

UNITED STATES DEPARTMENT OF JUSTICE
EXECUTIVE OFFICE FOR IMMIGRATION REVIEW
OFFICE OF THE CHIEF ADMINISTRATIVE HEARING OFFICER

IN RE INVESTIGATION OF)
SEAFARERS INTERNATIONAL) OCAHO Subpoena No.
UNION) 93-2-00008
_____)

ORDER DENYING PETITION TO RESCIND OR MODIFY
SUBPOENA
(March 19, 1993)

Procedural Background

On February 8, 1993, the Office of Special Counsel for Immigration Related Unfair Employment Practices (OSC) filed a request for issuance of a subpoena captioned in this investigation. The subpoena demands four categories of data from Seafarers International Union (SIU). I signed and issued the subpoena on February 10, 1993.

On March 2, 1993, SIU filed a Petition to Modify or Rescind Subpoena. SIU recites that it was served with the subpoena on February 11; suggests a rationale for lawful discrimination against employment of non-U.S. seamen on American flag vessels; and acknowledges the possibility of inadvertent failure to hire non-citizens in instances where U.S. citizenship-only is not required. Asserting that on February 16 it made a settlement offer which OSC rejected on February 19, SIU asks me to "note that this Petition is filed within 10 days of the rejection of this settlement order."

Addressing the specific data categories sought, SIU opposes ##1,2 and 4 but not 3. Item 3 requests all SIU's Immigration and Naturalization Service Forms I-9 for the Port of Houston (POH) for the period March 25, 1992 to February 1, 1993 (92-93).

Item #1 requests all SIU job orders in its management information system for POH for 92-93. SIU contends that it would be burdensome to produce 1852 job orders.

Item #2 requests a list of all SIU members for POH during 92-93. Asserting that it does not maintain membership lists by port, SIU says

a member can register at any port each and every day a hiring hall is open. It objects that "it would be unduly burdensome to compile such a document due to the number of individuals involved." 28 C.F.R. §68.25. (1991).

Item #4 requests the names and addresses of non-U.S. SIS members for POH for 92-93. SIU says it cannot comply, asserting that its records do not specify members' citizenship; SIU records indicate whether an individual holds a passport but do not identify the country of issuance.

Discussion

On March 8, 1993, OSC filed a Memorandum in Opposition (Memo) to the Petition. OSC asks me to deny the Petition as untimely filed, and because the data sought meets "the test of propriety."

OSC is correct as to timeliness. The Petition was filed (3/2/93) more than ten days after service of the subpoena (2/11/93). SUI perhaps referred to filing of its Petition within ten days of rejection by OSC of SIU's settlement offer as an implicit explanation of its failure to meet the requirement of 28 C.F.R. §68.25(c) that challenges to subpoenas be filed within ten days of service. SUI is mistaken in its time calculation. The Petition, although attached to a transmittal letter dated February 26, was filed on March 2, eleven days after OSC rejected the settlement. OSC's Memo does not discuss whether settlement negotiations should be understood to toll the running of the ten day period. SIU is represented by counsel, to whom the February 10 subpoena was addressed. There is no suggestion that SIU was misled by OSC into a reasonable belief that SUI's offer of settlement overtook its obligations with respect to the subpoena. Accordingly, I hold that by waiting 18 days after receipt of the subpoena, without good cause or intervening request for an extension of time, SIU forfeits its opportunity for challenge.

Because the development of OCAHO caselaw is still in its formative stage, however, it is instructive to address the particulars of the subpoena at issue. The subpoena is to be construed in context of the investigation in which it issues. There is no reason to discredit OSC's assertion that its investigation, initiated on receipt of charges of an alleged unfair employment practice by SUI in respect of referrals for employment on a specific date in August 1992, was expanded by OSC pursuant to its authority to conduct investigations on its own initiative. Memo at 2. See 8 U.S.C. §1324b(d)(1).

I am persuaded by review of the subpoena and OSC's Memo that the subpoena inquiry satisfies the requirements of EEOC v. Maryland Cup Corp., 785 F.2d 471 (4th Cir. 1986), as adopted in OCAHO jurisprudence, In re Carolina Employers Assoc., 3 OCAHO 455 (9/19/92). Reviewing OSC's rationale and the exhibits attached to its Memo, I do not find that production of the data sought at ##1 and 2 is unduly burdensome in context of SUI's obligation to comply with reasonable production demands of a lawful administrative subpoena, even including the production of evidence "that does not presently exist in documentary form." Maryland Cup, 785 F.2d at 478. Clearly, the data sought is relevant to an OSC investigation of SUI's hiring hall practices. See EEOC v. Shell Oil Co., 466 U.S. 54, 68-69 (1984). Moreover, it is well settled that the role of the court is "sharply limited" in an investigatory subpoena enforcement proceeding. EEOC v. South Carolina Nat'l Bank, 562 F.2d 329, 332 (4th Cir. 1977); Maryland Cup at 475. ("[A]dministrative subpoenas are subject only to limited judicial review. See e.g., NLRB v. G.H.R. Energy Corp., 797 F.2d 110, 113 (5th Cir. 1982) (interpreting a statute granting a subpoena power identical to that of the EEOC)"). See also, EEOC v. Tempel Steel Corp., 814 F.2d 482, 485 (7th Cir. 1987), cited early in the development of OCAHO caselaw, In re St. Christopher-Otillie, 1 OCAHO 3 (5/5/88).

OSC concedes that if SUI lacks the ability to comply with #4, it "only need state so in response to the subpoena." Memo at 13. For that reason, and to provide an opportunity for OSC and SUI to negotiate a schedule for production of the data commanded by the February 10 subpoena, I reject as premature OSC's request for an order authorizing it to seek enforcement in district court. 8 U.S.C. § 1324b(f)(2).

The Petition is denied.

SO ORDERED.

Dated and entered this 19th day of March, 1993.

MARVIN H. MORSE
Administrative Law Judge