UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STARBUCKS COFFEE CO.

and **Case 01-CA-177856**

JENNIFER KELLEY

ORDER

The Employer's Petition to Revoke subpoena duces tecum B-1-U3IELZ 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 subpoena.[1]

[1] In denying the petition, we have considered the subpoena in light of the Region's statement in its opposition that, to the extent that documents responsive to pars. 2(a) and (b) may reveal addresses, contact information, or other information regarding customers other than the customer whose complaint was allegedly a factor in the Charging Party's discharge, the Region would not object to the Employer redacting such information in its production, provided that this offer is understood not to constitute any waiver of the Region's right to view such redacted information should it become necessary. The Region's modification is designed to promote efficiency in obtaining from the Employer the information that the Region needs for its investigation, and, accordingly, we do not agree with our colleague's position that the better practice is to grant the motion to revoke the subpoena without prejudice to the potential issuance of a new subpoena.

To the extent that the Employer has provided some of the requested material, it is not required to produce that information again, provided that the Employer accurately describes which documents under subpoena it has already provided, states whether those previously-provided documents constitute all of the requested documents, and provides all of the information that was subpoenaed. Further, to the extent that the Employer has knowledge of the existence of responsive documents that are not in its possession or control, the Employer shall identify those documents and their locations, if known.

Our colleague would grant the Employer's petition with respect to the Region's statements, in its cover letter, that the Employer must be prepared to provide certain information regarding the methodology of its electronic search for

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., May 19, 2017.

MARK GASTON PEARCE MEMBER

LAUREN McFERRAN, MEMBER

CHAIRMAN MISCIMARRA, dissenting in part.

I respectfully dissent, in part, from the Board majority's denial of the petition to revoke the subpoena. As discussed below, I would grant the petition to revoke with respect to portions of subpoena paragraphs 2 and 4, without prejudice to the Region's right to issue new or amended subpoenas.

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requested emails. Our colleague views this element of the cover letter as an inappropriate attempt by the Region to prepare a defense to an anticipated argument by the Employer that the subpoena's demand for the emails is burdensome, rather than a legitimate attempt to determine the comprehensiveness of the Employer's response to the Region's request for information that is related to matters "under investigation." We disagree with our colleague's premise that the Region's interest in the Employer's search for the requested emails – even if it would, in fact, prove useful to evaluate a potential claim of burdensomeness – can be severed completely from the Region's interest in emails themselves. Burdensomeness and completeness are related concepts here, as an incomplete investigation is less likely to reveal relevant information that is responsive to the subpoena. To that effect, the subpoena requires a *reasonable* search for responsive documents, paper and electronic, which is consistent with the Region's description of the request in its brief. In our view, it is within the Region's discretion to inquire whether the Employer made a good faith effort to provide the requested information, which inherently inquires into both the completeness and – inextricably – the burdensomeness of the search. In addition, our colleague argues that the description of the electronic search requirements should have been in the subpoena itself versus the cover letter to the subpoena. We do not think that distinction provides a compelling reason to revoke the subpoena under Sec. 102.31 of the Board's Rules and Regulations.

Paragraph 2 of the Region's subpoena requests the following information:

> For the period from January 1, 2014 to the present, those documents showing customer complaints, and the documentation and investigation thereof, within the Rocky Hill Facility's district regarding employee conduct (or misconduct), including:
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> (a) The substance or details of the complaints, including those documents showing the oral or written communications between and among the Employer and/or the complainants;
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> (b) The steps taken by the Employer to investigate the complaints; and
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> (c) The name, telephone number, address, email address of any customer who complained about the Charging Party.

In its petition to revoke, the Employer asserts, among other things, that "the request seeks personal information regarding non-party customers" and therefore impermissibly "encompass[es] individual privacy rights." The Regional Director, in his opposition brief, states, in relevant part, that insofar as the Employer "is concerned that documents responsive to [paragraphs 2(a) and (b)] may reveal" personal information about "customers other than the customer involved in [the Charging Party's discharge][,] the Subregion has no objection to the Employer redacting such information in its production, provided that this offer is understood not to constitute any waiver of the Subregion's right to unredacted information should it become necessary." This statement in the Region's opposition brief is contradicted by the subpoena's specific instructions, which provide that the subpoena "seeks production of responsive documents in their entirety, *without abbreviation, redaction, deletion or expurgation*" (emphasis added). I view the Region's statement, in its opposition brief, regarding potentially accommodating the Employer's concerns about non-party customers as a clarification of these portions of the subpoena. I disagree, however, with the Board's

practice that often permits an overly broad subpoena request to be "clarified" by the Region after a party has filed a meritorious petition to revoke, which then prompts the Board to deny the petition. In my view, this practice encourages the issuance of subpoenas that are not appropriately tailored to matters under investigation, which in turn needlessly leads to Board intervention in many subpoena disputes that could have been avoided had the subpoena requests been crafted in a manner that appropriately conforms to matters relevant to the charge. Additionally, I believe this practice creates the appearance of unfairness by permitting one side (the Region's attorneys, who are representatives of the General Counsel) to avoid having a subpoena revoked by making an after-the-fact "change" that is communicated in briefing. See Sec. 11(1) of the Act (stating the Board "shall revoke" any subpoena where "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").

The majority states that, in denying the petition to revoke, it has considered the subpoena in light of the Region's above-mentioned statement regarding paragraphs 2(a) and (b), and that the "Region's modification [with respect to paragraphs 2(a) and (b)] is designed to promote efficiency in obtaining from the Employer the information that the Region needs for its investigation . . . ." Unlike the majority, however, I believe these efforts must be undertaken before disputes regarding a subpoena's scope are presented to the Board in a party's petition to revoke. Even assuming arguendo that the modification is designed to promote efficiency, as my colleagues assert, I believe that efficiency would be better served by issuing a properly-drafted subpoena, instead of

relying on a subsequent clarification in response to a petition to revoke. As I have explained above, it is better to avoid such disputes in the first place by ensuring that the subpoena requests are crafted to appropriately conform to matters that are relevant to the charge. Accordingly, I would grant the petition to revoke paragraphs 2(a) and (b), insofar as these requests were broad enough to encompass irrelevant and/or personal identification information regarding non-party customers, notwithstanding the limitation expressed in the Region's opposition brief, without prejudice to the Region's right to issue new or amended subpoena requests that are narrower in scope.

Next, in relevant part, paragraph 4 of the subpoena seeks, for each item covered by subpoena paragraph 3, copies of those documents showing "(c) Any records (including without limitation . . . emails . . .) relating to any investigation conducted before issuing the disciplinary action." In the Region's cover letter to the subpoena, the Region states that certain subpoena paragraphs include requests for the production of emails. The cover letter further states that, when the Employer produces the subpoenaed items, it should "be prepared" to "provide the following information regarding production of the subpoenaed emails" (emphasis and bullet points in original):

- **Whose email was searched?** I will expect a search of the email of all individuals ("custodians") who are most likely to possess communications covered by the subpoena.

- **What email was searched?** For each custodian's mailbox, what folders, archives and document management systems were searched? Did the search include both email stored on the Company's server for its company email system, and email stored in personal folders and archives on individual computers? Did the search include email hosted on third-party service providers such as Google or Yahoo, including both company and personal accounts used by custodians for work-related communications?

- **How was the search conducted?** Who conducted the searches, and what search software and/or search terms were used to locate emails?

In its petition to revoke, the Employer argues that this language in the cover letter—which it argues compels it to engage in an electronically stored information (ESI) search—is an unreasonable, unilateral demand that will impose undue costs and burdens on the Employer. The Employer also characterizes the request as a fishing expedition. The Region, in its opposition, argues that the subpoena "calls for a reasonable search for responsive documents," the Employer has mischaracterized the cover letter and the Region's position, and the cover letter's language is necessary for the Region "to adduce, among other things, whether retrieval of such information is in fact unduly burdensome (as the Employer suggests it is)." The Region also asserts that the Employer has not made any proposals as to how to possibly narrow the scope of the subpoena. Further, the Region asserts that the Employer's argument that an ESI search would be burdensome and expensive is speculative and unsubstantiated.

Here, the Region essentially appears to be arguing that it included the requirement for an ESI search in its cover letter to evaluate the merits of the Employer's assertions that an ESI search would be unduly burdensome and costly. In my view, this is not a proper basis for setting forth requirements that—if they were to appear at all—should have been included in the subpoena. For example, paragraph 6 of the Instructions & Definitions section of the subpoena refers to the production of electronically stored information and e-mails, without requiring any productions regarding the details of particular ESI searches. To the extent the Region requires the production of this additional information, I believe these requests should have been included in the subpoena itself. In any event, as mentioned above, I believe the Region's rationale for including the ESI requirements here—anticipating that the

Employer would object to the subpoena on the basis of burdensomeness and costs of compliance, and requiring more expansive disclosures to permit the Region to evaluate such defenses—is unreasonable. The Board has broad discretion regarding subpoenas, but they must still be reasonably tailored to matters that are "under investigation" or "in question in [the] proceedings,"[1] and I do not believe our statute authorizes expanding subpoena requests, in the first instance, to encompass potential disputes over the scope of the subpoena itself. For this reason, I believe the Board should also grant the petition to revoke as to the ESI requirements set forth in the Region's cover letter which, in turn, apply to subpoena paragraphs seeking the production of emails.[2]

PHILIP A. MISCIMARRA, CHAIRMAN

[1] National Labor Relations Act, Sec. 11(1).

[2] My colleagues do not provide any case support for their argument that the Region was entitled to request, in its cover letter, information about the methodology of the Employer's electronic search for subpoenaed emails. Instead, they essentially argue that, because the concepts of burdensomeness and completeness are "inextricably" related concepts here, as they relate to the Employer's response to the subpoenaed emails, it was within the Region's discretion to include these requests in its cover letter. I do not find this argument to be compelling. Regardless of whatever theoretical connection the concepts of burdensomeness and completeness might have, the fact remains that, *in this case*, the Region stated, in its opposition, that it included its cover letter requests in order to "adduce, among other things, *whether* retrieval of such information is in fact unduly burdensome . . . ." (emphasis supplied). That is the stated purpose of the request. As I have explained above, the Region's rationale for the cover letter requirements is unreasonable and improperly seeks to expand the scope of the subpoena.