

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 95-59

August 17, 1995

TO: All Regional Directors, Officers-in-Charge
and Resident Officers

FROM: B. Allan Benson, Acting Associate General Counsel

SUBJECT: Section 11 Subpoenas

Attached is a recent U.S. District Court decision in *NLRB v. Alaska Pulp Corporation*, 149 LRRM 2684 (D.D.C. 1995), that illustrates the breadth of the investigative powers available to the Board under Section 11 of the Act.¹

Of particular interest is the court's sanctioning of the use of investigative subpoenas during the pendency of an administrative proceeding -- that is, after issuance of complaint (or a compliance specification) and prior to issuance of an ALJD or Board decision. In this instance, after issuance of a compliance specification and while the compliance proceeding was pending decision before an ALJ, the Contempt Branch caused an investigative subpoena to be served on respondent seeking information, in the form of documents and answers to interrogatories, concerning possible dissipation of assets and potential derivative liability of sister corporations and officers of respondent. Respondent moved to quash on grounds, inter alia, that the Board was engaging in back door discovery during the pendency of the compliance proceeding, and that, in any event, a respondent has no obligation under Section 11 to furnish information in the form of answers to interrogatories. The Board denied the motion to quash on grounds that the "information sought appears to meet the requirements of Section 11(1) of the Act"

In the ensuing subpoena enforcement action, the court found "ample justification for the Board to investigate both the ability of Alaska Pulp to satisfy any final liquidated backpay claim order and the existence of derivative liability on the part of wholly-owned subsidiaries or corporate entities closely connected to Alaska Pulp." The court emphasized that there is "absolutely no requirement, as Alaska Pulp suggests, that the

¹ Also attached is a related decision in the same case (published at 149 LRRM 2682 (D.D.C. 1995)) holding that although the company under investigation was located in Alaska, the District Court in the District of Columbia has jurisdiction to enforce the subpoena because the investigation was centered in the District of Columbia. The Court observed that because subpoena enforcement proceedings are summary in nature, the location of the documents at issue is "irrelevant to venue considerations."

Board is banned from taking action to protect backpay claims of striking employees . . . until there is a final liquidated backpay order,” citing *Linde v. RTC*, 5 F.3d 1508, 1517-1518 (D.C. Cir. 1993) for the proposition that “[i]nvestigations may be conducted by administrative agencies both pre- and post-complaint.” As the court observed, “[a]n administrative agency does not have to wait until all the horses have been stolen from the barn, before it closes the door.”

The Court also had no difficulty concluding that the Board was entitled to insist that information be provided under Section 11 in the form of answers to interrogatories:

Through the use of a subpoena, the Board may require the appearance of witnesses or the production of evidence. 29 U.S.C. 161(1). Such production does not exclude the use of interrogatories to obtain evidence. The . . . Seventh Circuit stated that the Board may use its investigative powers to obtain ‘everything it [could] seek[] for an order compelling discovery.’ *NLRB v. Interstate Material Corp.*, 930 F.2d 4, 6 (7th Cir. 1991). The language in § 11 of the NLRA includes authority to require Alaska Pulp to compile evidence that is not in documentary form. *EEOC v. Maryland Cup Corp.*, 785 F.2d 471 (4th Cir. 1986).

Consistent with Memoranda GC 94-9 and OM 93-37, the Regions are reminded to make appropriate use of the investigative authority provided under Section 11 of the Act. Also, please be reminded to furnish copies of investigative subpoenas to your Assistant General Counsel in accord with Memorandum GC 94-9. Questions regarding this memorandum, or the use of Section 11 subpoenas in general, may be addressed to your Assistant General Counsel or to the Contempt Litigation or Special Litigation Branches.

B. A. B.

Attachments

cc: NLRBU

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