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Labor Law -- Pre-Hearing Discovery of Employees' Statements

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The principle of full disclosure through discovery has, at least since the adoption of the Federal Rules of Civil Procedure in 1938,[1] become fully entrenched in litigation conducted in federal and most state courts. It has not, however, become an established principle in proceedings before the National Labor Relations Board although the Board's adjudicative hearings closely resemble court litigation[2] to which discovery has been so usefully applied. This fact appears on its face somewhat difficult to justify. The expressed rationale for discovery in civil adjudications—that it minimizes "gamesmanship" and surprise, identifies and simplifies the issues, and tends in the long run to expedite the adjudicative process—seems also applicable to Board hearings. As Professor Davis has stated in his treatise on administrative law, "[p]robably no sound reason can be given for failure to extend to administrative adjudications the discovery procedures worked out for judicial proceedings."[3]

In the recent case of *NLRB v. Schill Steel Products, Inc.*,[4] the Court of Appeals for the Fifth Circuit addressed itself to this important question of discovery prior to labor hearings on petition of the Board to adjudge Schill Steel in civil contempt for failure to comply with a cease and desist order.[5] The company acquiesced in the Board's motion that a special master be appointed to hear contempt proceedings, but moved for a specific provision in the order that would allow discovery of all statements taken by the Board in the course of its investigation from witnesses whose testimony the Board intended to adduce at the contempt hearing. The court rejected the Board's argument that such discovery could lead to undue intimidation of witnesses by the employer and held the statements subject to discovery under the Federal Rules of Civil Procedure. Noting that under the Board's own rules, statements

[1] FED. R. CIV. P. 26-37.

[2] An adjudicatory hearing is similar to a trial; the parties present evidence, subject to cross-examination and rebuttal, before a tribunal which makes a determination of fact and law. 1 K. DAVIS, ADMINISTRATIVE LAW § 7.01 (1958).

[3] *Id.* § 8.15, at 589.

[4] 408 F.2d 803 (5th Cir. 1969).

[5] The Fifth Circuit had previously handed down a decree on February 2, 1965, enforcing the Board's orders of February 8, 1963, and August 20, 1963, that the company cease and desist from certain named violations of sections 8(a)(1), 8(a)(3), and 8(a)(5) of the National Labor Relations Act. In the principal case, the Board, alleging that the company had failed to comply with the court's decree, petitioned the court to adjudge the company in civil contempt.

of such witnesses were to be turned over anyway *after* they testified,[6] the court concluded that discovery at the pre-hearing stage would not lead to greater coercion.[7]

The decision in *Schill* dramatizes the split between the federal courts and the Board on the issue of pre-hearing discovery of employee statements. The federal courts for several years have consistently recognized the right to such discovery in original proceedings in federal court. For example in a 1962 case, *Fusco v. Richard W. Kasse Baking Co.*,[8] the Board's regional director filed a petition seeking to have certain unfair labor practices enjoined. The respondent served on the regional director a subpoena calling for him to testify and produce certain affidavits, reports, and memoranda. The regional director declined to produce the material. The court held that the discovery provisions of the federal rules were applicable, but limited discovery to affidavits and statements of those employees who were to appear as witnesses for the petitioner.[9] The court in *Fusco*, and other federal courts[10] since that decision, reasoned that although the action is brought by an official governmental agency, the agency is in no different position than any ordinary litigant and is therefore bound by the discovery provisions of the Federal Rules of Civil Procedure.

Contrary to the practice in the federal courts, the Board has consistently refused to allow any pre-hearing discovery in Board proceedings[11] despite repeated attempts by respondents to gain discovery privileges. In view of the current trend of full disclosure in civil actions and in light of the *Schill* decision, a re-examination of Board policy denying discovery seems imperative. The focus will be on discovery of statements of witnesses whom the Board plans to call for testimony at the hearing. Since the investigation of unfair labor practices centers around such statements, the contents, if discoverable, would be most beneficial to the respondent in preparing its defense.

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[6] See note 40 *infra* and accompanying text.

[7] 408 F.2d at 805.

[8] 205 F. Supp. 459 (N.D. Ohio 1962).

[9] *Id.* at 464.

[10] *See, e.g.*, Sperandeo v. Milk Drivers Local 537, 334 F.2d 381 (10th Cir. 1964); Olson Rug Co. v. NLRB, 291 F.2d 655 (7th Cir. 1961); Madden v. Milk Wagon Drivers Local 753, 229 F. Supp. 490 (N.D. Ill. 1964); Fusco v. Richard W. Kasse Baking Co., 205 F. Supp. 459 (N.D. Ohio 1962).

[11] *See, e.g.*, Walsh-Lumpkin Wholesale Drug Co., 129 N.L.R.B. 294, 296 (1960); Plumbers & Steamfitters Local 100, 128 N.L.R.B. 398, 400 (1960); Sealtest S. Dairies, 126 N.L.R.B. 1223 n.3 (1960); Chambers Mfg. Corp., 124 N.L.R.B. 721, 722 (1959).

CURRENT BOARD PRACTICE

The rules and regulations of the Board expressly forbid any formal discovery of a witness' statements or the information contained in those statements without consent of the Board itself. This policy is reflected in Board regulation 102.118:

> No . . . employee of the Board shall produce or present any files, documents, reports, memoranda, or records of the Board or testify in behalf of any party to any cause . . . with respect to any information, facts, or other matter coming to his knowledge, in his official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board . . . without the written consent of the Board . . . .[12]

Nor does the Administrative Procedure Act,[13] which provides statutory guidelines of the rules of evidence and procedure to be followed by the various federal agencies, contain any provisions for discovery in the administrative adjudicative process.

Employers have, of course, attempted informal means of discovery to ascertain what employees have told the Board. But informal discovery may be subject to strictly enforced limitations. For example, in *Winn Dixie Stores, Inc.*,[14] the Board held "that the Respondent's requests [to his employees] for copies of the employees' statements to the General Counsel constitute interference, restraint, and coercion within the meaning of section 8(a)(1) of the [National Labor Relations] Act."[15] In fact, it is immaterial whether the statements are actually handed over. The request itself is a violation.[16]

However, the Board has been more tolerant of employer interrogation of employees.

> [A]n employer is privileged to interview employees for the purpose of discovering facts within the limits of the issues raised by a complaint, where the employer or its counsel, does so for the purpose of preparing its case for trial and does not go beyond the necessities of such preparation to pry into matters of union membership, to discuss the nature or extent of union activity, to dissuade employees from joining or re-

[12] 29 C.F.R. § 102.118(a) (1969).
[13] 5 U.S.C. §§ 1001-11 (1964).
[14] 143 N.L.R.B. 848 (1963), *enforced*, 341 F.2d 750 (6th Cir. 1965).
[15] *Id.* at 850.
[16] Henry I. Siegel Co. v. NLRB, 328 F.2d 25, 27 (2d Cir. 1964).

maining members of a union, or otherwise to interfere with the statutory right to self-organization.[17]

This ruling strikes a delicate balance between the legitimate interest of the employer in preparing its case for trial and the interest of the employee in being free from unwarranted interrogation—a balance that an employer risks upsetting each time he questions an employee. In *Joy Silk Mills, Inc. v. NLRB*[18] the court recognized this danger:

> Apparently this rule means that an employer may question his employees in preparation for a hearing but is restricted to questions relevant to the charges of unfair labor practice and of sufficient probative value *to justify the risk of intimidation which interrogation as to union matters necessarily entails*; and that even such questions may not be asked where there is purposeful intimidation of employees. *Such a standard assumes that interrogation of employees concerning their union activities is, of itself, coercive,* but that fairness to the employer requires that a limited amount of such questioning be permitted despite the possible restraint which may result.[19]

The privilege is a narrow one, and "[a]ny interrogation by the employer relating to union matters presents an ever present danger of coercing employees in violation of their § 7 rights."[20] Undoubtedly, such limitations are justified. Moreover, if formal pre-hearing discovery of witness statements were allowed, the justification for employer interrogation—a type of informal discovery with hazards to all involved—would be practically eliminated.

While denying discovery to others, the Board through its investigative powers has the ability to ascertain facts relevant to a controversy well before the hearing stage. This power is derived from section 11(*l*) of the Labor Management Relations Act, which provides that

> [t]he Board or its duly authorized agents or agencies, shall at all reasonable times have access to, for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question.[21]

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[17] May Dep't Stores Co., 70 N.L.R.B. 94, 95 (1946).
[18] 185 F.2d 732 (D.C. Cir. 1950).
[19] *Id.* at 743 (emphasis added).
[20] Texas Indus., Inc. v. NLRB, 336 F.2d 128, 133 (5th Cir. 1964).
[21] Labor-Management Relations Act (Taft-Hartley Act) § 11(1), 29 U.S.C. § 161(1) (1964).

Such broad investigative powers have been strongly criticized by Professor Davis in his treatise on administrative law;[22] nevertheless, they insure that the Board will be well prepared in advance of the hearing.[23]

Attacks on Board Policy

Attempts to assert discovery privileges in Board proceedings have met with little success. For example, section 102.118(a) of the Board's rules[24] was attacked as a denial of due process in *NLRB v. Vapor Blast Manufacturing Co.*[25] However, the court held that the rules of the Board restricting examination of documents did not deny procedural due process and that the Board had responsibility "to formulate its own rules for unfair practice hearings and to determine whether full discovery is practicable in such hearings."[26]

Other attempts to gain discovery have been based on section 10(b) of the Labor-Management Relations Act, the last sentence of which provides that unfair labor practice hearings shall "be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rules of civil procedure for the district courts of the United States . . . ."[27] The Board's position is that this provision "clearly relates to evidence *before* the Board, and not to pretrial privileges accorded parties to judicial proceedings."[28] This interpretation has also received judicial endorsement.[29]

The frustration experienced by parties to a Board proceeding is exhibited by the fact that in at least one instance an attempt at discovery has been made under the recently passed Public Information Act,[30]

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[22] 1 K. Davis, Administrative Law § 3.01, at 160 (1958).

[23] For an analysis of the scope of administrative investigative powers see *id.* §§ 3.01-.14 (1958).

[24] See 29 C.F.R. § 102.118(a) (1969), *supra* note 12, and text immediately preceding.

[25] 287 F.2d 402 (7th Cir.), *cert. denied*, 368 U.S. 823 (1961).

[26] 287 F.2d at 407.

[27] Labor-Management Relations Act (Taft-Hartley Act) § 10(b), 29 U.S.C. § 160(b) (1964).

[28] Del. E. Webb Constr. Co., 95 N.L.R.B. 377 n.2 (1951).

[29] *See, e.g.*, NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407 (7th Cir. 1961); Raser Tanning Co. v. NLRB, 276 F.2d 80, 83 (6th Cir. 1960).

[30] 5 U.S.C. § 552 (Supp. III, 1965-67). Subsection (a)(3) states in pertinent part:

> Except with respect to the records made available under paragraphs (1) and (2) of this subsection, each agency, on request for identifiable records made in accordance with published rules . . . shall make the records promptly available to any persons.

which has as its purpose the making of government records more readily accessible to the public for inspection. In the first reported opinion[31] under the Act, plaintiff employer brought suit to prevent withholding by the Board of certain documents consisting of witnesses' statements. The court denied the requested disclosure on the ground that the material came under the Act's exemption immunizing investigatory files compiled for law enforcement purposes.[32]

Because of the courts' unqualified refusal to find any statutory or constitutional basis for the claim that discovery should be granted, it is not surprising that the Board has evinced considerable antipathy to such disclosure. One attack on the Board's rules in this general area, however, has been successful although it met with stiff opposition from the Board.

The attack was based on *Jencks v. United States*,[33] a criminal case in which the defendant Jencks was prosecuted for filing a false non-Communist affidavit with the National Labor Relations Board. Two F.B.I. informers were crucial government witnesses. Jencks sought an order requiring the Government to produce for inspection the reports relating to those matters about which each informer had testified. The trial court denied the order, and the court of appeals affirmed. The Supreme Court reversed, holding that *once a witness has testified,* a defendant is entitled to an order directing the government to produce for inspection by the defendant any reports made by the witness touching the events and activities to which he gave testimony.[34] Since under *Jencks* the statements are to be turned over to the defendant only after the witness has testified, the net effect of the holding is to provide the defendant a source for impeachment of the witness.

Relying upon the rule derived from *Jencks*, the respondent in *Great Atlantic & Pacific Tea Co.*[35] sought the production of all documents that might be relevant and material to the cross-examination of a hearing witness. The contention that regulations barring such disclosure had been abrogated by *Jencks* was rejected by the Board, which held that the decision should not operate to overturn statutes authorizing agencies to adopt rules reasonably calculated to maintain their records inviolate.[36]

[31] Barceloneta Shoe Corp. v. Compton, 271 F. Supp. 591 (D. Puerto Rico 1967).
[32] 5 U.S.C. § 552(b)(7) (Supp. III, 1965-67).
[33] 353 U.S. 657 (1957).
[34] *Id.* at 668.
[35] 118 N.L.R.B. 1280 (1957).
[36] *Id.* at 1282.

Subsequently the Court of Appeals of the Second Circuit in *NLRB v. Adhesive Products Corp.*[37] considered the same question and on the authority of *Jencks* reversed the district court, which had denied production under the Board rule forbidding disclosure.[38] In the wake of the Second Circuit's decision, the Board in *Ra-Rich Manufacturing Corp.*[39] held that *Jencks* applied to its proceedings and thereby overruled its position in *Great Atlantic & Pacific Tea Co.* Thus, for purposes of cross-examination the Board affords parties the right to production of pre-hearing statements made by witnesses who have *already testified* to matters contained in those statements.[40]

Nevertheless, the *Jencks* rule as applied to hearings before the Board cannot be regarded as a substitute for discovery; it becomes operative only after the hearings have begun and one or more witnesses have testified. The chief utility of the rule remains co-extensive with its original purpose—to provide a respondent with a source of material upon which to impeach a witness. Though of indisputable value, this right to obtain witnesses' statements serves a purpose essentially distinct from the privilege of becoming apprised of an opposing party's information before adjudication in order to eliminate needless issues and prepare an effective defense.

Need for Discovery in 8(a)(3) Proceedings

A look at discovery against the background of one particular type of Board proceeding may be enlightening. Section 8(a)(3) makes any discriminatory treatment for the purpose of encouraging or discouraging union membership an unfair labor practice.[41] Charges under this provision make up the great bulk of Board cases against employers. In 1967 there

[37] 258 F.2d 403 (2d Cir. 1958).
[38] *Id.* at 408.
[39] 121 N.L.R.B. 700 (1958).
[40] 29 C.F.R. § 102.118(b)(1) (1969), as pertinent, reads:

> [A]fter 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 trial examiner 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. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the trial examiner shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

[41] Labor-Management Relations Act (Taft-Hartley Act) § 8(a)(3), 29 U.S.C. § 158(a)(3) (1964).

were 7,463 charges of discrimination—sixty-six per cent of the total filings against employers.[42]

The key to sustaining a discrimination charge lies in the government's ability to prove that the motive behind the employer's action was to encourage or discourage union activity. In the typical proceeding the government is fairly assured of a *prima facie* case of discrimination if it can prove the following questions of fact: (1) that the employee was a union member or adherent; (2) that the employer knew this fact; (3) that the employer was anti-union; and (4) that the employee was treated unlike non-union employees. For example, in a typical discrimination case, the trial examiner's analysis of the government's case reads in pertinent part as follows:

> There is no doubt that Allen was quite an active *union adherent*, and after the visit of Allen, McKinney, and Walker to Snipes' office on September 25 there can be no question about Snipes' *knowledge* of this fact. It has previously been found that the Respondent was vigorously *opposed* to the Union's advent. The timing of Allen's *discharge* within a few hours after Snipes became aware of Allen's prounion sympathies is therefore *suspect*.[43]

Of course additional factors, if present, are also introduced by the government to strengthen its case. It can fairly be said that the Board is quite liberal in permitting inferences to be drawn from these surrounding circumstances.[44]

In discrimination cases under section 8(a)(3) the Board pays lip service to the proposition that the burden of proof is on the government; however, because of the relative ease with which inference is allowed, the burden of going forward appears to shift to the employer to show good cause for his actions.[45] Undoubtedly the burden should be on the

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[42] NATIONAL LABOR RELATIONS BOARD, THIRTY-SECOND ANNUAL REPORT, Table 2, at 218 (1967).

[43] Wellington Mill Div. West Point Mfg. Co., 141 N.L.R.B. 819, 835 (1963), *modified*, 330 F.2d 579 (4th Cir. 1964).

[44] *See* Miller Elec. Mfg. Co. v. NLRB, 265 F.2d 225, 226 (7th Cir. 1959); NLRB v. Blue Bell, Inc., 219 F.2d 796, 798 (5th Cir. 1955); Indiana Metal Prod. Corp. v. NLRB, 202 F.2d 613, 616 (7th Cir. 1953); Interlake Iron Corp. v. NLRB, 131 F.2d 129, 133 (7th Cir. 1942); NLRB v. Illinois Tool Works, 119 F.2d 356, 363 (7th Cir. 1941).

[45] Jasper Nat'l. Mattress Co., 89 N.L.R.B. 75, 77-78 (1950). The Board stated that after the government had established its *prima facie* case, "[i]t . . . devolved upon the Respondent to come forward with reasonably convincing evidence to show that the discharges were actually for nondiscriminatory reasons." Other Board decisions have stated this proposition more explicitly. *See, e.g.*, Pacific

employer since the reasons for his actions are peculiarly within his knowledge. However, once saddled with this burden, the question then becomes whether it should often be made intolerable by denying the employer discovery privileges. Such a situation is particularly disturbing because overt acts of the kind that are a part of everyday business management are laid open to inferences that may sustain the charge. As it stands now, prior to the hearing the respondent has no idea on which of his acts or conversations the government will base its case or introduce for the drawing of inferences. The employer is in a very unenviable position. He does not know to what facts his proof must be responsive; therefore, he often cannot adequately prepare a defense. In view of the large number of discrimination cases—about two of every three charges against employers heard by the Board—discovery would appear to be justified by this type of proceeding alone.

Objections to Discovery

Although witness statements have never been subject to discovery in Board proceedings, it is conceivable that should they in the future be held discoverable, the Board could protect them under the work product doctrine. This doctrine excludes from discovery such items as a lawyer's own notes and memoranda or anything else reflecting his mental impressions, theories, or conclusions, including statements that he has taken from witnesses. Although the work product doctrine was formulated in civil cases, it would seem applicable to administrative hearings that are basically adversary. The policies behind the work product rule are based on the adversary process.[46]

The leading case involving the work product doctrine is *Hickman v. Taylor*,[47] in which witnesses' statements were protected from discovery. The basis for the Court's holding was that the plaintiff had made no showing of necessity for the discovery. The Court stated that the petitioner "has sought discovery as of right of oral and written statements of witnesses whose identity is well known and whose availability to petitioner appears unimpaired."[48] After pointing out the numerous other means available to petitioner to obtain the information sought, the Court

Mills, 91 N.L.R.B. 60, 61 (1950), where the Board held that "the burden of *going forward with evidence* after the *prima facie* case of discriminatory character of discharge had been established necessarily falls upon the Respondent."

[46] *See* Hickman v. Taylor, 329 U.S. 495, 510-11 (1947).

[47] 329 U.S. 495 (1947).

[48] *Id.* at 508.

concluded that he was attempting "to secure the production of written statements . . . without any showing of necessity or any indication or claim that denial of such production would unduly prejudice the preparation of petitioner's case or cause him any hardship or injustice."[49]

There is, of course, no firm rule to use in determining the necessity that must be shown for discovery of work product. However, Professor Wright in his analysis of the case states that "[u]ndoubtedly the single most important factor in measuring necessity or justification for discovery of work product materials is whether the information in question is otherwise available to the party seeking discovery."[50] The courts, in effect, should balance the competing interests of the parties involved. The court in *Hickman* found that there was equal opportunity on the part of both parties to prepare for trial.

Applying the above reasoning to an unfair labor practice proceeding, discovery seems strongly justified; there are no alternative effective means of discovery available to an employer. A great disparity exists between the respective abilities of the parties involved as far as preparation for the hearing is concerned. Detailed information of alleged unfair labor practices is to be found only from employees, to whom the employer's access is severely restricted by Board decisions. Thus it appears that the federal courts could find the requisite necessity for discovery. The Court in *Hickman* intimated as much by stating that "production might be justified where the witnesses are no longer available or can be reached only with difficulty."[51] Mr. Justice Jackson in his concurring opinion reiterated the position of the Court:

> There might be circumstances, too, where impossibility or difficulty of access to the witness or his refusal to respond to requests for information or other facts would show that the interest of justice require that such statements be made available.[52]

In sum, it is unlikely that the work product rule would impair discovery of witnesses' statements in a Board proceeding. Furthermore, the need for ascertaining the truth seemingly outweighs any harm resulting from work product disclosure.

Thus far, the Board has sucessfully based its denial of discovery rights

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[49] *Id.* at 509.
[50] C. WRIGHT, FEDERAL COURTS § 82, at 317 (1963).
[51] 329 U.S. at 511.
[52] *Id.* at 519.

on a more pragmatic objection than assertion of the work product rule. A Board investigation is unique in that most of the statements taken during its course are obtained from *employees*—a fact distinguishing Board adjudicatory proceedings from civil cases in a way significantly related to the appropriateness of discovery. There is a seemingly genuine fear by the Board that if discovery of witnesses' statements were allowed beforehand, such disclosure could lead to undue intimidation by the employer.[53]

The point is well taken that an employee who is asked to cooperate with the Board by giving a statement to its investigator is in a particularly delicate situation. Indeed, the real danger of granting discovery appears to be the prohibitive effect on an employee's willingness to give statements; the employee may choose to remain silent, and the Board's ability to conduct effective investigations would become more difficult. The Court of Appeals for the Fifth Circuit in *Texas Industries, Inc. v. NLRB*[54] remarked that

> [I]t would seem axiomatic that if an employee knows his statements to Board agents will be freely discoverable by his employer, he will be less candid in his disclosures. The employee will be understandably reluctant to reveal information prejudicial to his employer when the employer can easily find out that he has done so.[55]

While such a rationale seems perfectly valid, the risk of such disclosure and its prohibitive effect appear to be present under current Board procedure. Under the *Jencks* rule, a witness' statement is available to the respondent after the witness has testified. Thus, if discovery were allowed only of statements of witnesses whom the Board planned to have testify at the hearing, it would follow that the prohibitive effect would be no greater than under the *Jencks* rule. The Fifth Circuit took this view in *Schill* to reject the Board's argument that discovery would lead to intimidation. The court stated that it was "unable to see how the danger of coercion or reprisal becomes greater if we require that the statements to the Board of witnesses who testify be turned over at the discovery stage rather than during the course of the hearing."[56] This reasoning also appears valid in proceedings before the Board.

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[53] *See, e.g.*, NLRB v. Schill Steel Prod., Inc., 408 F.2d 803 (5th Cir. 1969).
[54] 336 F.2d 128 (5th Cir. 1964).
[55] *Id.* at 134.
[56] 408 F.2d at 805.

STATUTORY PROHIBITIONS AGAINST INTIMIDATION AND A PROPOSAL

Some protection against intimidation is provided employees by statutory prohibitions. Pertinent is section 8(a)(4) of the Labor-Management Relations Act making it an unfair labor practice for an employer "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."[57] It is not unreasonable to believe that the great majority of employers who have been charged with an unfair labor practice will not subject themselves to a second such charge by discriminating against an employee who files charges or makes statements to the Board. But undoubtedly there are a handful who would continue to resist the provisions of the Act at any cost. The Board's concern in this area reveals a lack of faith in the remedy of section 8(a)(4) provided for such an occurrence. Perhaps there is good cause for the Board's concern; since coercion is in itself a separate unfair labor practice, it calls for a separate proceeding against the employer. Consequently, if an employee is fired for filing charges with the Board, it may be quite some time before his rights are asserted in court, especially if appeals are taken.

A practical solution to the problem would be to provide an *immediate* means of relief to an employee who feels that he has been prejudiced under section 8(a)(4). Such relief could be made available by section 10(*l*) of the Labor-Management Relations Act, which provides that immediate injunctive relief or a temporary restraining order may be granted for certain unfair labor practice charges.[58] Amendment of

[57] Labor-Management Relations Act (Taft-Hartley Act) § 8(a)(4), 29 U.S.C. § 158(a)(4) (1964).

[58] Labor-Management Relations Act (Taft-Hartley Act) § 10(*l*), 29 U.S.C. § 160(*l*) (1964) reads in pertinent part:

> Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed, or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should be issued, he shall on behalf of the Board, petition any district court of the United States . . . within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary

this section to include section 8(a)(4) in the list of unfair labor practices for which injunctive relief is available would be a big step in providing the employee with more protection against coercion by his employer. Such a strengthening of the remedy against intimidation would complement adoption of pre-hearing discovery of employees' statements.

CONCLUSION

It seems anomalous that discovery of employees' statements to the Board is allowed in original proceedings in federal court but not for hearings before the Board itself. Since the main argument by the Board against discovery is fear of employer intimidation, the solution would appear to be a strengthening of the remedy against such intimidation to complement the adoption of discovery procedures.

On April 13, 1961, the Administrative Conference of the United States was established by executive order to consider administrative law problems and make recommendations. The Conference officially endorsed discovery in Recommendation No. 30 in 1963: "The Conference approves the principle of discovery in adjudicatory proceedings and recommends that each agency adopt rules providing for discovery to the extent and in the manner appropriate to its proceedings."[59] Over five years have passed and the Board has not yet acted on this recommendation. It is obvious, therefore, that if a change is to be made, it must come about through amendment of the National Labor Relations Act by Congress. Hopefully such action will be forthcoming.

F. FINCHER JARRELL

Military Law—Jurisdiction of Courts-Martial To Try Servicemen for Civilian Offenses

Since the days of the Continental Army, the question of how much judicial authority should be vested in the military has been the subject of continuing debate. The Constitution gave Congress the power "[t]o make Rules for the Government and Regulation of the land and naval

restraining order as it deems just and proper, notwithstanding any other provision of law.

[59] Recommendation No. 30 of the 1963 Administrative Conference of the United States, *quoted in* Fuchs, *The Administrative Conference of the United States*, 15 AD. L. REV. 6, 45 (1963).