

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**INTERNATIONAL UNION OF OPERATING
ENGINEERS, LOCAL 18, and its agent,
PCS BUILDERS, LLC**

and

Case 08-CB-147620

LABORERS LOCAL UNION No. 894

ORDER¹

International Union Of Operating Engineers Local 18's petition to revoke subpoena duces tecum B-1-MBUC3X is denied. The subpoena seeks information relevant to the matter 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, Local 18 has failed to establish any other legal basis for revoking the subpoena. See generally *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005 (9th Cir. 1996); *NLRB v. Carolina Food Processors, Inc.*, 81 F.3d 507 (4th Cir. 1996).

Dated, Washington, D.C., September 28, 2015.

MARK GASTON PEARCE, CHAIRMAN

KENT Y. HIROZAWA, MEMBER

MEMBER MISCIMARRA, concurring.

The Board has broad authority under the National Labor Relations Act (NLRA or Act) to investigate "any matter under investigation or in question" as the result of an unfair labor practice charge, which includes broad subpoena power. Sec. 11(1) and (2). I concur with the denial of the petition to revoke filed by the International Union of

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

Operating Engineers Local 18 (IUOE or Local 18) in this case, and this denial permits the General Counsel to seek enforcement of the Board’s subpoena. However, this matter presents a close question because the underlying dispute involves alleged discrimination on the basis of union membership by Local 18 – against members of various Laborers’ locals – which allegedly occurred during the construction of Local 18’s new headquarters building.² Accordingly, Local 18 raises the following defense: in its capacity as a “private actor” or “market participant” (rather than as a labor organization), it was permitted to insist on a prohibition against having work performed on its headquarters building by members of certain non-IUOE Laborers’ locals. Thus, Local 18 maintains that “as a private actor, [IUOE Local 18] may conduct business in the free market without running afoul of labor concerns that implicate the Act and the Board’s resulting jurisdiction.”³

At this point, the Board does not pass on the Local 18’s “private actor” argument nor do I, but it attempts to raise a potential question about the lack of Board jurisdiction. Additionally, I believe enforcement of a Board subpoena may be inappropriate if the documents sought pertain to the merits of a dispute and not to the jurisdictional issue raised by the charged party. For this reason, I dissented from the denial of a petition to revoke in *G2 Secure Staff, LLC*, Case 12-CA-111844 (March 25, 2015) (Member Miscimarra, dissenting), where the respondent maintained it was covered by the Railway Labor Act, not the NLRA, and where a Regional Office of the Board had

² The charge alleges that the discrimination violates Sec. 8(b)(1)(A) and 8(b)(2) of the Act.

³ *Petition to Revoke Subpoena Duces Tecum*, p. 8 (citing *Bldg. & Constr. Trades Council v. Associated Builders & Contrs. (Boston Harbor)*, 507 U.S. 218 (1993) and *Wisc. Dept. of Indus., Labor & Human Rels. v. Gould, Inc.*, 475 U.S. 282 (1986)).

previously dismissed a charge against the respondent on this basis. Therefore, I would have granted the petition to revoke, which clearly went to the merits of the underlying charge, but “without prejudice to a subpoena limited to the question of Board jurisdiction or a subpoena issued after a determination by the Regional Director, in the first instance, that Respondent [was] . . . subject to the NLRA.”

In the instant case, although the question presented is a close one, I agree with the denial of the petition to revoke for several reasons. First, Local 18 is unquestionably a labor organization over which the Board generally has jurisdiction putting aside the particular dispute in this case, and Local 18’s status as labor organization under our statute is reflected in many other cases in which it has been a party. Second, it is not entirely clear whether the “private actor” argument raised by Local 18 really involves a question of Board jurisdiction, as opposed to merely raising a defense against the alleged violation. (It is possible that the Board has jurisdiction over this dispute but Local 18 may prevail on the merits because its conduct, as a “private actor,” regarding the construction of its own headquarters, does not violate the Act.) Third, regardless of how we characterize the “private actor” argument raised by Local 18, the parties’ competing positions suggest that the resolution of this argument will require examination of the subpoenaed collective-bargaining agreements and project agreements (in addition to whatever other evidence the parties may choose to submit in support of their respective contentions). In other words, even if the “private actor” argument raises a question of jurisdiction, its resolution appears to involve some substantial overlap with the merits of the alleged violations, and it is reasonable to conclude that the Region cannot fairly investigate the former without considering the

latter. It is also relevant, in my view, that the record before us does not suggest it will be unduly onerous or burdensome for Local 18 to compile and submit the subpoenaed documents, which encompass collective-bargaining agreements and project agreements pertaining to a specified location.⁴

In these circumstances, I believe it is appropriate to enforce the subpoena and I concur with the Board's denial of Local 18's petition to revoke the subpoena.

PHILIP A. MISCIMARRA, MEMBER

⁴ The challenged subpoena requests seek: "Copies of any and all agreements, including but not limited to collective bargaining agreements and/or project agreements between the International Union of Operating Engineers, Local 18 and any and all contractors and/or subcontractors who are working or have worked on the construction site known as the District 6 Building and/or I.U.O.E Local 18 Headquarters and/or a training center located on Triplett Blvd. in Akron, Ohio."