Ampersand Publishing, LLC d/b/a Santa Barbara News-Press *and* Graphic Communications Conference, International Brotherhood of Teamsters. Case 31–CA–029253

September 27, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS GRIFFIN AND BLOCK

The sole issue in this case is whether the Respondent violated Section 8(a)(1) of the National Labor Relations Act by, prior to a Board hearing, serving subpoenas on several current and former employees. The subpoenas demanded the confidential witness affidavits that the employees had provided to the Board during the course of its investigation of certain unfair labor practice charges. Relying on the Board's established policy of protecting Board affidavits from disclosure prior to a hearing, the judge found that the Respondent violated the Act. In its exceptions, the Respondent essentially reasserts several defenses already considered and rejected by the judge.

We agree with the judge that the Respondent's arguments lack merit. We thus adopt her finding that the Respondent violated Section 8(a)(1). In doing so, however, we clarify our basis for rejecting the Respondent's contention that its conduct is immunized from liability under the Act by the *Noerr-Pennington* doctrine, which derives from the First Amendment and protects the right to petition the government for redress of grievances. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*., 365 U.S. 127 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657 (1965).[1]

Background

In May 2007, the General Counsel issued a complaint against the Respondent (2007 complaint), alleging various violations of Section 8(a)(3) and (1). Prior to the hearing on the 2007 complaint, the Respondent subpoenaed from several employees any affidavits or statements the employees had provided to the Board (2007 subpoenas). At the hearing, Administrative Law Judge William G. Kocol granted the General Counsel's petition to revoke the 2007 subpoenas on the ground that the Respondent was not entitled to the confidential affidavits unless and until the subpoenaed employee had testified in the proceeding and then only after a timely request for the statements for the purpose of cross-examination. He also ordered the Respondent to notify the affected employees in writing of his ruling.[2]

On March 24, 2009, the General Counsel issued a second complaint against the Respondent (March 2009 complaint) alleging numerous violations of Section 8(a)(5), (3), and (1). On about May 6, 2009, prior to the hearing on that complaint, the Respondent obtained subpoenas from the Board and caused them to be served on several current and former employees (2009 subpoenas). The 2009 subpoenas requested production of "all documents provided to and/or received from Region 31 . . . pertaining to the charges [at issue in the March 2009 complaint], that you personally possess, including but not limited to: letters, affidavits, notes, and/or emails." At the hearing on the March 2009 complaint, Administrative Law Judge Clifford Anderson granted the petitions of the General Counsel and the Union to revoke the 2009 subpoenas and quashed the subpoenas to the extent they sought confidential witness affidavits.[3]

[1] On February 5, 2010, Administrative Law Judge Lana H. Parke issued the attached decision. The Respondent filed exceptions and a supporting brief. The General Counsel filed an answering brief, and the Respondent filed a reply brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings, and conclusions as modified and to adopt her recommended Order as modified and set forth in full below.

We shall amend the judge's Conclusion of Law 4 to delete an inadvertent reference to Sec. 8(a)(3), as there is no allegation or finding that the Respondent violated Sec. 8(a)(3) by its conduct at issue in this case.

In addition, we shall modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container, Inc*., 325 NLRB 17 (1997). We shall also modify the judge's recommended Order to provide for the posting of the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010). Pursuant to the General Counsel's request, the judge recommended that the Respondent be ordered to mail copies of the notice to all former employees employed by the Respondent at any time from May 1, 2009, to the date of the posting of the notice. We shall modify the judge's recommended Order to conform to the Board's standard remedial wording for such a mailing. Further, we shall substitute a new notice to conform to the Order as modified.

In his answering brief, the General Counsel asserts that the Board should disregard the Respondent's citation to certain documents and exhibits. GC Exh. 1(f) is the Respondent's answer to the complaint. In filing the answer, the Respondent included, as attachments, several emails and a letter. In its exceptions brief, the Respondent relies on the documents that were attached to GC Exh. 1(f). We do not rely on the documents because they were not properly authenticated, offered, and received at the hearing. In addition, although the Respondent relies on GC Exh. 30 in its exceptions brief, we do not rely on the exhibit because the judge did not admit it into the record.

[2] On December 26, 2007, Judge Kocol issued a decision on the allegations at issue in the 2007 complaint. The Respondent filed exceptions, and the General Counsel filed cross-exceptions to the decision. The Board resolved the exceptions and cross-exceptions in *Santa Barbara News-Press*, 357 NLRB 425 (2011).

[3] On May 28, 2010, Judge Anderson issued his decision on the allegations at issue in the March 2009 complaint. The Respondent and the Charging Party filed exceptions, and the General Counsel filed

On May 8, 2009, shortly after the Respondent served the 2009 subpoenas on the employees, the Union filed a charge asserting that the Respondent violated the Act by subpoenaing the employees' Board affidavits. On August 7, 2009, the General Counsel issued the present complaint (August 2009 complaint) alleging that the Respondent violated Section 8(a)(1) by subpoenaing employees (via the 2009 subpoenas) to produce the confidential witness affidavits they had provided to the Board in connection with its investigation of the charges underlying the March 2009 complaint.

Judge's Decision

After a hearing on the August 2009 complaint, Administrative Law Judge Lana Parke found that the Respondent violated Section 8(a)(1) by serving subpoenas on current and former employees, prior to their testimony at a Board hearing, which requested copies of affidavits the employees had provided to the Board during the course of an unfair labor practice investigation. The judge relied on the Board's well-established policy of protecting affidavits from disclosure prior to a witness testifying at an unfair labor practice hearing. She found that the Respondent's service of the 2009 subpoenas had a chilling effect on the employees' rights to participate in Board investigations and coerced the employees in violation of Section 8(a)(1). In addition, she rejected the Respondent's defenses that: (1) the matter is moot because the 2009 subpoenas were revoked by Judge Anderson during the hearing on the March 2009 complaint; (2) the First Amendment Petition Clause and the *Noerr-Pennington* doctrine immunize it from liability under the Act; (3) it was entitled to copies of the affidavits personally possessed by the employees because the affidavits were not protected by any privilege; and (4) the Federal Rules of Evidence compel disclosure of the affidavits.

In its exceptions, the Respondent essentially renews these defenses. In agreement with the judge, we find that the Respondent's arguments lack merit. In particular, for the reasons set forth below, we reject the Respondent's argument that its subpoena-related conduct is shielded by the *Noerr-Pennington* doctrine.

Discussion

The confidential witness affidavit is the "keystone" of an unfair labor practice investigation. NLRB Casehandling Manual (Part 1), Unfair Labor Practice Proceedings, Section 10060. The Board accordingly has a well-established policy against prehearing disclosure of witness statements. Section 102.118(b) of the Board's Rules and Regulations provides that an affidavit may be disclosed only upon a motion by the respondent, for the purposes of cross-examination, after a witness has testified in a Board proceeding. The Board's nondisclosure policy ensures that employee attitudes, activities, and sympathies in connection with the union are "free of any inquisitive interest by the [e]mployer as are the employees' union activities themselves." *Winn-Dixie Stores, Inc*., 143 NLRB 848, 849 (1963). The policy also protects the Board's processes by guarding against the "inhibitory effect" that an employer's prehearing demand for Board affidavits would have on employees' willingness to provide statements to the Board or otherwise cooperate with Board agents. See, e.g., *Hilton Credit Corp.*, 137 NLRB 56, 56 fn. 1 (1962). The Supreme Court has recognized the danger inherent in the prehearing disclosure of Board affidavits and endorsed the Board's nondisclosure policy. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

Consistent with that nondisclosure policy, the Board has found that an employer violates Section 8(a)(1) by demanding that an employee give it a copy of the confidential affidavit that the employee provided to a Board agent. See *Inter-Disciplinary Advantage*, 349 NLRB 480, 505 (2007); *Frascona Buick, Inc*., 266 NLRB 636, 647 (1983); *Ingram Farms, Inc*., 258 NLRB 1051, 1055 (1981), enfd. 685 F.2d 1387 (11th Cir. 1982); *W. T. Grant Co*., 144 NLRB 1179, 1182 (1963); *Winn-Dixie Stores*, 143 NLRB at 850; and *Hilton Credit Corp*., supra at 56 fn. 1. The Board considers such demands to be inherently coercive and unlawful. See *Inter-Disciplinary Advantage*, supra at 505.

The Respondent does not challenge this precedent, nor does it deny that it demanded, in the form of the 2009 subpoenas, the confidential Board affidavits of several employees. Instead, the Respondent asserts that the *Noerr-Pennington* doctrine immunizes it from liability because the subpoenas constituted direct petitioning or, alternatively, because they constituted conduct incidental to direct petitioning under the First Amendment. We disagree.

The *Noerr-Pennington* doctrine applies to all branches of Government, including the executive branch (including independent agencies), the legislature, and the courts. See *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510 (1972). It protects conduct that is part of a direct petition to government and, in some contexts, conduct that is "incidental" to a direct petition. See *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 611 (D.C. Cir. 2007). In the labor context, it is well established that the *Noerr-Pennington* doctrine protects *direct* petitioning. See *Bill Johnson's Restaurants, Inc.*

cross-exceptions. The Board resolved the exceptions and cross-exceptions in *Santa Barbara News-Press*, 358 NLRB 1415 (2012).

v. NLRB, 461 U.S. 731 (1983); *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). The Board addressed the types of activities that are protected as direct petitioning in *Venetian Casino Resort, LLC*, 357 NLRB 1725 (2011). There, the Board observed that "[f]ederal courts generally have limited *Noerr-Pennington* immunity to petitions that seek the passage of a law or rule, or a significant policy decision regarding enforcement." Id. at 1727. It explained that "'*Noerr* is aimed at insuring uninhibited access to government policy makers,' not at 'dealings with officials who administer' existing laws and policy determinations." Id., quoting *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 424 F.2d 25 (1st Cir. 1970), cert. denied 400 U.S. 850 (1970).

Although not a model of clarity, the Respondent's argument appears to be that its subpoenas were a direct petition to the Government for the redress of a grievance because the Respondent petitioned the Regional Director for Region 31 for the subpoenas to help defend itself against the March 2009 complaint. This contention is utterly meritless.

To begin, the Respondent's request for subpoenas from the Regional Director is *not* the basis for the unfair labor practice we are finding. Rather, the violation rests on the Respondent's prehearing use of those subpoenas to attempt to compel employees to produce their confidential Board affidavits.

Further, even taking the Respondent's argument on its own terms, its communications with the Regional Director clearly did not constitute direct petitioning. Consistent with the Board's standard subpoena process, the Respondent requested the subpoenas from the Regional Director, and the subpoenas were issued by the Board's Executive Secretary. But the involvement of those agency officials, as part of the Board's standard subpoena process, did not make them "petition receiver[s]" for the purposes of establishing *Noerr-Pennington* immunity in this context. *Venetian Casino Resort*, 357 NLRB at 1727 fn. 12, quoting *Hilton v. City of Wheeling*, 209 F.3d 1005, 1007 (7th Cir. 2000), cert. denied 531 U.S. 1080 (2001). In responding to subpoena requests, both Regional Directors and the Board's Executive Secretary act in a ministerial capacity. They process such requests in a nondiscretionary manner, as provided for by Section 11(1) of the National Labor Relations Act and Section 102.31 of the Board's Rules and Regulations. Thus, as to the subpoena matters at issue here, the involvement of these agency officials is limited to administering existing law and procedures; they have no policymaking authority in responding to subpoena requests. See *Whitten*, 424 F.2d at 33. Moreover, there is no evidence or argument that the Respondent sought the subpoenas from the Board in an effort to influence the passage of any laws or regulations. Nor did the Respondent's request for subpoenas involve a "significant policy determination" in the application of the Act. *Whitten*, 424 F.2d at 32. Accordingly, we conclude that the Respondent's subpoena requests did not constitute a direct petition to the government for the purposes of establishing *Noerr-Pennington* immunity.

We turn now to the Respondent's alternative argument—that its subpoena-related conduct was incidental to a direct petition. The Respondent's argument seems to be that its defense of the allegations in the March 2009 complaint constituted direct petitioning. On this view, its subpoena requests during that litigation constituted conduct incidental to direct petitioning. Here, too, we find no merit to the Respondent's position.

Whether the incidental-conduct aspect of the *Noerr-Pennington* doctrine applies in the labor law context is unsettled. In this regard, the Supreme Court has not extended *Noerr-Pennington* immunity to protect incidental conduct under Federal labor law. See *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 612 (D.C. Cir. 2007). However, we need not resolve that question in this case.[4] Even assuming that the incidental-conduct aspect of the *Noerr-Pennington* doctrine applies and that the Respondent's activity amounted to such incidental conduct, the Respondent may not claim *Noerr-Pennington* immunity because it acted with an illegal objective in obtaining the subpoenas from the Board and serving them on the employees.

As explained, the Board has a well-established policy of protecting confidential witness affidavits from prehearing disclosure. It has consistently held that an employer's prehearing demand for such affidavits violates Section 8(a)(1). The Respondent was keenly aware of Board law on this point when it served the 2009 subpoenas. In connection with the 2007 subpoenas, Judge Kocol had made clear to the Respondent that it was not entitled to an employee's Board affidavit prior to the employee testifying at a Board hearing. See *Santa Barbara News-Press*, 357 NLRB at 102–103. Nevertheless, prior to the hearing on the March 2009 complaint, the Respondent served the 2009 subpoenas on employees, demanding their confidential Board affidavits. The Respondent thus knowingly acted contrary to established Board policy and precedent designed to protect affiants involved in Board proceedings from such chilling and coercive actions. The fact that the Respondent's prehear-

[4] We express no view on the judge's unsupported statement that "[s]ubpoenaing documentary evidence from witnesses for potential use in a judicial proceeding is conduct incidental to direct petitioning."

ing demand for the affidavits came in the form of a Board subpoena does not alter this conclusion. The Respondent cannot use the Board's own processes to circumvent our established policy and precedent. Indeed, the Respondent's attempt to do so here only served to heighten the coercive nature of its unlawful demands by improperly cloaking them with apparent Board approval.

We therefore find that in serving the subpoenas, the Respondent had an objective that was illegal under Federal labor law. See *Dilling Mechanical Contractors*, 357 NLRB 544, 546 (2011); *Wright Electric, Inc*., 327 NLRB 1194, 1195 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000); *Manno Electric*, 321 NLRB 278, 297–298 (1996), enfd. 127 F.3d 34 (5th Cir. 1997). That illegal objective precludes any claim of immunity here under the *Noerr-Pennington* doctrine and the First Amendment. While the Supreme Court has held that employer lawsuits, as direct petitioning, may be entitled to *Noerr-Pennington* immunity, it has carved out exceptions for lawsuits that are preempted by the Act or (as relevant here) have an objective that is illegal under federal law. See *Bill Johnson's*, 461 U.S. at 737 fn. 5.[5] Even if the Respondent's subpoena-related conduct somehow amounted to direct petitioning or to conduct incidental to such petitioning, it would enjoy no special protection here.

Accordingly, we find, in agreement with the judge, that the Respondent violated Section 8(a)(1) of the Act, as alleged in the August 2009 complaint.

ORDER

The National Labor Relations Board orders that the Respondent, Ampersand Publishing, LLC d/b/a Santa Barbara News-Press, Santa Barbara, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing subpoenas to current and former employees, prior to their testimony at a National Labor Relations Board hearing, that request copies of the affidavits the employees submitted to the National Labor Relations Board in an unfair labor practice investigation.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days after service by the Region, post at its Santa Barbara, California facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. The Respondent shall mail copies of the notice to all former, but not current, employees employed by the Respondent at any time since May 6, 2009, at their last known address. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 6, 2009.

(b) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT issue subpoenas to current and former employees prior to their testimony at a National Labor

[5] These exceptions were not affected by the Supreme Court's decision in *BE&K Construction Co. v. NLRB*, 536 U.S. 516 (2002). See *Can-Am Plumbing v. NLRB*, 321 F.3d 145, 151 (D.C. Cir. 2003).

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Relations Board hearing that request copies of affidavits the employees submitted to the National Labor Relations Board in an unfair labor practice investigation.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

AMPERSAND PUBLISHING D/B/A SANTA BARBARA NEWS-PRESS

Joanna F. Silverman, Esq., for the General Counsel.
Richard R. Sutherland, Esq. (Cappello & Noel, LLP), of Santa Barbara, California, for the Respondent.
Glenn E. Plosa, Esq. (The Zinser Law Firm), of Nashville, Tennessee, for the Respondent.

DECISION

I. STATEMENT OF THE CASE

LANA PARKE, Administrative Law Judge. Pursuant to charges filed by Graphic Communications Conference, International Brotherhood of Teamsters (the Union), on August 7, 2009, the Regional Director for Region 31 (Region 31) of the National Labor Relations Board (the Board) issued a complaint and notice of hearing (the August 2009 complaint). The complaint alleges that Ampersand Publishing, LLC d/b/a Santa Barbara News-Press (the Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act). This matter was tried in Santa Barbara, California, on October 26–27, 2009.[1]

II. ISSUE

Did Respondent violate Section 8(a)(1) of the Act on May 7 by issuing subpoenas duces tecum to its current or former employees requesting affidavits provided to Region 31 pertaining to the charges in Cases 31–CA–028589, 31–CA–028661, 31–CA–028667, 31–CA–028700, 31–CA–028733, 31–CA–028734, 31–CA–028799, 31–CA–028889, 31–CA–028890, 31–CA–028944, 31–CA–029032, 31–CA–029076, 31–CA–029099, and 31–CA–029124?

III. JURISDICTION

At all relevant times, the Respondent, a limited liability company, with an office and place of business in Santa Barbara, California (the Respondent's facility), has been engaged in the publication of the Santa Barbara News-Press, a daily newspaper. During the calendar year ending December 31, 2008, the Respondent derived gross revenues in excess of $200,000, held membership in or subscribed to an interstate news service, the Associated Press, and advertised nationally sold products, including Cingular. During the same period, the Respondent purchased and received at its facility goods valued in excess of $5000 directly from suppliers located outside the state of California. I find the Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.

[1] All dates herein are 2009, unless otherwise specified.

IV. FINDINGS OF FACTS

Based on the entire evidence of record and after considering the briefs filed by the General Counsel and the Respondent, I find the following events occurred in the circumstances described below during the period relevant to these proceedings. Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

A. Litigation History

At all relevant times, the law firm of Cappello & Noel of Santa Barbara, California, has represented the Respondent in the proceedings described herein, and the following attorneys have been agents of the Respondent within the meaning of Section 2(13) of the Act: A. Barry Cappello (Cappello), Dugan P. Kelley (Kelley), and Richard R. Sutherland (Sutherland).

On September 27, 2006, a union representation election was held in an appropriate unit of the Respondent's employees, which the Union won by a vote of 33 to 6. The Respondent filed objections to the election and a hearing was held before Judge William L. Schmidt on January 9 and 10, 2007. On March 8, 2007, Judge Schmidt recommended to the Board that the objections be overruled.

On May 31, 2007, Region 31 issued an Order consolidating cases, second consolidated complaint, and notice of hearing in Cases 31–CA–027950 and 31–CA–028157 (the 2007 complaint). On August 14, 2007, Judge William G. Kocol commenced a 17-day hearing of the issues presented by the 2007 complaint (the Kocol hearing).[2] Cappello and Kelley served as the Respondent's attorneys in the Kocol hearing.

Prior to commencement of the Kocol hearing, the Respondent had subpoenaed a number of employees requiring them to produce: "Any and all documents, including but not limited to affidavits, declarations, or statements that you have provided to the NLRB" (the 2007 subpoenas). During a prehearing conference call with the parties, Judge Kocol granted the General Counsel's petition to revoke the 2007 subpoenas in their entirety on grounds the Respondent was not entitled to witness statements given to the NLRB except and until the subpoened employees had testified in an NLRB proceeding and then only after a timely request for those statements for the purpose of cross-examination. Judge Kocol further required the Respondent to advise the affected employees in writing of his ruling, with which direction the Respondent apparently complied.

On August 16, 2007, while the Kocol hearing was going on, the Board adopted Judge Schmidt's recommendations regarding objections to the September 27, 2006 election and certified the Union as the collective-bargaining representative of the unit employees.

On December 26, 2007, Judge Kocol issued his decision (the Kocol decision) finding, inter alia, that the Respondent had violated the Act by threatening to discipline employees if they engaged in union and protected concerted activity, coercively interrogating employees concerning their union activities, instructing employees to remove buttons from their clothing and signs from their vehicles inscribed with language protected by the Act; terminating a supervisor because he refused to commit

[2] The Kocol hearing ended on September 26, 2007.

an unfair labor practice, issuing letters of suspension to employees because they engaged in union and protected concerted activity, canceling a writer's column because she supported the Union, giving lower evaluations to certain employees because they engaged in union activity, thereby depriving them of annual performance bonuses, and discharging eight employees because they engaged in union activity. The Kocol decision is still pending before the Board.[3]

On March 24, Region 31 issued an Order Consolidating Cases, Amended Consolidated Complaint, and Notice of Hearing against the Respondent in Cases 31–CA–028589, 31–CA–028661, 31–CA–028667, 31–CA–028700, 31–CA–028733, 31–CA–028734, 31–CA–028799, 31–CA–028889, 31–CA–028890, 31–CA–028944, 31–CA–029032, 31–CA–029076, 31–CA–029099, and 31–CA–029124 (the March 2009 complaint). The March 2009 complaint, as amended on April 15, alleged that the Respondent had committed numerous violations of Section 8(a)(5), (3), and (1) of the Act.[4] Hearing on the March 2009 complaint allegations was ultimately scheduled to commence on May 26.

On May 6–8, Attorneys Cappello, Kelley, and Sutherland caused subpoenas duces tecum (the 2009 subpoenas) to be issued to numerous current or former employees of the Respondent. The 2009 subpoenas, in pertinent part, requested that the subpoened individuals produce affidavits provided to Region 31 that pertained to the unfair labor practice charges underlying the March 2009 complaint. The General Counsel and counsel for the Union filed petitions to revoke the 2009 subpoenas.

On May 26, Judge Clifford Anderson commenced a 20-day hearing of the issues presented by the March 2009 complaint (the Anderson hearing).[5] At the Anderson hearing, Judge Anderson revoked the 2009 subpoenas insofar as they sought production of affidavits provided to Region 31 that pertained to the unfair labor practice charges at issue in the Anderson hearing.

B. The August 2009 Complaint

On August 7, 2009, the Regional Director for Region 31 issued the August 2009 complaint. The August 2009 complaint alleged that the Respondent violated Section 8(a)(1) of the Act by subpoenaing employees to produce affidavits provided to Region 31, pertaining to the unfair labor practice charges underlying the March 2009 complaint (i.e., the 2009 subpoenas).[6]

V. DISCUSSION

The General Counsel argues that by subpoenaing employees to produce affidavits provided to the Board pursuant to unfair labor practice investigations, the Respondent essentially attempted to engage in impermissible interrogation by requiring the involuntary production of employee statements given to the Board. The General Counsel further argues that demanding production of such statements prior to an employee's testimony at a Board hearing is inherently coercive and unlawful.

The Respondent defends its conduct on the following grounds: (1) any issues relating to the 2009 subpoenas were resolved at the Anderson hearing; (2) serving subpoenas in a Board proceeding is activity protected by the First Amendment to the United States Constitution; (3) the subpoenas sought nothing from the Region's investigatory file, and the Respondent was entitled to personally possessed documents and affidavits of the subpoenaed individuals because no privilege protected such documents, or if it did, it was waived; (4) the Federal Rules of Evidence compel disclosure of a personally possessed copy of an otherwise privileged document.[7]

The Board has a well-established policy against disclosure of witness statements (except as provided in Section 102.118(b)(1) of the NLRB Rules and Regulations and Statements of Procedure[8]), which has been sustained by the Supreme Court in *NLRB* v. *Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978), and by circuit courts.[9] Under the Board's policy, the

[3] Following issuance of the Kocol decision, Region 31 filed a petition with the United States District Court for the Central District of California seeking a temporary injunction pursuant to Sec. 10(j) of the Act that would require the Respondent to comply with the remedies ordered by Judge Kocol. On May 21, 2008, the court denied the petition, which denial the United States 9th Circuit Court of Appeals affirmed on January 26.

[4] The March 2009 complaint alleged that Respondent violated Sec. 8(a)(5) and (1) of the Act by failing and refusing to bargain in good faith for an initial collective-bargaining agreement, by making unilateral changes to employees' terms and conditions of employment, by bypassing the Union and dealing directly with a unit employee, by laying off unit employees, by suspending and discharging a unit employee, by delaying in providing the Union with requested information, by failing and refusing to bargain over the terms and conditions of unit employees hired through temporary agencies or, in the alternative, by unilaterally transferring unit work. The complaint also alleged that the Respondent violated Sec. 8(a)(3) of the Act by discriminating against employees because of their union activities and independently violated Sec. 8(a)(1) by, inter alia, discouraging employees from cooperating in the on-going Board investigation.

[5] The Anderson hearing ended on August 11. Judge Anderson's decision has not yet issued.

[6] There is no contention that 2009 subpoena requests that were unrelated to Board-procured affidavits or statements violated the Act.

[7] At the hearing the Respondent, citing *Ducane Heating Corp.*, 273 NLRB 1389 (1985), argued that unfair labor practices alleged in the instant matter were outside the 10(b) period because the Union on January 4 filed a charge in Case 31–CA–028662 alleging the same theory of violation, which it withdrew in March. I refused to receive evidence of the charge in Case 31–CA–028662, as it involved circumstances unrelated to the 2009 subpoenas at issue herein. The Respondent raises the 10(b) argument again in its post-hearing brief. I decline to revisit the issue.

[8] Sec. l02.118(b)(1) provides that "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." These provisions apply only to witnesses the General Counsel or the charging party calls to testify. *Clear Channel Outdoor, Inc.*, 346 NLRB 696, 696 fn. 1 (2006).

[9] See circuit court cases cited in *Robbins Tire & Rubber Co.*, supra. The Court noted that Congress in enacting the investigatory records exemption to the FOIA "was particularly concerned that premature production of witnesses' statements in NLRB proceedings would ad-

Respondent is not entitled to employee witness statements given to the Board except and until employees have testified in a Board proceeding and then only after a timely request for the statements is made for the purpose of cross-examination. In *Robbins Tire & Rubber Co*, the Supreme Court considered whether the Freedom of Information Act required the Board to disclose prehearing statements of witnesses expected to testify at a hearing. The Court held the Board was exempted from disclosing such statements prehearing finding "the dangers posed by premature release of witness statements would involve precisely the kind of 'interference with enforcement proceedings' that the [investigatory records exemption] was designed to avoid." Id. at 239. The "most obvious risk," the Court stated, was that "employers or, in some cases, unions will coerce or intimidate employees and others who have given statements, in an effort to make them change their testimony or not testify at all." Id. at 239.

The *Robbins Tire* Court recognized that disclosure of witness statements (except as provided in Sec. 102.118(b)(1)) could have a "chilling effect on the Board's [investigatory] sources," since employees "may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify at a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated." Id. at 241.[10] Further the Board's nondisclosure policy extends to the situation where an affiant has given a copy of his/her statement to the charging party union; neither that circumstance nor an employee's personal possession of a copy of the affidavit establishes, "clearly and unmistakably, that the employee has consented to release the affidavit to the opposing side." *H. B. Zachry Co.*, 310 NLRB 1037, 1038 and fn. 5 (1993).[11]

The Respondent included demands for employee witness statements given to the Board in both its 2007 and its 2009 subpoenas to employees and former employees. Judge Kocol in 2007 and Judge Anderson in 2009, respectively, revoked the 2007 and 2009 subpoenas insofar as they sought production of affidavits provided to Region 31 pertaining to the unfair labor practice charges before them. The question before me is whether the Respondent's 2009 subpoena demand for employee witness statements interfered with, restrained, or coerced employees in violation of the Act.

The Respondent's first argument against an affirmative answer to the question is its contention that Judge Anderson addressed the 2009 subpoenas at issue in this litigation and resolved any disputes, thus mooting the issue. While Judge Anderson revoked the 2009 subpoenas insofar as they sought employee witness statements provided to the Board, the issue of whether service of those subpoenas constituted unfair labor practices was not before Judge Anderson, and he did not address that question. Therefore, the issue before me is not moot.

The Respondent's second argument is that serving a subpoena cannot violate the Act because the right to subpoena is constitutionally protected by the First Amendment right to petition the Government for a redress of grievances (the Petition Clause), contending that the *Noerr-Pennington* doctrine appropriately applies to Board proceedings. The Supreme Court created the *Noerr-Pennington* doctrine in the context of two antitrust litigations: *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and *Mine Workers v. Pennington*, 381 U.S. 657 (1965). The doctrine provides that in certain contexts the First Amendment protects otherwise illegal conduct if it is part of a direct petition to Government or "incidental" to a direct petition. In the labor relations context, the Petition Clause protects access to judicial processes, and the Court instructs that labor laws must be interpreted, where possible, to avoid burdening such access. *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731, 741–744 (1983) (in light of the Petition Clause protection, a construction of the NLRA permitting the Board to enjoin a well founded but retaliatory lawsuit is untenable). While the Supreme Court has extended *Noerr-Pennington* immunity into labor law to protect direct petitioning, it has not done so for "incidental" conduct. See *Venetian Casino Resort, LLC v. NLRB*, 484 F.3d 601, 612 (D.C. Cir. 2007). Subpoenaing documentary evidence from witnesses for potential use in a judicial proceeding is conduct incidental to direct petitioning.

In arguing that the Petition Clause protects its conduct of subpoenaing Board-obtained witness statements in contravention of Board policy, the Respondent analogizes this case to the situation in *BE & K Construction Co.*, 351 NLRB 451 (2007). In that case, the Board, on remand from the United States Supreme Court, held that the filing and maintenance of a reasonably based lawsuit did not violate the Act regardless of the motive for bringing it. Because the employer's lawsuit in *BE & K* was reasonably based in fact and law, the Board found that the filing of the suit did not violate Section 8(a)(1). In determining whether the *BE & K* lawsuit was reasonably based, the Board applied "the same test as that articulated by the Court in the antitrust context: a lawsuit lacks a reasonable basis, or is 'objectively baseless,' if 'no reasonable litigant could realistically expect success on the merits' [citation omitted]." The Board concluded in *BE & K* that "in order to avoid chilling the fundamental First Amendment right to petition," it would find

---

versely affect that agency's ability to prosecute violations of the NLRA." Id. at 238.

[10] The Respondent argues that the holding of *Robbins Tire* is inapplicable because that case involved a FOIA not a subpoena request, and the Court's policy concerns related to the disclosure of affidavits from the Board's investigatory file not to the "production of a personally possessed affidavit by an individual who could claim no privilege." I do not agree that the *Robbins Tire* holding is so restricted. The Court's concern with the dangers of premature release of witness statements is fully applicable to this matter.

[11] The Respondent argues that *H. B. Zachry* is inapplicable because, inter alia, its disposition has never been subject to judicial review and because its holding conflicts with that of *Martin v. Ronnigen Research & Development Co*., 1 Wage & Hour Cas. 2d. (BNA) 176, 1992 Westlaw 409936 (W.D. Mich. 1992). In *Zachry*, the Board specifically rejected the approach taken in *Martin v. Ronnigen* and instead applied *Robbins Tire*, supra, and held that it would not require the charging party union to produce employee affidavits in possession of the General Counsel and the union pursuant to the employer's subpoena to the union. "Based on policy considerations set forth in *Robbins Tire*," the Board refused to require the affidavit's production "simply because the affiant gave a copy of it to the Charging Party Union." Supra at 1037–1038. I am bound to follow Board law. *Iowa Beef Packers*, 144 NLRB 615, 616 (1963), enfd. in part 331 F.2d 176 (8th Cir. 1964).

"only lawsuits that are both objectively and subjectively baseless" to be precluded under the Act, stating, "a lawsuit that targets conduct protected by the Act can be condemned as an unfair labor practice if it lacks a reasonable basis and was brought with the requisite kind of retaliatory purpose."

The *BE & K* case is inapposite to the issue herein since *BE & K* involved direct petitioning, i.e., a lawsuit, rather than conduct incidental thereto. Even assuming that analogizing *BE & K* to the Respondent's witness-statements subpoenas is apt, it is apparent that the subpoena requests could be unfair labor practices if the requests lacked reasonable bases and were brought with coercive purpose.[12] Accordingly, I reject the Respondent's contention that the allegations must be dismissed because "a subpoena served in the context of litigation, even assuming *arguendo*, that it was retaliatory . . . is protected pursuant to the First Amendment of the Constitution."

The Respondent's third argument is that it was entitled to personally possessed affidavits of the subpoenaed individuals because no privilege protected them, or, alternatively, that any such privilege was waived. The Respondent asserts the following as precluding any privilege that might otherwise attach to an investigatory affidavit: a personally possessed affidavit copy is not held in the Board's investigatory file; no one from the Region informed affiants that their affidavits were confidential, admonished them not to share their affidavits, or gave safeguarding cautions; the Region does not act as the affiants' personal attorney; the Regional investigator did not inform affiants that their affidavit disclosures were protected by any sort of attorney-client privilege; the Region voluntarily provided affiants with their affidavits.[13] In its argument, the Respondent focuses primarily on the nonexistence or waiver of a valid attorney-client privilege. The Respondent's argument is misplaced. The employee witness statements are not shielded from subpoena by attorney-client privilege but by the Board's longstanding policy of protecting employees from the reprisal and harassment inherent in labor litigation by exempting their statements from disclosure unless and until they are called to testify. This protection exists in order to remove any chilling effect that would otherwise befall the Board's investigatory sources. *Smithfield Packing Co.*, 334 NLRB 34, 34–35 (2001), citing *Robbins Tire & Rubber Co*., supra. The Respondent has not persuasively explained why the Board's policy does not protect the employee statements it subpoenaed.

The Respondent's fourth argument is that the Federal Rules of Evidence (FRE) compel disclosure of a personally possessed copy of an otherwise privileged document.[14] The Board's Rules and Regulations, Section 102.39,[15] authorize application of the FRE to conduct of Board proceedings insofar as practicable. Even assuming Section 102.39 unconditionally obliged the administrative law judge conducting a board hearing to adhere to the FRE, the Respondent has not identified any evidentiary rule therein that would compel subpoenaed employees to produce investigatory Board affidavits, even those personally possessed. The Respondent points out that FRE 612 permits an adverse party access to any writing a witness uses to refresh memory for the purpose of testifying, either "(1) while testifying, or (2) before testifying, if the court in its discretion determines it is necessary in the interests of justice," subject to judicial excision of any portions thereof unrelated to the witness' testimony. Except for unusual circumstances, FRE 612 contemplates production of such a writing after an adverse party has established the witness used it to refresh memory, which would generally occur during cross-examination. In fact, by requiring that a witness affidavit be supplied after a witness has testified without the qualification that it have been used to refresh memory, Section 102.118(b)(1)[16] gives somewhat broader witness statement access to the adverse party than FRE 612 does. Accordingly, the FRE does not insulate the Respondent from charges that its 2009 subpoena demand for employee witness statements interfered with, restrained, or coerced employees in violation of the Act.

Viewed objectively, in the circumstances set forth herein, the Respondent's conduct of issuing the 2009 subpoenas requiring its current or former employees to produce affidavits they had provided to the Board had the effect of interfering with, restraining, or coercing employees in violation of Section 8(a)(1) of the Act.[17] Respondent's 2007 subpoenas seeking employee witness statements were revoked by Judge Kocol in a ruling that clearly delineated the Board's restrictions on production of such statements. Nevertheless, through issuance of the 2009 subpoenas, the Respondent again sought production of restricted witness statements. The Respondent's twice-repeated attempt to force current or former employees to disclose protected witness statements outside the parameters set by the Board's rules can reasonably be expected to have a chilling effect on employees' right to cooperate in Board investigations. The Board's relevant regulatory language and case law involve complex issues and express complex concepts; it is both logical and realistic to expect reasonable employees to fear that the Board might not be able to prevent premature or improper release of voluntary witness statements, which, in turn, might

[12] The question of whether the Petition Clause affords an employer the right to serve a subpoena duces tecum that seeks documents later deemed to be legally unobtainable has not been definitively answered, but the motivation underlying the subpoena is relevant. See *Scott v. Burress*, 2008 WS 585072, at 6–7 (E.D.Mich. Mar.3, 2008) (holding that the magistrate judge improperly awarded sanctions despite the fact that the subpoenas were improper because "there is no indication in his memorandum opinion that he found [the] subpoenas to have been issued in bad faith").

[13] The Respondent infers from the testimony of Richard Mineards, an affiant in this matter, that Board assurances, or lack thereof, regarding his affidavit apply generally to all affiants.

[14] The Respondent argues that a personally possessed copy of an affidavit must be produced pursuant to FRE 401, 402, 403, 502, and 612. FRE 401, 402, and 403 concern the relevance of proposed evidence, which does not bear on the issues herein; FRE 502 applies to the attorney-client privilege and work-product protection, the inappositeness of which has already been addressed.

[15] NLRB Rules and Regulations and Statements of Procedure.

[16] NLRB Rules and Regulations and Statements of Procedure.

[17] Application of an objective standard requires the analysis to focus on the probable perspective of reasonable employees upon receiving or learning of the 2009 subpoenas. See *Flexsteel Industries*, 311 NLRB 257, 257 (1993).

subject them to employer intimidation or coercion regarding their cooperation in the investigation or their testimony at hearing, all of which could chill employee rights. Viewed subjectively, the Respondent must have intended such a coercive effect. The Respondent has provided no viable explanation or legal justification for twice seeking employees' Board statements. Judge Kocol's clearly stated ruling, summarized in the Kocol decision, by which he revoked the Respondent's 2007 subpoena of witness statements outlined the law and regulations governing disclosure of employee statements. The reasoning of Judge Kocol's ruling unmistakably applied to the similar subpoena requests the Respondent pressed for in the 2009 subpoenas. Judge Kocol's ruling had to have put the Respondent on notice that such subpoena requests were improper and would not be sustained. Nonetheless, the Respondent issued the 2009 subpoenas in a work environment tainted by the numerous, serious unremedied unfair labor practices found by Judge Kocol. In those circumstances, it is not only reasonable, but nearly unavoidable, to infer that in issuing the 2009 subpoenas, the Respondent was motivated, at least in part, by a desire to quell employee willingness to give evidence to, or for, the General Counsel. Accordingly, I find that by issuing subpoenas to current and former employees prior to their testimony at a Board hearing, requesting their copies of affidavits they had submitted to the Board in an unfair labor practice investigation, the Respondent violated Section 8(a)(1) of the Act.[18]

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce and in a business affecting commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by issuing subpoenas to current and former employees prior to their testimony at a Board hearing that requested their copies of affidavits they had submitted to the Board in an unfair labor practice investigation.

4. The unfair labor practices set forth above affect commerce within the meaning of Section 8(a)(3) and (1) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. The Respondent will be ordered to post an appropriate notice.

The General Counsel asks that the Respondent be required to mail copies of the notice to employees since many of those affected by Respondent's unfair labor practice conduct are not currently employed by Respondent and thus would not have access to Respondent's premises to view a posted notice. Presumably, the General Counsel seeks notice-mailing for former employees, as current employees may view notices posted at the Respondent's facility. Since the Respondent's unlawful conduct directed toward former employees as well as current employees can be expected to have a chilling effect on employees' Section 7 rights, the Respondent is ordered to mail copies of the notice herein to all former employees who were employed by the Respondent at any time during the period of May 1, 2009, to the date of posting of the notice.

[Recommended Order omitted from publication.]

[18] In light of my finding herein, I find it unnecessary to consider whether, as the General Counsel contends, the Respondent attempted to engage in impermissible interrogation by requiring the involuntary production of employee statements given to the Board.