American Postal Workers Union Local 64 (United States Postal Service) *and* Teresa S. Taft. Case 21–CB–13333(P)

October 10, 2003

ORDER DENYING PETITION TO REVOKE SUBPOENA

CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

This matter is before the Board pursuant to the Union's petition to revoke two investigatory subpoenas ad testificandum (A-607736 and A-607737), which were served by the Regional Director on January 24, 2003. The subpoenas were served on Yolanda Elder and Arthur Clark, the Union's general president and vice president, respectively, in connection with the Regional Office's investigation of an unfair labor practice charge, Case 21–CB–13333(P), filed against the Union by Teresa Taft. The charge alleges that the Union violated Section 8(b)(1)(A) of the Act by: (1) removing Taft from her position as union steward because her husband had filed unfair labor practice charges against the Union; (2) prohibiting her from attending mandatory union steward training; and (3) failing to provide her with notices of the time and location of Union Women's Committee meetings.

On January 27, 2003, the Union filed a timely petition to revoke the two subpoenas. The Union's petition set forth the following grounds for revoking the subpoenas:

> The Union has already cooperated with the Region by providing two (2) written statements setting forth its position, as well as numerous documents, with regard to the above-entitled charge. In addition, [the Union is] unaware of any law that requires a party to produce the Charged Party for the purpose of providing an affidavit to the Region during the investigation of an unfair labor practice charge against that party. Moreover, [the Regional investigator's] desire to hear Ms. Elder and Mr. Clarke's recollection of an alleged conversation with the Charging Party is insufficient to warrant the issuance of subpoenas. As always, the region has the option of issuing a complaint based on the evidence (or lack thereof) it has already compiled.

We deny the Union's petition to revoke. Section 11(1) of the Act specifically authorizes the issuance of investigatory subpoenas seeking testimony,[1] and the Board's authority to issue such subpoenas is well established. See *Offshore Mariners United*, 338 NLRB 745, 746 (2002); *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1007–1008 (9th Cir. 1996).

Our dissenting colleague would grant the Union's petition to revoke the subpoenas on the grounds that the Regional Director has failed to show that the subpoenaed testimony is relevant to the investigation, and that the subpoenas do not describe with particularity the evidence being sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. For the reasons set forth below, we disagree.

As an initial matter, we find it significant that the Union itself has not raised the issues addressed by our colleague. Our colleague states his belief that the Union has sufficiently raised the issues; however, he fails to identify any basis in the Union's petition to revoke to support that belief. Nor are we able to discern any.

Our colleague alternatively asserts that the Board has a responsibility to assure that its subpoenas are in compliance with Board Rules. The Board surely has that responsibility; but we should exercise it with appropriate restraint by generally limiting our review to the issues and arguments raised by the parties.[2] There are both legal (procedural due process) and practical (administrative economy and efficiency) reasons for exercising such judicial restraint.[3]

As our colleague has raised the issues, however, we will address them. First, the subpoenas clearly "relate[] to [a] matter under investigation or in question" as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules. The Regional Director asserts that both of the subpoenaed union officials were present during the underlying events alleged in the charge, and that both are being subpoenaed to give their accounts of those events so

[1] Sec. 11(1) provides, in relevant part, as follows:

> The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board, or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of the subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required.

[2] See, e.g., *Avne Systems, Inc.*, 331 NLRB 1352, 1354 (2000) (Board Member's dissenting argument not made by excepting party itself is not procedurally before the Board).

[3] We perceive no harm to the effective administration of the Act here by enforcing subpoenas that even the party seeking revocation does not contend are too vague or seek irrelevant information. On the other hand, we do believe such harm would result if we adopted our colleague's position and routinely revoked subpoenas on grounds not asserted by the party seeking revocation.

that the Regional Director may complete the investigation and make a determination whether to issue a complaint. No further demonstration of relevance is required. Cf. *RNR Enterprises, Inc. v. SEC*, 122 F.3d 93 (2d Cir. 1997), cert. denied 522 U.S. 958 (1997) (relevance of investigatory subpoenas ad testificandum was established by SEC attorney's declaration that the subpoenaed testimony would assist in determining whether there had been violations of the Federal securities laws as described in the SEC's formal order directing an investigation, and specifically in connection with RNR's 1995 offering of $5 million of unregistered securities to the public).

Second, the subpoenas describe with sufficient particularity the testimony sought. The subpoenas ad testificandum specifically identify the unfair labor practice case involving the Union—*American Postal Workers Union, Local 64*, Case 21–CB–13333(P)—regarding which the union officials are required to testify. Again, nothing more is required. See *Offshore Mariners United*, supra (subpoena ad testificandum relevant and not overly broad or vague where subpoena informed witness that his testimony was needed pursuant to cited unfair labor practice charges); see also *RNR Enterprises, Inc. v. SEC*, supra.[4] Moreover, it is clear that the Union was aware of the testimony being sought by the subpoenas, as its petition to revoke describes it ("Ms. Elder and Mr. Clarke's recollection of an alleged conversation with the Charging Party.")

Accordingly, we deny the Union's petition to revoke the subpoenas.

CHAIRMAN BATTISTA, dissenting.

I would grant the Union's Petition to Revoke. The charge alleges essentially that the Union, for discriminatory reasons, removed the Charging Party from her stewardship. The Regional Director tells us only that the two subpoenaed witnesses have not "provide[d] sufficient information regarding certain underlying events," and thus "further evidence" is required. We do not know what the "information" is, what the certain "underlying events" are, or what the "further evidence" is.[1] I believe that a more specific showing of relevance is required.

Section 102.31(b) requires that the subpoena must "describe with sufficient particularity the evidence whose production is required." See Section 102.31(b) of the Board's Rules. In my view, the general references to "underlying events," "further evidence" and "information" fall far short of the "particularity" that is required.

My colleagues say that it is sufficient that the subpoena simply identify the name and number of the case under investigation. I disagree. The case caption itself would set forth that information and, according to my colleagues, nothing more is required. In my view, the mere naming of the case does not, standing alone, "describe with sufficient particularity the evidence whose production is required."

My colleagues cite *Offshore Mariners United*, supra, as support for their view. However, that case offers no such support. In that 8(b)(4)(B) case, a union official had written a letter to two neutral employers who did business with a primary employer. The letter described the alleged anti-union activity of the primary and asked to meet with the neutrals. The subpoena named the letter-writer and sought his testimony concerning the letter. The subpoena was therefore narrowly focused, quite unlike the "underlying events" and "further evidence" involved here. The subpoena was therefore particularized. In our case, as set forth above, the subpoena is vague and general.

My colleagues apparently believe that a subpoena need not set forth with particularity the evidence whose production is required. In their view, it is sufficient if the particularity is set forth in the opposition to revoke the subpoena. Of course, this is directly contrary to Rule 102.31(b), which requires that the subpoena itself describe the information with particularity. In addition, the Rule comports with general precepts concerning subpoenas. That is, it makes no sense to permit a subpoena to be vague and indefinite and to have the gaps filled in only after motions and countermotions.

Finally, my colleagues say that the Union has not "specifically" raised the issues discussed above. I believe that the Union has sufficiently raised the issue. In any event, it is *the Board's* subpoena that is being issued, and it is *the Board's* responsibility to assure that its subpoenas are in compliance with Board Rules.

I agree with my colleagues' observation that the Board should exercise its responsibilities "with appropriate restraint." However where, as here, a subpoena wholly fails to comport with a Rule, it is surely the Board's responsibility to point out the failure and to act accordingly.[2]

[4] Contrary to our colleague's suggestion, *Offshore Mariners* is not distinguishable. Like here, the testimonial subpoena in that case simply cited the case name and number. The more particular description of the testimony being sought was not set forth in the subpoena itself; rather, as here, it was set forth in the Regional Director's opposition to the petition to revoke.

[1] Concededly, there is a suggestion that one specific matter involved is an alleged conversation between a subpoenaed witness and the Charging Party. However, this is a matter raised by the Union, not by the party asking for the subpoena. In addition, the subpoena request is not confined to that one item.

[2] Contrary to the suggestion of my colleagues I would not "routinely" revoke a subpoena on a ground that is not asserted by the party seeking revocation. Rather, I would revoke the subpoena here because it utterly fails to comport with the Board's Rule.