UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

PETITION FOR REHEARING OR REHEARING EN BANC

Pursuant to Federal Rules of Appellate Procedure 35 and 40 and their corresponding Local Rules, the National Labor Relations Board (hereinafter "the NLRB," "the Board," or "the Agency") respectfully petitions the Court to grant rehearing or rehearing en banc of the decision of a panel of this Court (Neimeyer and Gregory, Circuit Judges, and Damon J. Keith, Senior Circuit Judge of the United States Court of Appeals for the Sixth Circuit, sitting by designation), issued on February 22, 2011.

The case was before this Court on the Board's appeal of a decision by the United States District Court for the District of Maryland, per the Honorable Richard D. Bennett, holding that (1) the Board and its administrative law judges ("ALJs"), as non-Article III actors, categorically lack the authority to conduct *in camera* inspections of contested documents and to rule on privilege claims raised in petitions to revoke

administrative subpoenas; and (2) the three documents at issue here were privileged from disclosure without need for *in camera* inspection by the district court.

The panel's decision correctly holds that the district court erred as a matter of law in concluding that only Article III judges have the authority to conduct *in camera* inspections and make rulings on privilege claims raised as grounds for revoking administrative subpoenas in Board proceedings. Consistent with this holding, the panel decision also correctly recognizes (slip op. at 13) that "the [NLRB] ALJ can order and conduct the *in camera* review of documents."

Notwithstanding these determinations, however, the panel affirms the decision below concluding that when, as here, the Board applies to a district court for an order directing an intransigent party to comply with an ALJ's lawful demand for *in camera* review, the district court *must* decide the privilege issue itself and cannot enforce the ALJ's *in camera* review order. The panel then concludes that the district court appropriately found that the three documents at issue here are privileged, without the need for *in camera* review, based solely on representations made in Interbake's privilege log submitted to the ALJ. The Board seeks rehearing and modification of the panel's opinion with respect to these latter two holdings.

RULE 35 STATEMENT

The panel's decision that a district court must be the forum to conduct an *in camera* inspection if a party in a Board proceeding refuses to submit subpoenaed documents to an ALJ for such inspection is contrary to Supreme Court case law and

presents a question of exceptional importance because it does serious harm to Section 11(1) of the National Labor Relations Act ("NLRA" or "the Act"), 29 U.S.C. § 161(1). In particular, the panel's decision fails to give effect to the critical distinction between *in camera* inspection by a neutral adjudicator and production to a litigation opponent, as recognized by the Supreme Court in *United States v. Zolin*, 491 U.S. 554 (1989). By empowering only district courts to conduct enforceable *in camera* inspections, the panel's decision gives short shrift to the Board's antecedent jurisdiction under Section 11(1) to initially review subpoena objections. Further, with respect to the panel's affirmance of the district court's substantive privilege rulings, the decision is inconsistent with circuit law, such as *United States v. Jones*, 696 F.2d 1069 (4th Cir. 1982), which places the burden of proof on the proponent of a privilege claim to establish every element of the privileges asserted.

ARGUMENT

I. The Panel's Decision Denying ALJs the Enforceable Authority to Order *In Camera* Review to Resolve Privilege Disputes Is Inconsistent with the Supreme Court's Decision in *United States v. Zolin*.

The NLRB respectfully suggests that the panel's opinion overlooks critical principles articulated by the Supreme Court in *United States v. Zolin*, 491 U.S. 554 (1989), as well as the consequences that follow from those principles. As a result of these oversights, the panel applies Section 11(2) of the NLRA, 29 U.S.C. § 161(2), which provides for judicial enforcement of Board subpoenas, in a manner that does serious harm to Section 11(1), *id.* § 161(1), which obligates the Board to act first when

disputes arise over the validity of such subpoenas. Specifically, the panel's decision interprets Section 11(2) so as to empower parties to effectively oust the Board of its Section 11(1) jurisdiction to initially review subpoena objections and instead to present those objections to a court for immediate and final judicial review. Such a broad reading of Section 11(2) cannot be reconciled with existing precedent.

In *Zolin*, the Supreme Court recognized the fundamental difference between *in camera* production of privileged communications to a neutral adjudicator, like a judge, and public production of such communications to others, such as a litigation adversary. This difference is so vitally important that, in a significant departure from the general rule of waiver, the Court declared it "clear that *in camera* review does not destroy the privileged nature of the contested communications." *Id.* at 569.[1] In accord with *Zolin*'s recognition of the key distinction between adjudicators and party-opponents, this Court correctly held that "the [NLRB] ALJ can order and conduct the *in camera* review of documents," and that *in camera* review is permissible because the NLRB's "structure ensures sufficient independence of ALJs." (slip op. at 13). The essential proposition which undergirds both of these conclusions is that, consistent with *Zolin*, the Board's ALJs are fundamentally different from the parties who appear before them in NLRB litigation including, most notably, the General Counsel, who functions as a prosecutor during unfair labor practice hearings.

[1] *Cf. United States v. Myers*, 593 F.3d 338, 348 n.15 (4th Cir. 2010) ("Myers does not waive her Fifth Amendment privilege . . . simply by turning over items for privilege review.) (citing *Zolin*).

However, this is where the panel decision's consistency with *Zolin* ends. Though the panel acknowledges and indeed endorses the authority of Board ALJs to conduct *in camera* inspections, it effectively nullifies this authority by requiring district courts to conclusively resolve all privilege questions whenever the Board seeks enforcement of concededly lawful demands by ALJs for *in camera* review. In other words, the panel's decision requires district courts to exercise their Section 11(2) subpoena enforcement jurisdiction, once invoked, to the detriment of the Board's Section 11(1) subpoena revocation jurisdiction. The panel reaches this conclusion by adhering to the general rule that in a typical subpoena enforcement action, the target of a subpoena may "contest the subpoena's validity through any appropriate defense," (slip op. at 11), which the court must then rule upon. And in support of this conclusion, the panel cites to several cases where enforcement of an agency's subpoena would have resulted in production to an adversarial party, such as the agency's prosecuting attorney, for potential use as evidence in an ongoing or future proceeding. *See, e.g.*, *ICC v. Brimson*, 154 U.S. 447 (1894); *Penfield Co. v. SEC*, 330 U.S. 585 (1947); *Director, Office of Thrift Supervision v. Vinson & Elkins, LLP*, 124 F.3d 1304 (D.C. Cir. 1997); *NLRB v. Harvey*, 349 F.2d 900 (4th Cir. 1965); *NLRB v. Cable Car Advertisers, Inc.*, 319 F. Supp. 2d 991 (N.D. Cal. 2004).[2]

[2] The panel's decision also cites two cases (slip op. at 12)—*NLRB v. Silver Spur Casino*, 623 F.2d 571, 579-80 (9th Cir. 1980), and *NLRB v. Indep. Ass'n of Steel Fabricators, Inc.*, 582 F.2d 135, 145 (2d Cir. 1978), *overruled on other grounds*, 454 U.S. 404 (1982)—neither of which relate to subpoena enforcement proceedings. Rather, in both cases,

But this exposes a crucial blind-spot in the panel's reasoning. As *Zolin* makes clear, the difference between disclosure to neutral adjudicators as opposed to litigation opponents not only matters, it requires a conclusion that the analytical framework otherwise applicable in subpoena enforcement actions cannot fit this case. As the panel correctly observed, "Congress intended that the Board evaluate privilege objections made with respect to subpoenaed documents during the course of administrative hearings, with judicial review available *only after* objections are considered and denied by the Board." (slip op. at 12). This proposition, which arises from the text and structure of Section 11 of the NLRA, is not in dispute. *See Hortex Mfg. Co. v. NLRB*, 364 F.2d 302, 303 (5th Cir. 1966); *see also EEOC v. Cuzzens of Ga., Inc.*, 608 F.2d 1062, 1062-63 (5th Cir. 1979) (per curiam)[3]; *cf. Maurice v. NLRB*, 691 F.2d 182 (4th Cir. 1982). When ALJ Clark ordered Interbake to submit the three documents at issue in this case to him for *in camera* review, he did so not to obtain substantive evidence for use in the pending hearing, but rather to carry out his Section

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on review of final Board orders pursuant to Section 10(e) and (f) of the NLRA, the circuit courts addressed privilege issues which arose in the course of unfair labor practice proceedings. In *Silver Spur*, the court rejected an argument that an ALJ had erroneously quashed a subpoena on privilege grounds, and in *Independent Association of Steel Fabricators,* the court rejected the argument that an ALJ had erroneously admitted evidence over a privilege objection, finding that enough additional evidence supported the Board's order. Neither case addressed the appropriate standard for district court enforcement of subpoenas.

[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). Consequently, judicial interpretations of Section 11 generally impact both NLRB and EEOC subpoena enforcement proceedings.

11(1) duty to rule on Interbake's petition to revoke the Agency's subpoena. However, the Board and its ALJs lack the power to compel obedience to document demands, even if the extent of disclosure is limited to *in camera* review by an ALJ for the sole purpose of resolving a privilege dispute. Therefore, when Interbake flatly refused to comply with Judge Clark's *in camera* review order, the Board was forced to seek enforcement of its subpoena in district court for the sole purpose of enabling *in camera* review by Judge Clark so that he could appropriately "consider[]" and rule on Interbake's privilege-based "objections" to the subpoena, as Section 11(1) requires.[4] For this reason, a substantive judicial ruling on Interbake's privilege objections at this stage of the litigation renders Section 11(1) inoperative and turns the statutory scheme on its head because, as the panel itself recognizes, "judicial review [is] available *only after* objections are considered and denied by the Board." *See Dep't of Revenue v. ACF Indus., Inc.*, 510 U.S. 332, 340 (1994) (instructing that a statute should not be interpreted in a manner that "would subvert the statutory plan" and "contravene the 'elementary canon of construction that a statute should be interpreted so as not to render one part inoperative'").

Therefore, Congress's clear direction that the Board rule on a petition to

[4] At no time in this subpoena enforcement litigation did the Board seek disclosure of Interbake's communications to Interbake's litigation adversary—that is, the NLRB's General Counsel. Indeed, the Board has consistently acknowledged that even if Judge Clark rejected Interbake's privilege arguments after conducting an *in camera* review, Interbake could still refuse to turn over the documents and require the Board to seek enforcement under Section 11(2), exactly as the statute contemplates.

revoke "before the jurisdiction of a district court . . . be invoked in an enforcement proceeding," *Hortex*, 364 F.2d at 303, necessarily calls for a more limited scope of judicial inquiry when subpoena enforcement would result in disclosure *solely* to a neutral adjudicator to facilitate the administrative resolution of a petition to revoke under Section 11(1). Accordingly, the proper question for the district court in such a case cannot be—as in a typical subpoena enforcement action that culminates in disclosure to an adversary—whether the documents are privileged *vel non*. Rather, the question must be whether the ALJ is authorized to order *in camera* review under the circumstances. This course of proceeding gives due regard to the unique status occupied by neutral adjudicators under *Zolin*, while providing courts with a useful analytical tool to prevent potential agency abuse of the subpoena power. Equally if not more important, it gives effect to both provisions of Section 11 by providing the NLRB with a mechanism to fully perform its Section 11(1) duty to rule on petitions to revoke, while preserving the judiciary's ability under Section 11(2) to timely resolve the same issues in a subsequent subpoena enforcement proceeding, if necessary.[5]

The panel criticizes this scheme, suggesting that it would "devolve into a piecemeal enforcement process" and would "interfere unduly with the administrative

[5] Moreover, this process comports with the well-established principle of administrative exhaustion, which applies in the subpoena enforcement context, as this Court and many others have previously recognized. *See Maurice*, 691 F.2d at 183 (requiring subpoenaed party "to exhaust available administrative remedies before seeking judicial relief"); *see also Cuzzens of Ga., Inc.*, 608 F.2d at 1064; *NLRB v. Frederick Cowan & Co.*, 522 F.2d 26, 28 (2d Cir. 1975).

process." (slip op. at 14). But the process ultimately endorsed by the panel no less "interfere[s]" with the Board's ability to efficiently perform its functions. The facts of this very case illustrate the problem with the panel's approach. Instead of complying with ALJ Clark's lawful *in camera* review order, Interbake has forced the Board to institute time-consuming subpoena enforcement proceedings that, to date, have lasted nearly two years while the underlying administrative hearing remains suspended. If Interbake had simply complied with Judge Clark's order in July of 2009, he might have terminated the dispute—right there and then— by finding that all of the contested documents were privileged. Similarly, if the district court had enforced the Board's limited request in August 2009 for *in camera* review by Judge Clark, further proceedings might have proven unnecessary. But in lieu of this potentially speedy process, the panel invites respondents like Interbake to fully litigate their privilege arguments in district courts even before the Board and its ALJs have had the opportunity to rule on them. In so doing, the panel approves a procedure that, by logic, can only increase the likelihood of collateral subpoena enforcement cases appearing on district court dockets while core administrative proceedings lie dormant.[6]

[6] The NLRB acknowledges that the process it advocates might provide parties with the ability to delay administrative proceedings by forcing the Board to seek district court enforcement of the same subpoena twice: *first*, to obtain an order requiring *in camera* inspection by an ALJ, and *second*, to obtain an order requiring that the documents be produced to the party requesting the subpoena, *if* the ALJ concludes that no privilege applies. However, the Board is confident that the traditional tools

Thus, in the context of this case, the better and more statutorily consistent course is for the district court to evaluate only the propriety of the ALJ's *in camera* review order. Full consideration of "any appropriate defense" raised in a subpoena enforcement action makes little sense here, where the disclosure sought by the Agency is at this point strictly limited to a neutral adjudicator. Moreover, it is inconsistent with *Zolin*'s teachings. By giving full and final consideration to Interbake's privilege objections at this point, the panel treats disclosure to ALJs no different than disclosure to the world at large. This is contrary to *Zolin*'s principles and merits correction on rehearing.

II. Without Adequate Explanation, the Panel's Decision Departs from Circuit Precedent, Including *United States v. Jones* and *Hawkins v. Stables*, By Upholding Interbake's Privilege Claims Based Solely on a Facially Deficient Log.

A. As stated, when the Board seeks subpoena enforcement to secure compliance with an ALJ's order for *in camera* review of allegedly privileged documents, the correct inquiry is whether the ALJ's order is proper under the circumstances, not whether the documents at issue are, in fact, privileged. The district court rejected this argument, as did the panel on appeal. Then, in a two-sentence footnote, devoid of any factual findings, the lower court held that Interbake's privilege log adequately

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available to deter frivolous litigation are sufficient to combat such an effect. Moreover, once it has been established that ALJs have the judicially enforceable authority to conduct *in camera* inspections to resolve privilege disputes in the first instance, the Board anticipates that parties will no longer challenge, as happened here, the existence of that very power in a subpoena enforcement proceeding.

established that the three documents at issue in this case were protected from disclosure by both attorney-client privilege and work product doctrine.

The panel's decision largely affirmed this latter conclusion, applying an "abuse of discretion" standard of review.[7] (slip op. at 15). But, this Court has repeatedly indicated that where, as here, a district court resolves a privilege dispute and "[does] not hinge its conclusion on factual findings . . . [the Fourth Circuit will] review the decision de novo." *Hawkins v. Stables,* 148 F.3d 379, 382 (4th Cir. 1998); *see also In re Grand Jury Proceedings #5,* 401 F.3d 247, 254 (4th Cir. 2005); *Sandberg v. Va. Bankshares, Inc.,* 979 F.2d 332 (4th Cir. 1992). The panel decision departs from this law of the circuit without adequate explanation. The one case cited by the panel in support of applying an abuse of discretion standard, *NLRB v. Carolina Food Processors*, 81 F.3d 507 (4th Cir. 1996), is inapposite; no privilege questions were even at issue in that case.

B. But regardless of whether a plenary or deferential standard of review is applied, the panel's substantial affirmance of the district court's privilege rulings cannot stand because it is inconsistent with well-established circuit law regarding the burdens that privilege proponents must satisfy.

It is black letter law within this circuit that the party asserting attorney-client privilege or work product doctrine has the burden of proof to establish the existence

[7] The panel correctly held that Interbake had not established that certain reply e-mails were shielded from disclosure. (slip op. at 18). Interbake had entirely omitted those replies from its privilege log and had disclosed their existence only in passing in its reply brief to the district court. As it stands, the panel's decision remands this case to the district court for further proceedings with respect to those replies. (*id.*)

of each substantive element of the respective protection. *See, e.g.*, *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982). Thus, to carry its burden, the proponent of an attorney-client privilege designation must show, inter alia, that a communication was made "for the purpose of securing primarily either (i) an opinion of law or (ii) legal services or (iii) assistance in some legal proceeding." *Id.* In addition, the proponent of a work product doctrine assertion must show that the document was "prepared because of the prospect of litigation." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Murray Sheet Metal Co.*, 967 F.2d 980, 984 (4th Cir. 1992) (emphasis in original).

In support of its burden and at its own peril, Interbake submitted only a privilege log to the ALJ, with no supporting affidavits or other evidence. That log, which asserts that attorney-client privilege and work product protection shield all three documents from disclosure, does not state—let alone prove—that the critical elements mentioned above have been satisfied. The NLRB has pointed out these glaring deficiencies from the very beginning, but Interbake did not attempt to cure them before the ALJ. And tellingly, nowhere in Interbake's submissions to the district court or to the panel did the company even claim that these essential elements had been satisfied. Yet both the district court and the panel upheld Interbake's privilege arguments relying solely on the log's very limited representations.

In light of Interbake's burden of proof, the panel's decision to uphold the company's designations based only on a facially deficient privilege log is not only puzzling, it is contrary to precedent. According to the panel's decision (slip op. at 16),

"if the assertions contained in [the privilege log] are credited, a court could reasonably conclude that all the elements described in Rule 26(a)(5) and the test set forth in *Jones* had been met." But, as the panel acknowledges, Interbake's "log is not detailed." (slip op. at 16). The most that can be gleaned from the log is that, as the panel observes, two of the three "documents were sent to an attorney," and that "the communications concerned an investigation closely linked to the ongoing NLRB adjudication." (slip op. at 17). But Fourth Circuit precedent clearly establishes that the mere fact that a communication occurred between a client and his or her attorney is not enough to establish attorney-client privilege. *Hawkins*, 148 F.3d at 383. To qualify for the privilege, the communication must contain or solicit legal advice, and Interbake never advances this claim. Nor do the log's bare assertions regarding the subject matter of the documents support the inference that the communications were made "because of the prospect of litigation," as work product doctrine strictly requires. *Murray Sheet Metal Co.*, 967 F.2d at 984. Since all three contested documents relate to Interbake's internal investigation of an employee for violations of company policy, it is equally plausible, if not likely, that the "materials [were] prepared in the ordinary course of business . . . or for other non-litigation purposes." *Id.*

Moreover, it is difficult to accept the panel's apparent willingness to "credit" the log's representations, which again are unsupported by affidavits or other evidence, when the record actually refutes some of those very representations. A central point of contention from the very outset of this case has been the discrepancy between the

dates listed on the log for two of the three documents at issue in this case and the testimony of Interbake's own human resources manager, Jill Slaughter. During the administrative hearing before the ALJ, Slaughter repeatedly testified that the earliest she learned of the company's investigation of employee Missy Jones was February 13, 2009. Yet, the log claims that Slaughter sent two e-mails regarding the "Missy Jones [i]nvestigation" on February 9th of that year. These dates are important because a witness sequestration order in effect at the time precluded Interbake from informing Slaughter of any need for an investigation regarding Jones until February 10th at the earliest. In this light, Interbake and Slaughter had a strong incentive to be accurate; yet, this glaring discrepancy exists, and Interbake has made no attempt to reconcile the conflicting statements.

In the end, the outcome reached by the panel might make sense if Interbake's privilege log is viewed as *presumptively* establishing the existence of the claimed protections so as to shift the burden to the NLRB to disprove Interbake's privilege claims. But both the Supreme Court and the Fourth Circuit have roundly rejected such reasoning. *See Zolin*, 491 U.S. at 567 ("Nor does it make sense to us to assume that once the attorney-client nature of the contested communications is established, those communications must be treated as presumptively privileged for evidentiary purposes."); *Hawkins*, 148 F.3d at 383 (rejecting a district court's "realignment of the burden of proof" that effectively forced the party resisting the claim of privilege "to disprove its applicability."). Instead, the proponent of a privilege claim bears the

burden of proof, *Jones*, 696 F.2d at 1072, and Interbake has utterly failed to satisfy this burden.

Therefore, for these reasons, the panel's resolution of Interbake's privilege arguments was not only improper and premature as described above in part I, it was contrary to applicable precedent and merits rehearing.

CONCLUSION

The panel's decision is inconsistent with Supreme Court precedent, including *United States v. Zolin*, and departs from circuit precedent such as *United States v. Jones* and *Hawkins v. Stables* without explanation. Therefore, pursuant to Federal Rules of Appellate Procedure 36 and 40, rehearing by the panel or by the Court sitting en banc is warranted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 8, 2011, the National Labor Relations Board's Petition for Rehearing or Rehearing En Banc was served by CM/ECF (with courtesy copies sent by first-class mail) to each of the following:

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