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Labor Law - Evidence- Production of Pre-Trial Statements for Purpose of Cross-Examination in NLRB Proceeding

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LABOR LAW—EVIDENCE—PRODUCTION OF PRE-TRIAL STATEMENTS FOR PURPOSE OF CROSS-EXAMINATION IN NLRB PROCEEDINGS—Respondent was accused of unfair labor practices. At the hearing before the trial examiner, respondent requested pre-trial statements of the general counsel's witnesses who testified, for the purpose of impeaching their credibility on cross-examination. The trial examiner's refusal was upheld by the NLRB.¹ Upon motion to reopen the record, *held*, the record is reopened and further proceedings are to be held before the trial examiner. The holding of *Jencks v. United States*² applies to NLRB proceedings; hence respondent has the right for cross-examination purposes to production of pre-trial statements made by the general counsel's witnesses which directly relate

¹ Ra-Rich Mfg. Corp., 120 N.L.R.B. No. 73, 42 L.R.R.M. 1001 (1958).

² 353 U.S. 657 (1957).

to their testimony. *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. No. 90, 42 L.R.R.M. 1403 (1958).

In the *Jencks* case, which was a criminal proceeding, the Supreme Court held that the accused had the right to inspect pre-trial statements made by the government's witnesses which touched upon the subject matter of their testimony. While the government had the right to elect not to produce such statements, if it so elected, the case was to be dismissed. Thereafter, the NLRB held in a series of cases³ that this rule was restricted to criminal cases and did not apply to board proceedings governed by the Administrative Procedure Act.⁴ A recent decision by the Court of Appeals for the Second Circuit,⁵ however, prompted the Board to change its position. This extension of the *Jencks* rule to an NLRB proceeding seems logical, for although such proceeding is not a punitive action in the criminal sense, it is a public prosecution by the general counsel charging violations of the Labor-Management Relations Act.⁶ Thus it is necessary to balance the individual's right fully to protect himself⁷ against the government agency's right to keep its records confidential.⁸ Undoubtedly

³ Great Atlantic and Pacific Tea Co., 118 N.L.R.B. No. 138, 40 L.R.R.M. 1338 (1957); Bldg. and Constr. Trades Council, 119 N.L.R.B. No. 227, 41 L.R.R.M. 1388 (1958); Operating Engineers Union, 120 N.L.R.B. No. 76, 42 L.R.R.M. 1005 (1958); Baltimore Steam Packet Co., 120 N.L.R.B. No. 193, 42 L.R.R.M. 1215 (1958); E. V. Prentice Machine Works, Inc., 120 N.L.R.B. No. 210, 42 L.R.R.M. 1246 (1958).

⁴ 60 Stat. 237 (1946), 5 U.S.C. (1952) §1001 et seq. But see *Communist Party of the United States v. Subversive Activities Control Board*, (D.C. Cir. 1958) 254 F. (2d) 314, holding the *Jencks* rule applicable to the Subversive Activities Control Board which is governed by the Administrative Procedure Act.

⁵ *NLRB v. Adhesive Products Corp.*, (2d Cir. 1958) 258 F. (2d) 403, denying enforcement 117 N.L.R.B. 265 (1957).

⁶ "... [I]t [*Jencks* rule] should apply to any case where the government prosecutes a violation of law. . . . It cannot be contended that an unfair labor practice proceeding is 'purely civil' in nature. It is not litigation of the rights of private parties but it is a prosecution initiated by the General Counsel of the Board wherein he charges that a Respondent has violated certain provisions of the Act and accordingly seeks certain remedies. Though the Act is neither punitive nor compensatory but preventative and remedial in its nature, it establishes a public procedure looking only to public ends. . . ." Member Jenkins dissenting in part, *Great Atlantic and Pacific Tea Co.*, note 3 *supra*, at 1340. See also *Communist Party of the United States v. Subversive Activities Control Board*, note 4 *supra*; *NLRB v. Adhesive Products Corp.*, note 5 *supra*.

⁷ It is a generally accepted rule of evidence that a witness may be required to produce for inspection any statements or notes which he uses to refresh his memory while testifying. 3 WIGMORE, EVIDENCE, 3d ed., §763 (1940). This principle was extended to include statements used prior to trial to refresh the witness's memory. *Goldman v. United States*, 316 U.S. 129 (1942), held that the trial judge properly exercised his discretion in not ordering the production of such a statement, thus implying that such statements may be required to be produced. In *Gordon v. United States*, 344 U.S. 414 (1953), the Court held that pre-trial statements should be ordered to be produced upon the laying of a preliminary foundation of inconsistency between them and the actual testimony. The final extension came in the *Jencks* case.

⁸ Pursuant to congressional authority the NLRB has promulgated rules which prevent the public disclosure of its records except by the permission of designated officials. N.L.R.B. Rules and Regulations 102.87, Series 6, 16 FED. REG. 1934, 1947, 1948, as amended at 17 FED. REG. 4983.

the result in the principal case will better enable a respondent to defend himself in that he will have a greater opportunity to impeach the credibility of the general counsel's witnesses. It may be feared that investigation of violations will be impeded if assurance cannot be given that statements will be kept confidential. But this objection should not be too serious since normally only those persons willing to testify will be likely to have their pre-trial statements made public.⁹ It remains to be seen whether the Board will apply the *Jencks* rule to its full extent. Although no modifications were indicated by the decision in the principal case, Congress has restricted application of this rule in criminal proceedings in two important respects.¹⁰ First, if the government elects not to produce the requested statements, either the testimony will be stricken or a mistrial will be declared, but no dismissal will result.¹¹ Although the question whether the proceeding must be dismissed did not arise in the instant case, a mere striking of the testimony would seem sufficient sanction in NLRB proceedings since the danger of prejudicially impressing a jury does not exist. It would appear that under either form of the rule the effect will be approximately the same. If the modified rule were applied the testimony will be stricken if the general counsel elects not to produce the requested statements, but there will be no dismissal. If the rule is applied in unmodified form, the general counsel can avoid dismissal by determining prior to the hearing which statements he is willing to make public and allow only those witnesses to testify. The second restriction now in force in criminal cases provides that where the government claims that pre-trial statements contain matter not directly relating to the testimony, the statements are delivered first to the trial judge who extracts the immaterial portions before turning the statements over to the accused.¹² This modification would give more security to the NLRB records yet still allow respondent the right to secure pre-trial statements directly relating to the testimony of the witness. It would seem desirable for the Board to modify application of the *Jencks* rule to some extent, for otherwise the respondent in an NLRB proceeding would be given greater protection than the accused in a criminal proceeding.¹³

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⁹ Under the *Jencks* rule, only those statements made by the witness which touch upon the subject matter of his testimony must be produced. Hence only a person who testifies risks the possibility of the public disclosure of his pre-trial statements, and then only to the extent to which he testifies.

¹⁰ 18 U.S.C. (Supp. V, 1958) §3500. See notes, 56 MICH. L. REV. 314 (1957); 67 YALE L. J. 674 (1958).

¹¹ *Ibid.*

¹² *Ibid.*

¹³ On the other hand it could be argued that such a situation is quite consistent on the ground that the need for protection of NLRB records is not as great as that needed by criminal enforcement agencies.