32), as more thoroughly discussed below, expressed its disagreement with this Court's application of the test, which critically and profoundly differed from its own. Accordingly, the District Court's discussion of *Kronos I* and *II* does not reveal a misapplication of the law in this case, but a concession that it was governed by this Court's *Kronos* decisions.

In *Kronos I* and *II*, this Court determined that the District Court abused its discretion in placing numerous limitations on subpoenas issued by the EEOC. The EEOC investigation was against Kroger grocery store, which refused to hire an applicant with a disability based on an employment test created by third-party *Kronos*, which was the subject of the EEOC subpoena requesting information

concerning the test. The District Court characterized the scope of the subpoena as "breathtaking," and imposed limitations as to geography (relating only to the particular store at issue), job types (use of the test only for the position applied for), and time period (use of the test for the year and a half preceding the filing of the EEO charge). In *Kronos I*, this Court found that the District Court abused its discretion in applying too narrow a standard of relevance, which limited the EEOC access to materials relevant to its investigation.[23]

After the District Court issued a subsequent opinion upon remand, this Court again found subsequent restrictions imposed by the District Court to be invalid and in violation of this Court's mandate. This Court determined that, pursuant to the relevant legal standards for showing discrimination, the EEOC properly requested

[23] In addition to concluding that the District Court applied "*too restrictive a standard* of relevance" in limiting the information related to geography, time and job position, this Court further found "the District Court *erred in limiting* the EEOC's access to user's manuals and instructions, validation information, and materials pertaining to potential adverse impact on individuals with disabilities" [*Kronos I*, 620 F.3d at 297]; "[t]he District Court's *decision to narrow the subpoena* to include only bagger, stocker, and/or cashier/checker positions was an abuse of its discretion" [*id.* at 298]; "the District Court *misapplied the relevance standard* when it limited the EEOC's access to Kroger's information related only to the state of West Virginia" [*id.*]; [t]he District Court also *too narrowly circumscribed* the subpoenas when it instituted the temporal limitation of January 1, 2006 through May 31, 2007" [*id.* at 299]; [t]he District Court's decision *denying the EEOC access* to particular materials unless they relate only to Kroger was an improper use of its discretion" [*id.*]; and the District Court abused its discretion in *limiting Kronos's production* of the user's manual and instructions for the Assessment to those materials only actually provided to Kroger" [*id.* at 300] (*emphases added*).

all validation studies to determine the efficacy of the employment test, and that the District Court improperly restricted those studies to only those that "were relied upon in creating or implementing the test for Kroger" (*Kronos II*, 694 F.2d at 362). In so concluding, this Court noted that the standard for relevance is "'broad' and not 'particularly onerous' but nonetheless [must] be 'anchored to the charge of discrimination.'" *Id.* (citing *Kronos I*, 620 F.3d at 296-97). This broad view of relevance for subpoena enforcement is in accord with the view of other circuits. *See, e.g., Sandsend Fin. Consultants v. Federal Home Loan Bank Board*, 878 F.2d 875, 882 (5th Cir. 1989) ("For purposes of an administrative subpoena, the notion of relevancy is a broad one"); *NLRB v. Rohlen*, 385 F.2d 52, 56 (7th Cir. 1967); *EEOC v. Children's Hospital*, 719 F.2d 1426, 1428-29 (9th Cir. 1983). The broad standard for subpoena enforcement assists administrative agencies in performing their statutorily-mandated investigations. *Doe v. United States*, 253 F.3d 256, 263 (6th Cir. 2001).[24]

The District Court did not find that the *Kronos* opinions displaced controlling precedent and, in fact, made clear that it was not suggesting "the

[24] *See also United States v. Powell*, 379 U.S. 48, 53-54 (1964) (a more restrictive standard might seriously hamper an agency's ability to conduct investigations); *United States v. Markwood*, 48 F.3d 969, 979 (6th Cir. 1995) ("the scope of the issues which may be litigated in an enforcement proceeding must be narrow, because of the important governmental interest in the expeditious investigation of possible unlawful activity") (quoting *FTC v. Texaco, Inc.*, 555 F.2d at 872–73).

'applicable' legal framework for review of subpoena of an administrative agency is no longer sound law." JA31. The District Court simply disagreed with the Circuit Court's application of the test in the *Kronos* cases, and expressed its desire to apply the same restrictive standards rejected by this Court. As Appellants observed, "the District Court said that (were it not for the *Kronos* opinions), it would deny enforcement." (UPMC Br. 28). As guided by this Court, the District Court may have been "constrained" from applying its desired standard, but the Court made a correct application of existing law in granting enforcement.[25] In sum, the District Court's discussion of the *Kronos* opinions marked a shift in its understanding of the law, not the applicable legal precedent.

B. The District Court Appropriately Reviewed the Board's Subpoenas

Appellants (as well as amici parties) contend the District Court ran afoul of the statute and controlling precedent by rubber stamping the subpoenas and thereby failing to conduct a thorough, meaningful review of the subpoenas prior to enforcement. (UPMC Br. 21; Amicus Br. 9).[26] Appellants assert that the District

[25] The District Court characterizes this as the "Current Legal Predicament" of the case at hand. (JA31).

[26] With respect to the meaningful nature of the District Court's review, the Appellants want it two ways. On the one hand, Appellants contend the District Court failed to conduct a meaningful review and "merely" rubber stamped the subpoenas. (UPMC Br. 21). On the other hand, Appellants argue that after reviewing the subpoenas, the Court made "extensive" factual findings that require this Court to deny enforcement. (UPMC Br. 27).

Court, "in its own words – acted as *mere* 'rubber stamp' of the agency" [subpoenas] (UPMC Br. 22) (*emphasis added*), and that it "fail[ed] to conduct a thorough, meaningful review of the subpoenas prior to enforcing them" (UPMC Br. 21). This is a gross distortion of the District Court's opinion and the manner in which it used the terms *rubber stamping* and *meaningful review*.[27] The District Court employed its reference to a rubber stamp as a rhetorical device critically aimed at the Circuit Court's decision in the *Kronos* cases. JA30-32. The District Court stated that it was "constrained" to apply the standards outlined by the Circuit Court in the *Kronos* cases, and by doing so it believed it was "*essentially*" rubber stamping these subpoenas.[28] JA31.

The District Court referenced *meaningful review* in the same rhetorical fashion, implying that the test applied by the Circuit Court did not allow for a meaningful review. (JA30-32). A meaningful review as defined by the District Court, however, would encompass the restrictive standard of review rejected by this Court. Again, the limitation lamented by the District Court was its acquiescence with the Court's instructions for applying the appropriate test.

[27] Appellants reference the term "rubber stamp" throughout their brief (*see* UPMC Br. 3, 11, 15, 16, 21, 25, and 25).

[28] The District Court stated, "the practical effect of [*Kronos*] as to enforcement of subpoenas of federal government agencies is that this Court is constrained to essentially 'rubber stamp' the enforcement of the Subpoenas at hand." (JA31). The District Court did not state that it was *merely* rubber stamping the subpoenas.

The District Court critically reviewed the Board's subpoenas and could not have expressed such strong opinions absent a review of the requests. While the District Court's opinion is unconventional, the Court considered the facts and ultimately applied the appropriate law in finding the subpoenas met the appropriate standard of review as established by this Court. The District Court's enforcement rests upon a correct application of the law and a proper application of law to fact.

CONCLUSION

Appellants have not established that the District Court's enforcement rests upon a clearly erroneous finding of fact, an errant conclusion of law, or an improper application of law to fact. Accordingly, the Board respectfully requests that the Court affirm the District Court's order enforcing the Board's subpoenas duces tecum.

Respectfully submitted,

BARBARA A. O'NEILL
Assistant General Counsel
for Contempt, Compliance, and Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Telephone: (202) 273-2958
barbara.oneill@nlrb.gov

s/ Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
Telephone: (202) 273-2937
nancy.platt@nlrb.gov

DALFORD DEAN OWENS, JR.
Trial Attorney
Telephone: (202) 273-2934
dean.owens@nlrb.gov

Dated: Washington, D.C.
May 8, 2015

Certificate of Service

I hereby certify that a true and correct copy of the foregoing was served via the Court's CM/ECF system on May 8, 2015, on all counsel of record listed on the CM/ECF Service List.

s/ Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
for Contempt, Compliance, and Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Telephone: (202) 273-2937

CERTIFICATE OF COMPLIANCE

I certify that the attorneys whose names appear on this brief are employed by the United States government. I hereby certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), containing 8,036 words, and the word processing system used was Microsoft Word 2007. I further certify that the text of the electronic brief is identical to the text in the paper copies. I further certify that a virus check has been run on the file with Symantec Endpoint Protection version 12.1.2015 and no virus was detected.

s/ Nancy E. Kessler Platt
NANCY E. KESSLER PLATT
Deputy Assistant General Counsel
for Contempt, Compliance, and Special Litigation
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570
Telephone: (202) 273-2937