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Offshore Mariners United *and* International Transport Workers Federation *and* Trico Marine Operators, Inc. Cases 15–CC–832 and 15–CC–833

November 22, 2002

ORDER DENYING PETITION TO REVOKE SUBPOENA

BY MEMBERS LIEBMAN, COWEN, AND BARTLETT

This matter is before the Board on a Petition to Revoke Subpoena Ad Testificandum A-450645 filed by David Eckstein. The subpoena at issue was served on Eckstein by the General Counsel on May 14, 2002, as part of the Regional Office's investigation of charges filed against Offshore Mariners United (OMU) by Trico Marine Operators, Inc. (Trico). The charges allege, inter alia, that OMU violated Section 8(b)(4)(i) and (ii)(B) of the Act by inducing or encouraging employees of Trico's customers to refuse to perform any work related to Trico, and by threatening Trico's customers, all with an object of forcing or requiring the customers to cease doing business with Trico.

The Region's investigation disclosed that David Eckstein, a former field director for OMU, had written letters during his tenure as the OMU field director to two of the Employer's largest customers concerning the Employer's alleged antiunion/antiworker activities, and sought to meet with these customers and discuss those issues. In a followup letter to one of the customers, Eckstein stated that the OMU was contacting the customer in an attempt to highlight the inherent problems of doing business with such a company. The Region was unsuccessful in gaining the voluntary cooperation of Eckstein, and therefore issued the subpoena seeking his testimony concerning the allegations in the charges.

After receiving the subpoena, Eckstein timely filed a Petition to Revoke. The General Counsel filed a motion in opposition, and a motion to expedite. Eckstein also filed a request for hearing and oral argument.[1] Each party has also filed various responses to the filings of the other party.

Eckstein's arguments for revocation of the subpoena are as follows: First, Eckstein argues that the service of the subpoena was improper because it was sent via facsimile. Eckstein then asserts that the subpoena is overly broad and vague because there is no indication what form Eckstein's testimony will take, what areas of information the witness will be expected to provide, or whether such questions are within the purview of permissible inquiry. Eckstein further argues that because he is no longer employed by the OMU, he is not within the Board's scope of authority. In addition, Eckstein asserts that the subpoena is unduly burdensome because he must travel over a 1000 miles (from Chicago to New Orleans) to comply with the subpoena, and that the Region can obtain whatever information it seeks by other means. Finally, Eckstein maintains that the General Counsel does not have the authority to issue this precomplaint subpoena, and that the General Counsel has sufficient evidence to make a determination on whether to issue a complaint without Eckstein's testimony.

We deny the Petition to Revoke. Section 102.31(b) of the Board's Rules and Regulations provides that the Board shall revoke a subpoena if the evidence sought does not relate to any matter under investigation, if the subpoena does not describe with sufficient particularity the evidence whose production is required, or if for any other reason sufficient in law the subpoena is otherwise invalid. None of these criteria are met here.

Specifically, there is no merit in Eckstein's contention that service of the subpoena was improper. The General Counsel has attached to his opposition documents showing that on May 14, 2002, the subpoena was sent to Eckstein's principal office or place of business by Federal Express and that the subpoena was received the next day. Eckstein does not challenge the authenticity of these documents. The General Counsel also states that the facsimile sent to Eckstein's attorney was merely a courtesy copy, and is not relied on to establish service. The General Counsel's method of service is authorized under Section 102.113(c) of the Board's Rules, which states that "[s]ubpoenas shall be served upon the recipient . . . by leaving a copy thereof at the principal office or place of business of the person required to be served."

Nor has Eckstein provided any other basis for revoking the subpoena. The subpoena is not overly broad or vague, because the subpoena ad testificandum set forth the specific scope of the inquiry by notifying Eckstein that he is required to testify in the matter of *Offshore Mariners United*, Cases 15–CC–832 and 15–CC–833. In addition, there is no merit in Eckstein's contention that because he is no longer employed by OMU, it is outside the scope of the Board's authority to subpoena him to testify in this matter.[2] Further, any burden imposed on

[1] This motion is denied.

[2] See *NLRB v. The Bakersfield Californian*, 128 F.3d 1339, 1342 (9th Cir. 1997) (NLRB has authority to issue investigatory subpoenas to nonparties in unfair labor practice proceedings). See also *NLRB v. Lewis*, 310 F.2d 364, 366 (7th Cir. 1962); *Link v. NLRB*, 330 F.2d 437, 439 (4th Cir. 1964).

Eckstein by the requirement that he travel to New Orleans would appear to be outweighed by the fact that both Eckstein's attorney and the Board agent assigned the case have offices in that area. Thus, we find that compliance with the subpoena would not be unduly burdensome.[3] In addition, there is no merit to Eckstein's contention that the Board does not have the authority to issue a precomplaint subpoena. It is well established that, under Section 11(1) of the Act, the "Board may issue subpoenas requiring both the production of evidence and testimony during the investigatory stages of an unfair labor practice proceeding."[4] Moreover, it is clear that "the information sought appears relevant to the charges under investigation."[5] Accordingly, after carefully considering this matter, we deny the Petition to Revoke.

Advancing two arguments not made by Eckstein, our dissenting colleague would grant the petition to revoke. Although it is unnecessary for us to address the dissent's contentions because they were not raised by Eckstein, we find, in any event, that they lack merit.

The dissent's initial argument is that the petition to revoke should be granted because the Regional Director issued the subpoena without prior clearance from the Division of Operations Management, as allegedly required by Section 11770.2 of the NLRB Casehandling Manual, Part I, Unfair Labor Practice Proceedings. This argument is flawed for three reasons.

First, the Casehandling Manual was prepared by the General Counsel pursuant to his authority under Section 3(d) of the Act. The Casehandling Manual itself states that it is intended "only to provide . . . guidance for the Agency's staff" and is "not a form of authority binding on the General Counsel or on the Board."[6] For this reason, the dissent errs in relying on the Casehandling Manual as a basis for granting the petition to revoke the subpoena.

Second, on May 1, 2000, then General Counsel Leonard R. Page issued a memorandum substantially increasing the authority of the Regional Offices to issue investigative subpoenas without first obtaining approval from headquarters.[7] The wording of this memorandum is broad enough to authorize the issuance of the subpoena in issue here.[8] Thus, this memorandum effectively rebuts the dissent's contention that the subpoena was not validly issued.

Third, on October 3, 2002, the present General Counsel, Arthur F. Rosenfeld, personally submitted a "Motion Requesting Expedited Ruling on Validity of Investigative Subpoena In Statutory Priority Cases." In so doing, the General Counsel reaffirmed and ratified the Regional Director's issuance of the subpoena in issue. This is yet another reason for rejecting the dissent's claim that the Regional Director exceeded his authority.

The dissent's remaining argument is that the Board's policy against pretrial discovery is both unfair and inefficient. In his view, the Board should provide "full pretrial discovery to all parties involved in Board proceedings." Because the Board's rules currently do not provide discovery rights to all parties, the dissent contends that the petition to revoke the subpoena should be granted. We respectfully decline our dissenting colleague's invitation to profoundly alter Board policy in this area.

"Pretrial discovery in Board proceedings is neither constitutionally nor statutorily required." *NLRB v. Washington Heights*, 897 F.2d 1238, 1245 (2d Cir. 1990). Historically, the Board has prohibited disclosure of documents in the possession of the General Counsel, whether in response to a subpoena or otherwise, without the General Counsel's written consent.[9] The Board's policy is well established and has been sustained by the circuit courts.[10] Further, Congress has long recognized the Board's policy and never changed it.[11]

The Board's policy is based not merely on the "cost and inconvenience full discovery would impose on administrative proceedings."[12] More fundamentally, as

[3] Of course, the parties remain free to reach an accommodation on an alternative location for the taking of Eckstein's testimony.

[4] *NLRB v. North Bay Plumbing*, 102 F.3d 1005, 1008 (9th Cir. 1996).

[5] *NLRB v. Playskool, Inc.*, 431 F.2d 518, 520 (7th Cir. 1970).

[6] See the section entitled, "Purpose of Manual."

[7] See Memorandum GC 00-02, "Investigative Subpoenas."

[8] The memorandum states, inter alia, that "[Regional] Directors and their designees are authorized to issue investigative subpoenas *ad testificandum* and *duces tecum* to charged parties and third-party witnesses whenever the evidence sought would materially aid in the determination of whether a charge allegation has merit and whenever such evidence cannot be obtained by reasonable voluntary means."

[9] See Sec. 102.118(a) of the Board's Rules and Regulations. A limited exception to this rule is set forth in Sec. 102.118(b)(1), which requires the production of statements by the General Counsel or Charging Party witnesses after they have testified.

[10] See cases cited in *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 237 fn. 16 (1978).

[11] See *Robbins Tire*, supra, 437 U.S. at 238–239 (stating that in enacting the investigatory records exemption to the Freedom of Information Act in 1966, Congress "was particularly concerned that premature production of witnesses' statements in NLRB proceedings would adversely affect that agency's ability to prosecute violations of the NLRA, and . . . the legislative history of the 1974 amendments affords no basis for concluding that Congress at that time intended to create any radical departure from prior, court-approved Board practice.").

[12] *P.S.C. Resources, Inc. v. NLRB*, 576 F.2d 380, 386 (1st Cir. 1978). See *Emhart Industries v. NLRB*, 907 F.2d 372, 378 (2d Cir. 1990)("Pretrial discovery, perhaps the primary source of delay in civil actions, is almost never allowed by the Board."); *David R. Webb Co.*, 311 NLRB 1135, 1136 (1993)("Even granting that some advantages may be gained from prehearing discovery, the fact remains that it can be productive of

discussed in *Robbins Tire*, supra, the Board's policy is grounded in "the peculiar character of labor litigation," where "witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment."[13] As the Supreme Court recognized, "both employees and nonemployees may be reluctant to give statements to the NLRB investigators at all, absent assurances that unless called to testify in a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated."[14] The Court specifically cautioned that the possibility that a "change in the Board's prehearing discovery rules will have a chilling effect on the Board's sources cannot be ignored."[15] We therefore adhere to the Board's longstanding policy and reaffirm it.[16]

Accordingly, having rejected the various arguments presented both by Eckstein and our dissenting colleague, we deny the petition to revoke the General Counsel's investigatory subpoena.

Dated, Washington, D.C. November 22, 2002

Wilma B. Liebman, Member

Michael J. Bartlett, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER COWEN, dissenting.

Contrary to my colleagues, who deny David Eckstein's Petition to Revoke Subpoena No. A-450645, I would grant the petition because the prehearing discovery sought by the General Counsel is not provided for under the Board's rules. I also believe that it is important for the Board to reexamine the appropriateness of the Board's rules governing prehearing discovery.

The Federal Rules of Civil Procedure generally do not apply to administrative proceedings, *Silverman v. Commodity Futures Trading Commission*, 549 F.2d 28, 33 (7th Cir. 1977), and the Board has not adopted the use of those rules for prehearing discovery. NLRB Casehandling Manual, (Part One) Unfair Labor Practice Proceedings Sec. 10292.4. The NLRB Casehandling Manual specifies just four situations in which the Regional Director may issue an investigatory subpoena without clearance by the Division of Operations Management. Id. at Sec. 11770.2. These are situations where (1) a potential witness is willing to testify or produce records only if subpoenaed; (2) the subpoena seeks information from a party to obtain "commerce" information for determination of Board jurisdiction over that party; (3) the subpoena seeks procurement of an eligibility list for an impending election, or (4) the subpoena seeks the payroll list of union employees to determine the majority status of a union in an unfair labor practice case.

In this case, the General Counsel has directed that Eckstein appear "for the purpose of giving testimony before an agent of the National Labor Relations Board" in Offshore Mariners United (Trico Marine Operators, Inc.), Cases 15–CC–832 and 15–CC–833. This information request falls outside the four areas of inquiry allowed in §11770.2 of the NLRB Casehandling Manual.[1] Therefore, I would find that the petition to revoke the General Counsel's investigatory subpoena should be granted.

Although the General Counsel may compel the production of certain limited types of information prior to hearing, all other parties appearing before the Board do not have the ability to seek pretrial discovery. The Board rules prohibit any employee of the Board, regional director or administrative law judge from producing "any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in response to a subpoena duces tecum or otherwise" except as might be required under the Freedom of Information Act or upon the written consent of the Board, the Chairman of the Board or the General Counsel. 29 C.F.R. Sec. 102.118(a)(1) (2001). The Board's failure to provide discovery rights for all parties has resulted in what has been described as "trial by ambush" for parties accused of violating the Act. *New England Medical Center Hospital v. NLRB*, 548 F.2d 377, 387 (1st Cir. 1977); *Capital Cities Communications, Inc. v. NLRB*, 409 F.Supp. 971, 977 (N.D.Cal.1976). Courts have criticized the unfairness of the Board's restrictive discovery rules. *NLRB v.*

delay, offering, as it does, abundant opportunities for collateral disputes.").

[13] 437 U.S. at 240 (quoting *Roger J. Au & Son, Inc. v. NLRB*, 538 F.2d 80, 83 (3d Cir. 1976)).

[14] Id.

[15] Id. at 241.

[16] In reaffirming the Board's longstanding policy, Member Bartlett recognizes that the Board's policy provides the General Counsel with an advantage, and creates the potential for abuse of the subpoena power during the pretrial investigation. However, he believes that the answer to these concerns is for the Board to do what we have done here: scrutinize the General Counsel's investigative subpoena, in light of the objections raised in the petition to revoke, to ensure that the subpoena conforms to the provisions of Sec. 11 of the Act and Sec. 102.31 of the Board's Rules and Regulations.

[1] Specifically, the investigatory subpoena is not covered by the first area of inquiry because Eckstein has not expressed a willingness to testify or produce records if subpoenaed.

Hareman Garment Corp., 557 F.2d 559, 563 (6th Cir. 1977); *Pepsi-Cola Bottling Co. v. NLRB*, 92 LRRM 3527 (Kan. 1976).[2] In *NLRB v. Southern Materials Co*., 345 F.2d 240 (4th Cir. 1965), the Fourth Circuit stated:

> . . . the Board, acting in a quasi judicial capacity as it does, should freely permit discovery procedure in order that the rights of all parties may be properly protected.

Id. at 244. See also, *NLRB v. Miami Coca-Cola Bottling Co*., 403 F.2d 994, 996 (5th Cir. 1968); *NLRB v. Rex Disposables*, 494 F.2d 588, 592 (5th Cir. 1974). It is incumbent upon the Board to address the unfairness and inefficiency embodied in its current discovery procedures.[3]

The primary purpose of prehearing discovery is to ensure that a party has "an adequate opportunity to prepare or develop his defense to the charges leveled against him." *Conway v. International Assn. of Heat & Frost Insulators & Asbestos Workers*, 169 LRRM 3246 (N.D. Ohio 2002), citing *Yashon v. Hunt*, 825 F.2d 1016, 1026 (6th Cir. 1987). The Board's current discovery procedures do not allow a party charged with an unfair labor practice to obtain information it may need to prepare or develop its defense. *Pepsi-Cola Bottling Co.*, supra ("Counsel for parties charged with unfair labor practices must, of necessity, engage in considerable guesswork."). Discovery for all parties in Board proceedings is preferable because it allows the parties to assess their positions more thoroughly and determine whether to seek a resolution or proceed forward through the administrative hearing process. With full pretrial discovery available to all parties, parties would be better able to narrow and resolve issues and thereby expedite hearings or even avoid hearings altogether. I therefore encourage my colleagues to reexamine the appropriateness of the current Board discovery rules, and recommend that they consider providing full pretrial discovery to all parties involved in Board proceedings. Because there currently is no right to pretrial discovery, I would grant Eckstein's petition to revoke the General Counsel's investigatory subpoena.[4]

Dated, Washington, D.C. November 22, 2002

William B. Cowen, Member

NATIONAL LABOR RELATIONS BOARD

[2] The General Counsel has an inherent advantage in discovery because the Board has afforded the General Counsel certain discovery rights that are not afforded to any other parties, and because respondents are naturally inclined to cooperate with the General Counsel during the investigative stage based on their interest in avoiding litigation. As long as this imbalance in discovery exists, the Board should narrowly circumscribe the discovery available to the General Counsel. Providing discovery to the General Counsel beyond the areas outlined in §11770.2 of the NLRB Casehandling Manual, above, while denying discovery to companies or unions accused of violating the Act, would only enhance the "trial by ambush" that unfairly prejudices the parties appearing before the Board. The Board should therefore restrict discovery to those areas delineated in §11770.2 of the NLRB Casehandling Manual.

[3] Although there is no constitutional or statutory requirement that discovery be available in administrative proceedings, the administrative hearing procedure must still comply with the fundamentals of due process. See *Silverman*, supra; *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507, 512–513 (4th Cir. 1996); *Swift & Co. v. United States*, 308 F.2d 849, 851 (7th Cir. 1962).

[4] I agree with my colleagues that the information which the General Counsel seeks appears relevant to the charges under investigation, but this alone does not entitle the General Counsel to compel production of the information prior to hearing under the extant Board discovery rules. This situation does, however, provide a further example of why the Board's discovery rules should be amended to allow for full pretrial discovery for all parties.