

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

ALLIED WASTE SERVICES OF MASSACHUSETTS, LLC
d/b/a ALLIED WASTE SERVICES OF FALL RIVER
a/k/a THE FALL RIVER HAULING COMPANY

and

Cases 01-CA-123082
01-CA-126843

MANUEL ALEXANDER

ORDER¹

The Employer's petition to revoke subpoena duces tecum B-739151 is denied. The subpoena seeks information relevant to the matters under investigation and describes with sufficient particularity the evidence sought, as required by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Further, the Employer has failed to establish any other legal basis for revoking the subpoenas. See generally, *NLRB v. N. Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

In the instant case, the subpoenaed document – the employer's "Employee Handbook" – is potentially relevant to the specific alleged violations articulated in the unfair labor practice charge. The standard of "relevance" applicable to Board subpoenas is extremely broad. Although neither of the two pending charges "alleges a violation based on language contained in the employee handbook" (Employer's Petition to Revoke at 3), the Regional Director has a legitimate position that the Employee Handbook may shed light on the articulated nondiscriminatory reasons for Alexander's

¹ The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

discharge or may relate to the disciplinary process generally, which, in turn, may bear on the potential “existence of animus.” Counsel for the Regional Director’s Reply and Opposition at 3.

Absent the justification proffered by the Region (at least when defending against Employer’s petition to revoke), there could be merit in Employer’s additional argument that “insistence on the entire handbook without any attempt whatsoever to justify its relevance to the allegations under investigation is a blatant and obvious ‘fishing expedition’ in which [the Regional Director] *apparently hopes to find some completely unrelated section of the handbook that . . . can be argued to somehow infringe on employee Section 7 rights.*” Employer’s Petition to Revoke at 3 (emphasis added).

Two considerations warrant discussion here. First, Section 11(1) of the Act limits the Board’s subpoena power to a particular “matter under investigation or in question.” The statute does not give the Board authority to initiate its own unfair labor practice proceedings. Although Section 10(a) states that the Board is empowered “to prevent any person from engaging in any unfair labor practice,” Section 10(b) makes clear that the Board may only issue complaints and hold hearings regarding unfair labor practices “[w]hensoever *it is charged* that any person has engaged in or is engaging in any such unfair labor practice” (emphasis added); see also *National Assn. of Manufacturers v. NLRB*, 717 F.3d 947, 951 (D.C. Cir. 2013) (Board cannot enforce the Act unless “outside actors” file an unfair labor practice charge and “neither the Board nor its agents are authorized to institute charges *sua sponte*”) (quoting Robert A. Gorman & Matthew W. Finkin, *BASIC TEXT ON LABOR LAW*, at 10 (2d ed. 2004)).

Second, the Act's legislative history reveals the above limitation on the Board's authority was no accident. The earliest Wagner Act legislation, as introduced, would have given the Board broad affirmative powers to address matters at the Board's own initiative. These bills stated:

Whenever any member of the Board, or the executive secretary, or any person designated for such purpose by the Board, *shall have reason to believe, from information acquired from any source whatsoever, that any person has engaged in or is engaging in any such unfair labor practice, he shall in his discretion issue and cause to be served upon such person a complaint. . . . Any such complaint may be amended by any member of the Board or by any person designated for that purpose by the Board at any time prior to the issuance of an order based thereon; and the original complaint shall not be regarded as limiting the scope of the inquiry.*

S. 2926, 73d Cong. § 205(b) (1934), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act of 1935 (hereinafter "NLRA Hist.") at 6 (emphasis added); H.R. 8434, 73d Cong. § 205(b) (1934), 1 NLRA Hist. at 1133 (emphasis added). By the time the NLRA was enacted, Congress had eliminated the Board's power to initiate or expand unfair labor practice proceedings, at the Board's initiative, as reflected in the express limitations set forth in Sections 10(b) and 11(1).

The Board has reasonable latitude to investigate alleged unfair labor practices in a manner that may go beyond "the precise particularizations of a charge." *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308-309 (1959) (citation and footnote omitted). However, this authority to investigate matters "related to those alleged in the charge and which grow out of them while the proceeding is pending before the Board" does *not* mean the Board has "carte blanche to expand the charge as [it] might please, or to ignore it altogether." *Id.* (citation omitted).

In short, the Region’s explanation of relevance here – indicating that the request for the Employee Handbook bears some potential relevance to the pending allegations – warrants denying Employer’s petition to revoke. However, if the record revealed that the Region invoked our subpoena power to obtain employee handbooks or policy statements for the purpose of initiating or expanding charges or investigations, this would be an “improper purpose” that would warrant revocation of the subpoena. Cf. *SEC v. Brigadoon Scotch Distributors*, 480 F.2d 1047, 1056 (2d Cir. 1973). More generally, such action would constitute an exercise of authority that Congress intentionally denied to the Board.

In the instant case, the record does not establish that the Region subpoenaed the Employee Handbook for an improper purpose. Accordingly, the Employer’s petition to revoke is denied.

Dated, Washington, D.C., December 31, 2014.

PHILIP A. MISCIMARRA, MEMBER

HARRY I. JOHNSON, III, MEMBER

Member Hirozawa, concurring in the result.

I join my colleagues in denying the Employer’s petition to revoke. The subpoena clearly meets the requirements of Section 11(1) of the Act and Section 102.31(b) of the Board’s Rules, and lies well within the long-recognized scope of the Board’s investigatory power.² Accordingly, it is not necessary to address my colleagues’ views

² See *NLRB v. Fant Milling Co.*, 360 U.S. 301, 308-309 (1959) (The purpose of a charge “is merely to set in motion the machinery of an inquiry. The responsibility of making that

on the limits of that power or their discussion of whether the subpoena would be proper in the hypothetical situation they describe.

KENT Y. HIROZAWA, MEMBER

(SEAL)

NATIONAL LABOR RELATIONS BOARD

inquiry, and of framing the issues in the case is one that Congress has imposed on the Board. . . . Once its jurisdiction is invoked the Board must be left free to make full inquiry under its broad investigatory power in order properly to discharge the duty of protecting public rights which Congress has imposed upon it. There can be no justification for confining such an inquiry to the precise particularizations of a charge.” (internal citations omitted); accord, *National Licorice Co. v. NLRB*, 309 U.S. 350, 369 (1940).