

Projections, Inc. and Local 1298, Communications Workers of America, AFL-CIO. Case 34-CA-9217

August 23, 2000

ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS HURTGEN AND BRAME

On May 30, 2000, the Regional Director of Region 34 issued a subpoena duces tecum to Projections, Inc., the Charged Party in the captioned case, as part of its investigation of the charge filed by Local 1298, Communications Workers of America, AFL-CIO against TCI in Case 34-CA-9147. In the instant charge, the Union claims that the Charged Party violated Section 8(a)(1) by certain statements in its video, "Little Card, Big Trouble," which it sold to TCI Cablevision of south central Connecticut and which was shown to TCI's employees during the Union's organizational campaign at TCI. The subpoena seeks documents relating to the purchase of the video from the Charged Party by TCI, which the General Counsel contends are relevant to establishing an agency relationship between TCI and the Charged Party.

The Charged Party's petition to revoke subpoena duces tecum is denied as the material sought is relevant to the General Counsel's investigation of the liability of the Charged Party for the conduct alleged in the unfair labor practice charge.

Contrary to the position of our colleague, we do not believe that compliance with this subpoena would implicate the Charged Party's rights under Section 8(c) of the Act or the free speech provisions of the Constitution. Certainly, the Charged Party has not so contended in its petition to revoke subpoena duces tecum. In any event, we note that the subpoena inquiry is a narrow one, limited to whether the Charged Party and TCI have an agency relationship. The inquiry does not deal with the content of the films.

We do not agree with our dissenting colleague that Section 8(c) is an impediment to enforcement of the subpoena. Section 8(c) precludes the use of certain statements as evidence of an unfair labor practice. We are obviously not now passing on whether the statements in the video are unfair labor practices.

We also disagree with our colleague that the First Amendment precludes enforcement of the subpoena. As noted, Projections does not even raise this argument. Further, the subpoenaed evidence is simply designed to show whether Projection is *responsible* for any video statement that may be found unlawful. To be sure, in determining *whether* any statements are lawful, Section 8(c) and the First Amendment can be considered. But, the issue under investigation now is simply one of responsibility, i.e., whether Projections is responsible for *any* statement that may be found unlawful under Section 8(a)(1).

MEMBER BRAME, dissenting.

Contrary to the majority, I would grant Projections' petition to revoke the General Counsel's investigative subpoena. The subpoena seeks information concerning Projections' sale of a campaign video to TCI Cablevision for its use during a union organizing campaign involving TCI's employees. The majority has accepted the General Counsel's reasoning that the subpoena is proper because it seeks material relevant to the General Counsel's investigation. I disagree.

Section 8(c) of the Act provides that, "[t]he expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit." 29 U.S.C. §158(c). The courts have recognized that Section 8(c) of the Act was designed to protect employer free speech, and thus implements rights guaranteed by the First Amendment. *Holo-Krome v. NLRB*, 907 F.2d 1343, 1345 (2d Cir. 1990).

This subpoena probes into activity which potentially falls within the ambit of Section 8(c). In the First Amendment context, the Supreme Court has recognized that subpoenas which probe into protected expression may potentially chill the exercise of First Amendment rights. See *NAACP v. Alabama*, 357 U.S. 449 (1958). Accordingly, the Supreme Court has required the party seeking to enforce such a subpoena to show that its legitimate need for the subpoenaed information outweighs the potential intrusion on the rights of the subpoenaed party. *Id.* at 466. I would apply a similar standard to cases which, like this one, implicate 8(c) rights.

This approach is consistent with established principles governing the investigation of unfair labor practice cases. Thus, it is well settled that the Charging Party has the responsibility to proffer evidence in support of its charge. Case Handling Manual (Part One) Unfair Labor Practice Proceedings Section 10056.1. "Only when the investigation of the charging parties' evidence and pertinent leads *point to a prima facie case* should the charged party be contacted to provide evidence." Case Handling Manual (Part One) Unfair Labor Practice Proceedings Section 10056.5 (emphasis in original). See also *NLRB v. Pinkerton's*, 621 F.2d 1322, 1326 (1980) (recognizing that the Board properly declined to issue a subpoena where there was no demonstration of the relevance of the requested material).

By requiring the General Counsel to present some justification for his inquiry into areas which implicate 8(c) activity, the Board can prevent a chilling effect on employer freedom of speech and association. Because the General Counsel has not made this showing, I would grant the petition to revoke.