

**United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL**

Advice Memorandum

DATE: July 17, 2009

TO : James J. McDermott, Regional Director
Region 31

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Ampersand Publishing, LLC
d/b/a Santa Barbara News Press
Case 31-CA-29253

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by issuing subpoenas to current and former employees, prior to their testimony at a Board hearing, requesting their copies of the affidavits they submitted to the Board in a pending unfair labor practice hearing.

We conclude that the Employer violated Section 8(a)(1) by issuing the subpoenas.

FACTS

The Employer operates the Santa Barbara News-Press in Santa Barbara, California. On March 24, 2009,¹ the Regional Director issued a Consolidated Complaint alleging that the Employer committed numerous Section 8(a)(1), (3), and (5) violations. The hearing into those alleged violations began on May 26 and continues to date.

In early May, the Employer, through its attorney, issued subpoenas duces tecum to a union representative and nine current and former employees. Included in the subpoenas was a request for "[a]ny and all documents provided to and/or received from Region 31 of the National Labor Relations Board pertaining to the [abovementioned charges] that you personally possess, including but not limited to letters, affidavits, notes, and/or e-mails."

On May 7, the Union attorney emailed the Employer attorney objecting to the subpoenas and stating that the Union would file an unfair labor charge challenging their lawfulness. (b) (6), (b) (7)(C) emailed back that

¹ All dates are 2009 unless otherwise indicated.

"we are not seeking unblemished Jencks² affidavits that the witness may still have in their possession, copies of which are contained in the Region's investigatory file. However, non-privileged documents which must be produced would include: any drafts of the witness affidavit; a copy of the affidavit that contains notes, thoughts or impressions of the affiant which was not given to the Region as part of the Jencks affidavit; and any and all documents the affiant has reviewed in preparation for being called as a witness at trial."

Also on May 7, Counsel for the General Counsel filed a petition to revoke portions of the subpoenas duces tecum, arguing that the Employer attempted "an end-run around the Board's long-established policy to preserve the confidentiality of statements and materials contained in investigatory files obtained in the course of administrative proceeding" and noting that "any files, documents, reports, memoranda, or records of the Board or of the General Counsel" are "privileged against disclosure by this rule."³

On May 11, the Employer's attorney filed an Opposition to the General Counsel's Petition to Revoke Subpoenas Duces Tecum. The Opposition stated in pertinent part:

. . . . "The *News-Press* requests no documents from the Region/General Counsel's investigatory file. The *News-Press* is more than aware of the investigatory privilege that attaches to documents in the investigatory file, and that Jencks is an exception to the general privilege. . . . The *News-Press* requests documents possessed, personally, by the individuals. No privilege attaches to documents individuals provide to the Region in the course of the investigation [fn. omitted]

By letter of May 18 to the Union attorney the Employer's attorney stated that it was not seeking materials contained in the Region's investigatory file, including affidavits in possession of the Union subject to subpoena that were unaltered in any way.

On June 2, the Employer submitted a position statement to the Region reiterating that it was not seeking materials contained in the Region's investigatory file but that it

² Jencks v. United States, 353 U.S. 657 (1957).

³ The Motion cited the Board's Rules and Regulations, Sections 102.118(a)(1).

had only requested affidavits that were "within the possession of the subpoenaed individuals." The position statement also asserted that the Employer was entitled to the personal copies of affidavits in the possession of current or former employees that may contain "possible notes, markings, changes, etc." and that "such a 'new' document" was not part of the investigatory file and thus unprotected by Jencks.

The Employer never formally amended its original subpoena duces tecum to clarify that it was not seeking the Board affidavits contained in the Region's investigatory file. The Employer also never notified the subpoenaed employees that it was not seeking the Board affidavits contained in the Region's investigatory file, or that it was only seeking affidavits that were altered in some way from the documents in the Region's investigatory file.

ACTION

We conclude that the Employer violated Section 8(a)(1) by issuing subpoenas to current and former employees, prior to their testimony at a Board hearing, requesting their copies of the affidavits they submitted to the Board in a pending unfair labor practice hearing.

In NLRB v. Robbins Tire & Rubber Co., the U.S. Supreme Court held that release of witnesses' statements prior to unfair labor practice hearings necessarily "would interfere" in a statutory sense with the Board's "enforcement proceedings" and thus such statements are exempt from disclosure until after hearing under the Freedom of Information Act.⁴ In H.B. Zachry Company, the Board, applying Robbins Tire, held that it would not require the charging party union to produce employee affidavits that were in the possession of the General

⁴ 437 U.S. 214 (1978). See also NLRB Rules and Regulations and Statements of Procedure, Section 102.118(b)(1) ("Notwithstanding the prohibitions of subsection (a) of this section, after a witness called by the General Counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the Act, the administrative law judge shall, upon motion of the respondent, order the production of any statement . . . of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified").

Counsel and the union in response to a subpoena duces tecum that the employer had served on the union.⁵ The Board explained that although Section 102.118(b)(1) speaks of affidavits "in the possession of the General Counsel," it was not limited to situations where the affidavits were exclusively in the possession of the General Counsel.⁶ The Board noted that the union had a legitimate interest in asking employees for copies of affidavits given them and that if the employee complied with the request, the employee's protections of confidentiality would be lost.⁷

It is also well established that an employer violates Section 8(a)(1) of the Act if it questions employees about alleged unfair labor practices without giving them specific assurances that their cooperation is strictly voluntary.⁸ An employer's request for a copy of a statement that an employee has given to a Board agent "is, in substance, an attempt to engage in the kind of interrogation" that is prohibited by the Act.⁹ The Board has thus long held that an employer violates Section 8(a)(1) when it solicits copies of affidavits that employees have provided to Board

⁵ H.B. Zachry Co., 310 NLRB 1037, 1037-1038 (1993).

⁶ 310 NLRB at 1038, citing NLRB Rules and Regulations and Statements of Procedure, Section 102.118(b)(1), above.

⁷ 310 NLRB at 1038. The Board further noted that based on the policy considerations set forth in Robbins Tire, the Board would not require the production of the affidavit simply because the affiant gave a copy of it to the union.

⁸ Johnnie's Poultry Co., 146 NLRB 770, 775 (1964). See also Beverly Health and Rehabilitation Services, Inc., 332 NLRB 347, 349 (2000) (employer's rule, which compels employees to cooperate in unfair labor practice investigations or risk discipline, "violates the longstanding principle, established in Johnnie's Poultry, that employees may not be subjected to employer interrogations, relating to Section 7 activity, that reasonably tend to coerce them to make statements adverse to their Section 7 interests, those of a fellow employee, or those of their union Failure to inform employees of the voluntary nature of the employer's investigation is 'a clear violation' of Section 8(a)(1) of the Act").

⁹ W.T. Grant Co., 144 NLRB 1179, 1180-1181 (1963) citing Joy Silk Mills v. NLRB, 185 F.2d 732, 743 (D.C. Cir. 1950), cert. den. 341 U.S. 914.

agents in connection with the General Counsel's investigation of unfair labor practice charges.¹⁰

In the instant case, the Employer, through its attorney, issued subpoenas duces tecum to nine current and former employees prior to the unfair labor practice hearing, requesting all documents in their personal possession, including affidavits that were provided to or received from the Region. Applying the above principles, the Employer's solicitation from employees of the affidavits that they had provided to Board agents in connection with the unfair labor practice investigation was inherently coercive in violation of Section 8(a)(1).¹¹ Further, the fact that the demand was in the form of a subpoena duces tecum, which *requires* the production of evidence in the possession of the subpoenaed individual, made the solicitation *ipso facto* involuntary.¹²

¹⁰ Inter-Disciplinary Advantage, Inc., 349 NLRB 480, 505 (2007) (employer violated Section 8(a)(1) when its attorney questioned an employee about statements she may have made to a Board agent in the case and then asked her for a copy of the affidavit she gave to the Board: employer request for copies of affidavits provided by employees to the Board is inherently coercive and unlawful); Hilton Credit Corp., 137 NLRB 56, 58 fn. 1 (1962) (employer violated Section 8(a)(1) by telling employees who gave statements to Board agents investigating unfair labor practices charges against the employer that they had to give a copy of such statements to the employer); Henry I. Siegel Co., 143 NLRB 386, 387 fn. 1 (1963) (employer's demands for pretrial employee affidavits inhibited an effective Board investigation; it is the demand for such affidavits which interferes with the Board's efforts to secure vindication of employees' statutory rights without regard to whether such demands are successful). See also Wire Products Mfg. Corp., 326 NLRB 625, 627-628 (1998) (employer violated Section 8(a)(1) by interrogating employees about whether they had given statements to an agent of the Board: such questioning is inherently coercive and applies with equal force to questions pertaining to the content of the statements or whether the statements were made).

¹¹ See, e.g., Inter-Disciplinary Advantage, Inc., 349 NLRB at 505.

¹² See, e.g., Beverly Health and Rehabilitation Services, Inc., 332 NLRB at 349 (failure to inform employees of the voluntary nature of the employer's investigation was "a clear violation" of Section 8(a)(1) of the Act).

We are aware that in subsequent emails to the Union and in a position statement to the Region, the Employer claimed to modify the reach of its request, i.e., it stated that it was not seeking the Board affidavits contained in the Region's investigatory file but only affidavits containing "possible notes, markings, [or] changes." However, the Employer never formally amended its subpoena duces tecum, which specifically sought affidavits that were provided to or received from the Region. Nor did the Employer notify the subpoenaed employees of any purported modification of its original unlawful request. Moreover, the Employer's Opposition to the General Counsel's Petition to Revoke Subpoenas Duces Tecum, while acknowledging the "investigatory privilege that attaches to documents in the investigatory file," renewed its unlawful request for "documents possessed, personally, by the individuals" and argued that "[n]o privilege attaches to documents individuals provide to the Region in the course of the investigation." Accordingly, the Employer's subpoena duces tecum remains the operative document, and the Employer's request for affidavits in the subpoena duces tecum violated Section 8(a)(1).¹³

¹³ There is no evidence that the Employer's attorneys individually interfered in any way with employee rights protected by the Act. Cf. Valley Gold Dairies, Inc., 152 NLRB 1470, fn. 1 (1965) (an attorney acting as an employer's agent will only be found individually liable if he "exceeded the bounds of mere advocacy and ... was 'purposely aiding the employer in contravening the statute'"); Mason Law Firm, Cases 8-CA-36697 & 8-CA-36698, Advice Memorandum dated April 19, 2007, at 6-7 (attorneys did not individually violate Section 8(a)(1) where they were acting within the scope of their representation of the Employer in soliciting and coercing employees into accepting their representation).

Accordingly, absent settlement, the Region should issue a Section 8(a)(1) complaint.

B.J.K.

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