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Leslie v. Starbucks: Why Hire Labor Spies When Courts Will Do the Union-Busting for You?[1]

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In the union organizing campaigns of the 1930s, companies paid legions of spies to report everyone who attended a union meeting and what was said. Union meetings were held at night in pitch dark rooms so that no one could tell who else was there and who said what. Today, Starbucks needn't hire spies. They just use subpoenas in civil litigation. In an outrageous decision,[2] Judge John Sinatra, a Trump appointee in the Western District of New York, let them get away with it. The matter is now on appeal in the Second Circuit, and if the court of appeals does not overturn the ruling, it will turn any enforcement action brought by the National Labor Relations Board into a hunting license for companies to harass unions and workers.

The subpoena was issued in the NLRB's litigation to obtain an injunction under section 10(j) of the National Labor Relations Act against Starbucks' ongoing unfair labor practices against Starbucks workers in Buffalo and Rochester. The NLRB has alleged that Starbucks has illegally spied on workers engaged in union organizing, fired some union supporters and threatened others, promised increased benefits and better terms of employment if they refrain from unionizing, and refused to bargain in good faith. The NLRB will conduct a proceeding before an administrative law judge, as part of which both the NLRB and Starbucks will provide evidence in support of their allegations and defenses. The section 10(j) proceeding is designed to protect the organizing drive while that proceeding drags on.

Not content to follow the usual NLRA processes for gathering and presenting evidence in the administrative hearing, Starbucks tried to subpoena an enormous amount of confidential information about virtually every aspect of the entire nationwide Workers United campaign at every Starbucks across the country. They asked for things as fundamental to democratic engagement as the outreach workers had been doing to elected officials and all

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1 This piece was first published at https://onlabor.org/why-hire-labor-spies-when-courts-will-do-the-union-busting-for-you/.

2 *See Leslie v. Starbucks Corp.*, 22-CV-478 (JLS), 2022 WL 7702642 (W.D.N.Y. Sept. 23, 2022).

communications with print and broadcast journalists and on digital and social media. In other words, Starbucks has used the government's effort to protect Buffalo and Rochester Starbucks workers from ongoing retaliation as a device to get the information Starbucks needs to retaliate against union supporters at its stores nationwide.

The judge ordered the union and the workers to produce a staggering number of emails, text messages, and records of other communications including:

- The names of workers who support and oppose unionization at Starbucks stores in Buffalo and Rochester, and the contents of their communications with the union.
- For workers in the rest of the country, all communications with the union, identifying the location of the store, but allowing the names of workers to be redacted.
- All information "relating in any way" to union communication with any media outlet "concerning union organizing, union elections and other union related matters" in Buffalo and Rochester and concerning Starbucks' retaliation against workers nationwide.
- All information relating to union communications with Starbucks workers nationwide which concerned helping workers to speak to any media.
- All emails to the union since August 2021 from any Starbucks employee nationwide expressing interest in forming or supporting a union, attending a union meeting, or serving as a union representative.
- All documents relating to the timing of union elections nationwide, and everything related to reasons why Starbucks employees have said they do or don't support the union.

The order is contrary to law for several reasons.

First, most of the information that Starbucks seeks though this subpoena is protected by Section 7 of the NLRA, which prohibits interference, restraint, or coercion of workers' rights to join or support a union. Under section 7, a company cannot force workers to reveal what they said to each other or to the union, or to name names of who supports or opposes the union, or to hand over passwords to private email accounts regarding union matters. The right to keep this information confidential is necessary to prevent retaliation. For that reason, in a series of cases going back decades, the NLRB has held that some communications among and between employees and union representatives are shielded from disclosure because they reveal employee section 7 activity or collective bargaining strategy.[3]

Second, the vast scope of the court-ordered production of information, much of which is irrelevant to the NLRB's request for an injunction against ongoing Starbucks unfair labor practices in Buffalo and Rochester, violates the rule that litigants cannot use subpoenas or other civil discovery devices to harass their adversary.[4] Indeed, it is a disciplinary violation for a

[3] *Laguna College of Art and Design*, 362 NLRB 965 (2015); *Champ Corp.*, 291 NLRB 803 (1988); *Berbiglia, Inc.*, 233 NLRB 1476 (1977).

[4] Fed. R. Civ. P. 26(c), (g), 37, 45.

lawyer to seek to do so.[5] What workers nationwide have said to the union about their views on unionization has nothing to do with whether Starbucks workers in Buffalo or Rochester should be protected from retaliation. But forcing the union staff and lawyers to find, review, and make available to Starbucks' lawyers tens of thousands of emails and text messages sent or received in the last 15 months will cost an enormous amount of time and money. Indeed, even the emergency appeal seeking to overturn the judge's order takes time and money that union staff and lawyers can ill afford. Given the irrelevance of most of the material, the subpoenas serve little purpose other than harassment.

Third, some of the information the judge ordered the union to produce will reveal the union's litigation strategy; it is therefore protected from disclosure under the attorney work product doctrine.[6] Some may be protected from disclosure by NLRB doctrine intended to protect against witness intimidation that could follow release of NLRB investigative materials.[7]

Fourth, the First Amendment casts doubt on the portion of the district court order compelling production of names or other information that could identify those who belong to or support the union at stores where no election petition is pending. In *NAACP v. Alabama*,[8] the Supreme Court reversed a lower court order compelling the NAACP to produce membership lists in litigation because disclosure would burden freedom of association and had no bearing on the issues in the litigation. In *International Union v. Garner*,[9] the court extended the rationale of *NAACP v. Alabama* to information about those who attended union meetings and signed authorization cards.

Lawyers for Starbucks are cleverly seeking to turn the NLRB's proceeding to get an injunction against ongoing unfair labor practices at several Starbucks stores in western New York state into a device to get confidential information about the entire Workers United organizing campaign. If the Second Circuit does not overturn the district judge's order, it will license lawyers to use civil litigation to attack workers and their unions nationwide.

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5 Model Rules of Professional Conduct 3.4(d), 4.4(a).
6 FRCP 26(b)(3); *Hickman v. Taylor*, 329 U.S. 495 (1947).
7 *NLRB v. Robbins Tire*, 437 U.S. 214, 240 (1978).
8 357 U.S. 449 (1958).
9 102 F.R.D. 108 (M.D. Tenn. 1984).