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COMMENTS

Pretrial discovery generally serves two purposes: (1) to narrow and clarify the issues between the adverse parties, and (2) to ascertain the facts relative to those issues and to produce information concerning the existence or location of relevant facts.1 The discovery provisions of the Federal Rules of Civil Procedure2 have proven effective in serving these purposes in civil actions in the federal district courts.3 In administrative adjudications, however, discovery-type procedures have received a mixed response.4 In particular, the National Labor Relations Board (NLRB or the Board) has consistently opposed the adoption of discovery rules for administrative adjudicatory proceedings authorized by the National Labor Relations Act (NLRA).5 That policy has not gone without challenge, however; NLRB Chairman Murphy, for example, has suggested that full disclosure in accord with the Federal Rules of Civil Procedure be required of all parties in any NLRB proceeding.4

This comment examines NLRB discovery by reviewing the present law of discovery in the collective bargaining context, by

2. These rules were first promulgated by the United States Supreme Court in 1938. 308 U.S. 645 (1939); Fed. R. Civ. P. 86(a). Rules 26-37 are the general discovery provisions; these provisions were amended substantially in 1970. 398 U.S. 977 (1970).

The federal discovery provisions have been lauded for assisting trial preparation, minimizing the risk of surprise, reducing the number of controverted issues, and increasing the possibility of pretrial settlements. At the same time, discovery has been sharply criticized for imposing disproportionate burdens of cost and inconvenience on the parties, encroaching upon personal or professional privileges, allowing harassment, fostering delay, and inducing injudicious settlements. Id. at 942.

4. See notes 81-94 and accompanying text infra.
discussing the arguments made by proponents and opponents of adoption of discovery rules, and by analyzing the specific applicability of the federal rules' discovery provisions\(^7\) to NLRB proceedings.\(^8\)

I. DISCOVERY IN THE COLLECTIVE BARGAINING CONTEXT

A. The Need for Information

During collective bargaining and contract administration, representatives of both labor and management frequently need certain information that is possessed by the other party or the NLRB. For example, in attempting to negotiate a favorable wage-and-benefit package, a union may desire the results of an industry-wide wage survey made by an employer. Or, in order to insure that all employees are included in an appropriate bargaining unit, a union may need a list of job descriptions or classifications of all employees. Conversely, an employer may desire union records to verify whether a union's request that an employee be discharged for being delinquent in payment of dues is justified. An employer might also desire amplification of facts surrounding an incident that resulted in an employee's grievance. In addition, an employer or a union charged with an unfair labor practice may need information known only by the NLRB or the charging party in order to prepare a defense to the charge.

The need for information in the labor context can be classified as either subsidiary or primary. A need for data relevant and necessary to a collateral dispute might be termed subsidiary. A typical example is when the need for information arises during the processing of a dispute through the grievance procedure; i.e., a union may seek information in the employer's possession relating to a union member for whom the union is pursuing a grievance. Also included in this category is the situation where the respondent to an unfair labor practice complaint desires statements in the Board's possession that were made by potential witnesses. The term primary might be used to characterize instances in which the need for information is the heart of the dispute itself. For instance, a union may need certain economic data in order to carry out its statutory obligation of effective

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7. The discovery provisions of the Federal Rules of Civil Procedure, FED. R. CIV. P. 26-37, are herein referred to as the federal rules or the federal discovery rules.

8. This comment is limited to the discussion of unfair labor practice and related proceedings. Other Board proceedings authorized by the NLRA, such as representation and referendum procedures, are not treated.
representation during bargaining. The employer's refusal to supply such information voluntarily may lead to an unfair labor practice charge.

B. Present Practice, Law, and Doctrine

The need for information is a continuing and recurring one in labor relations. Under existing practice generally, requested information is freely exchanged:

Perhaps the information might not be supplied in quite the form desired, but it [will] be disclosed nonetheless, to the satisfaction of the party seeking disclosure. Indeed, there are many bargainers who, as a matter of policy, volunteer information even before a request, once its relevance has become apparent.

This informal discovery often exists both where the basic dispute has gone to arbitration and where an unfair labor practice com-


10. Jones I, supra note 9, at 586. As Jones has stated:

Sometimes parties choose not to seek disclosure of relevant bargaining information. For example, there are some unions with no desire whatsoever to inhibit their bargainers by embarrassing them with the facts of the particular enterprise. As a bargaining gambit, they want no access to operational information other than that which is put on the bargaining table by the employer. Similarly, a number of employers prefer to remain ignorant of the internal affairs of unions representing their employees. The [NLRA] reinforces the latter forbearance, by barring employer "interference" in the internal affairs of unions. NLRA § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964). It is important to recognize, however, that many employers would have it no other way, both as a matter of self-interest in effective bargaining and as a reflection of basic managerial philosophy, quite aside from the statutory policy.

Id. at n.52. Jones has also observed:

It is quite common for an arbitrator [or administrative law judge] to suggest, in the course of the morning's arbitration or NLRB hearing, what we might call, rhetorically, "lunchbreak discovery": "Why don't you dig that out during the lunchbreak and make it available?" The parties general [sic] comply and disclosure is routine when the hearing resumes after luncheon.


11. In arbitration, formal prehearing discovery is very limited. O. FAIRWEATHER, supra note 9, at 121. Since arbitration is widespread (the current Bureau of National Affairs sample analysis of 400 agreements reveals that 96 percent contain arbitration procedures, [1975] 2 COLLECTIVE BARGAINING NEGOTIATIONS & CONTRACTS (BNA) 51:6), it is perhaps surprising that discovery clauses are not found more frequently in collective bargaining
plaint has been issued. Unfortunately, informal discovery has not been satisfactory in every instance.

Formal discovery in NLRB adjudication is "stringently limited." With the issuance of the unfair labor practice complaint, discovery issues involve three parties: the respondent, the charg-

agreements. See generally id. at 65:541-44.

In a trilogy of articles, Professor Edgar A. Jones, Jr. has discussed the recurrence of discovery situations in labor relations, considered various aspects of arbitral discovery, and proposed a model of effective court, NLRB, and arbitrator interaction to remedy the need for disclosure. See Jones I, supra note 9; Jones II, supra note 10; Jones, The Labor Board, the Courts, and Arbitration—A Feasibility Study of Tribunal Interaction in Grie-
vable Refusals to Disclose, 116 U. Pa. L. Rev. 1185 (1968) [hereinafter cited as Jones III].


Although the choice between pursuing arbitration or filing an unfair labor prac-
tice charge, assuming the parties have this "and/or" option, may be influenced by a number of factors, an aggrieved party usually charges unfair labor practices and thus seeks to invoke an NLRB proceeding. This comment is based on the assumption that the parties choose, when a choice exists, this NLRB route.

Arbitration clearly provides the faster adjudication of disputes over refusals to disclose. See Jones I, supra note 9. See also Subcomm. on Administrative Practice & Procedure, Senate Comm. on the Judiciary, 89th Cong., 2d Sess., Evaluation Charts on Delay in Administrative Proceedings 25, 41, 58, 70 (Comm. Print 1966); Jones III, supra note 11, at 1244-59. The inherent delay in Board proceedings may lead to a loss of the charging party's prestige and have serious economic consequences. On the other hand, the charging party enlists the skills and resources of the General Counsel's office. Jones I, supra note 9, at 593. These skills and resources are, in theory but not in practice, free to the charging party. Id. at n.62. In view of these factors, the decision to arbitrate or file a charge requires the aggrieved party to balance the costs and benefits of both alternatives.

Even when the parties pursue NLRA remedies by invoking NLRB proceedings, the Board may in certain cases defer action to arbitration. The Supreme Court has indicated a clear preference for dispute resolution by arbitration rather than by the courts, at least where the contract contains an arbitration provision. See United Steelworkers v. Enter-

In NLRB v. Acme Indus. Co., 385 U.S. 432 (1967), the Court upheld the Board in interpreting a disputed, arbitrable contract and in determining that the employer had a statutory obligation to furnish certain requested information. The result seems to be that the Board may require disclosure of information where there is a statutory duty to disclose and need not defer to arbitration even if the controversy over disclosure is expressly arbitrable. Consequently, the NLRB has consistently refused to defer to arbitration in right-to-information cases subsequent to Acme Industrial. See THE DEVELOPING LABOR LAW 504 (C. Morris ed. 1971) and cases cited. However, the Board has chosen to defer to arbitration refusal-to-disclose cases where (1) the contract contains express disclosure provisions or expressly waives the right to such information, and (2) the dispute arguably is covered by the grievance-arbitration provisions of the contract. See THE DEVELOPING LABOR LAW 86 (K. Hanslowe, L. Cohen, & E. Spelfogel eds. 1973 Supp.).

ing party, and the General Counsel.14 This section explores the formal discovery methods currently available to these three parties in unfair labor practice proceedings and examines the limitations of each avenue.

I. Discovery between bargaining parties

It is argued by some that all discovery devices authorized by the Federal Rules of Civil Procedure are available in NLRB adjudications. This argument is based on an interpretation of the Taft-Hartley amendments to the NLRA which provide that any unfair labor practice proceeding "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable to the district courts of the United States under the rules of civil procedure for the district courts . . ."15 This argument has been accepted by the Fifth Circuit16 but has been rejected by five others.17 There is no indication, however, that the Fifth Circuit’s acceptance of this argument has led to full discovery in practice in that jurisdiction.

In actual practice the discovery devices available to the bargaining parties are extremely limited. Of the traditional means of discovery authorized by the federal rules, only limited depositions are permitted under the current NLRB rules.18 The Board’s deposition rule allows oral depositions upon proper written application, but only after the complaint is filed and before the case

18. 29 C.F.R. § 102.30 (1976). The federal rules provide for discovery by depositions, written interrogatories, and requests for admissions, physical and mental examinations, production of documents and things, and entry upon land. FED. R. CIV. P. 26(a). NLRB rules provide for three procedural devices that are tangentially related to discovery: (1) prehearing conferences, 29 C.F.R. § 102.35(g) (1976); (2) subpoenas, 29 C.F.R. § 102.31 (1976); and (3) summary judgments, 29 C.F.R. § 102.24 (1976). For a discussion and criticism of these rules, see 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 558-60, 590-91, 640 (1971).
is transferred from the administrative law judge to the Board. No provision is made for other types of depositions that might be beneficial to the resolution of labor disputes, e.g., depositions upon written questions, depositions before the charge is filed or complaint issued, or depositions subsequent to the Board's decision but prior to enforcement.

The literal language of the Board's rule does not expressly preclude the use of depositions for discovery purposes, but the Board and the courts have consistently ruled that use of depositions is limited to the securing of evidence for the adjudicatory hearing. For example, in *NLRB v. Interboro Contractors, Inc.*, the Second Circuit expressly rejected the notion that the NLRB's deposition rule permitted depositions for discovery purposes. The court upheld the Board's interpretation that the rule was intended only to preserve evidence when there was reason to believe a witness would not be present at the hearing.

These limitations on discovery produce hardships on parties properly seeking discovery and unjustifiable excuses for parties avoiding discovery. Further, when a primary need for information is central to the resolution of the parties' dispute, access or lack of access to the information may be determinative of the whole case or issue. To ameliorate this potential harshness, the Board allows an unfair labor practice proceeding to force disclosure. An unfair labor practice charge may be filed for the express purpose of forcing a party engaged in collective bargaining to disclose certain information in his possession. The charge generally is that the refusal to disclose constitutes an unfair labor practice.

The NLRA provides that it is an unfair labor practice for an employer or a labor organization to refuse to bargain collectively. The NLRB and the courts have long held that this duty

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19. The application must set forth the reasons why the deposition should be taken, the name and address of the witness, the subject matter of the expected testimony, the time and place of the deposition, and the identity of the officer before whom the deposition will be taken. The application must show good cause and must be addressed to the NLRB regional director prior to the hearing or to the administrative law judge during or subsequent to the hearing. If ordered by the regional director or the administrative law judge, the deposition may be taken before any officer authorized to administer oaths by law in the United States, before certain American diplomatic personnel in foreign countries, or before any person agreed upon by the parties. 29 C.F.R. § 102.30 (1976).

20. Once a petition for enforcement or review is filed with the court of appeals, the federal discovery rules may apply to the enforcement proceeding. See note 58 and accompanying text infra.


(a) It shall be an unfair labor practice for an employer—
to bargain collectively includes a duty to supply the other party with information that is necessary and relevant to proper bargaining, as well as with information needed for effective administration of an agreement already in force.\(^{23}\)

The scope of a union's duty to disclose is still an unresolved question;\(^{24}\) it is clear, however, that an employer has such a duty. This duty is based on the belief that the information is necessary for proper and intelligent performance of the union's duty of effective representation of the employees.\(^{25}\) The union's right to information may, however, be relinquished, either by "clear and unmistakable" language in the agreement\(^{26}\) or by subsequent


\(^{24}\) Only passing discussion has been given to the union's duty to supply the employer with information. See note 23 supra. NLRB member John H. Fanning has stated that he knows of no union refusal-to-disclose cases. Fanning, supra note 23, at 381. See also Jones II, supra note 10, at 837 n.26. But see Tool & Die Makers' Lodge No. 78, [1976] 5 LAB. L. REP. (1975-76 NLRB Dec.) ¶ 16,814 (May 28, 1976).


union actions during the bargaining process.\textsuperscript{27} Once the union has made a good faith demand for relevant information that should be disclosed, the employer must furnish it without undue delay.\textsuperscript{28} Unwarranted piecemeal or dilatory disclosure constitutes a refusal to bargain in good faith.\textsuperscript{29}

Employers' contentions that the requested data is confidential or privileged have uniformly been rejected.\textsuperscript{30} In \textit{Aluminum Ore Co. v. NLRB},\textsuperscript{31} the Seventh Circuit stated:

\begin{quote}
[W]e do not believe that it was the intent of Congress in [passing the NLRA] that, in the collective bargaining prescribed, the union, as representative of the employees, should be deprived of the pertinent facts constituting the wage history of its members. We can conceive of no justification for a claim that such information is confidential. Rather it seems to go to the very root of the facts upon which the merits were to be resolved.
\end{quote}

For similar reasons, arguments that divulgence of information would violate employees' rights of privacy have not been accepted.\textsuperscript{32}

NLRB cases involving charges that an employer is refusing to bargain, or is bargaining in bad faith, by declining to disclose generally fall into two categories: (1) cases involving wage data,\textsuperscript{33} \textit{i.e.}, information concerning employees' incomes and fringe benefits and the method by which they are established, and (2) disputes concerning financial data,\textsuperscript{34} \textit{i.e.}, data basically relating to

\textsuperscript{27} See \textit{Square D Co. v. NLRB}, 332 F.2d 360, 366 (9th Cir. 1964).

\textsuperscript{28} E.g., \textit{NLRB v. Fitzgerald Mills Corp.}, 313 F.2d 260, 264-65 (2d Cir.), cert. denied, 375 U.S. 834 (1963).


\textsuperscript{30} See, e.g., \textit{Boston Herald-Traveler Corp.}, 223 F.2d 58, 59 (1st Cir. 1955); \textit{NLRB v. Item Co.}, 220 F.2d 956, 959 (5th Cir.), cert. denied, 350 U.S. 836 (1955).

\textsuperscript{31} 131 F.2d 485, 487 (7th Cir. 1942).


\textsuperscript{33} The wage data category includes lists of names and addresses of employees, lists of wage rates, piecework rates, and hours worked, seniority lists, linked wage data, overtime data, incentive wage plan data, standards for computing merit pay increases, job classifications and descriptions, retirement and pension plan data, welfare plan data, profit sharing plan information, group insurance data, wage histories, lists of employment dates, and time studies used to determine wage rates. \textit{See generally} sources collected in Comment, \textit{Employers' Duty to Supply Economic Data for Collective Bargaining}, 57 Colum. L. Rev. 112, 112-14 (1957); Annot., 2 A.L.R.3d 880, 905-14 (1965 & Supp. 1976).

the economic and financial condition of the employer, such as profits and production costs, especially when the employer makes a claim of financial inability to meet a union request during bargaining.\textsuperscript{35} The rules developed by the NLRB and the courts for dealing with discovery of wage data differ from the rules evolved for dealing with discovery of financial data.

In determining the kinds of wage data that must be disclosed, the NLRB and the courts initially required unions to prove the relevance of the requested material.\textsuperscript{36} This requirement was soon modified, however, when first the courts and then the Board adopted a rule that requested information was presumptively relevant. In \textit{NLRB v. Yawman & Erbe Manufacturing Co.},\textsuperscript{37} the Second Circuit, enforcing an NLRB order to disclose, excused the union's failure to prove relevancy:

Since the employer has an affirmative statutory duty to supply relevant wage data, his refusal to do so is not justified by the Union's failure initially to show the relevance of the requested information. The rule governing disclosure of data of this kind is not unlike that prevailing in discovery procedures under modern codes. There the information must be disclosed unless it plainly appears irrelevant.\textsuperscript{38}

Then, in \textit{Whitin Machine Works},\textsuperscript{39} the Board, without citing \textit{Yawman & Erbe}, adopted the presumptive relevance rule\textsuperscript{40} suggested by the Second Circuit. Simply stated, the rule is that the

\begin{itemize}
\item \textsuperscript{35} See Di Fede, supra note 23, at 402. The line between the two categories is an elusive one. Some information disputes are hybrid in nature and do not fall clearly into one category or the other. See Comment, Employers' Duty to Supply Economic Data for Collective Bargaining, 57 \textit{COLUM. L. REV.} 112, 113 n.7 (1957). This analysis will proceed as though the line were firmly drawn and the categories rigidly defined.
\item \textsuperscript{36} See Bartosic & Hartley, supra note 23, at 24; Di Fede, supra note 23, at 403; Comment, Employers' Duty to Supply Economic Data for Collective Bargaining, 57 \textit{COLUM. L. REV.} 112, 117-18 (1957).
\item \textsuperscript{37} 187 F.2d 947 (2d Cir. 1951), enforcing per curiam 89 N.L.R.B. 881 (1950).
\item \textsuperscript{38} Id. at 949.
\item \textsuperscript{39} 108 N.L.R.B. 1537, enforced, 217 F.2d 593 (4th Cir. 1954), cert. denied, 349 U.S. 905 (1955).
\item \textsuperscript{40} The Board's adoption of the rule was clarified in two subsequent decisions in 1954. In Item Co., 108 N.L.R.B. 1634, 1635, 1639 (1954), enforced, 220 F.2d 856 (5th Cir.), cert. denied, 350 U.S. 836 (1955), the Board adopted the trial examiner's report, which had relied on \textit{Yawman & Erbe} in applying the presumptive relevance test. In Boston Herald-Traveler Corp., 110 N.L.R.B. 2097, 2097-99 (1954), enforced, 223 F.2d 58 (1st Cir. 1955), the Board unequivocally adopted the test, citing \textit{Whitin, Yawman & Erbe}, and \textit{Item}. For a review of the development of the presumptive relevance rule, see Bartosic & Hartley, supra note 23, at 24-29.
union has a presumptive right to disclosure of certain in-unit wage data during contract negotiation and administration. The rationale for the rule was explained by Chairman Farmer in his concurring opinion in *Whitin*:

[This broad rule is necessary to avoid the disruptive effect of the endless bickering and jockeying which has theretofore been characteristic of union demands and employer reaction to requests by unions for wage and related information. The unusually large number of cases coming before the Board involving this issue demonstrates the disturbing effect upon collective bargaining of the disagreements which arise as to whether particular wage information sought by the bargaining agent is sufficiently relevant to particular bargaining issues. I conceive the proper rule to be that wage and related information pertaining to the employees in the bargaining unit should, upon request, be made available to the bargaining agent without regard to its immediate relationship to the negotiation or administration of the collective bargaining agreement.]

While the presumptive relevance rule has generally been applied to the disclosure of in-unit wage data, it has not been extended to out-of-unit wage data or financial data. In the landmark financial data case of *NLRB v. Truitt Manufacturing Co.*, a union sought information concerning a company's financial condition after the company asserted during contract negotiations that it was not financially able to meet a requested wage increase. In affirming the NLRB's decision that refusal to supply such information was an unfair labor practice, the Supreme Court held that substantiation of the claimed inability to pay was required. This substantiation doctrine has been widely applied to cases involving requests for financial data whenever the employer has injected financial inability as a bargaining issue. Absent a claim by the employer of financial inability, however, it

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41. This includes individual earnings, job rates and classifications, merit increases, pension data, incentive earnings, piece rates, and the operation of the incentive system. Bartosic & Hartley, *supra* note 23, at 28-29, and sources there collected.
42. 108 N.L.R.B. at 1541 (concurring opinion).
43. 351 U.S. 149 (1956).
44. See id. at 152-53.

For a treatment of the question whether decisions since *Truitt* have confused the substantiation doctrine and the presumptive relevance doctrine as they relate to the requirement that all "necessary and relevant" information be disclosed, see Bartosic & Hartley, *supra* note 23, at 42-50.
appears that the union would be required to show both the necessity and the relevance\(^{46}\) of requested financial data.

2. *Discovery and the NLRB*

Different considerations come into play when the NLRB becomes involved in discovery procedures during a Board adjudication. Adjudications of unfair labor practice allegations are initiated by any individual or organization filing a charge with the NLRB regional director.\(^{47}\) After the charge is investigated, the regional director determines whether a complaint should be issued. The complaint, if issued, is prosecuted by the General Counsel.\(^{48}\) The General Counsel has little need to use formal discovery devices; usually, all of the information the General Counsel needs to prosecute the complaint is supplied by the charging party or can be obtained by the regional director's investigation of the charge.

The respondent or the charging party, however, may need information possessed by the NLRB. For instance, the respondent or potential respondent frequently desires access to statements and records acquired by the regional director during investigation from interviews with persons knowledgeable with the charges.\(^{49}\) Access is sought for the avowed purpose of preparing

\(^{46}\) Necessity and relevance are not mutually exclusive requirements. "Once relevance is determined, an employer's refusal to honor a request is a per se violation of the [NLRA]. Reasonable necessity for a union to have relevant data is apparent; necessity is not a separate and unique guideline, but is directly related to the relevance of the requested data." Curtiss-Wright Corp., Wright Aeronautical Div. v. NLRB, 347 F.2d 61, 69 (3d Cir. 1965).

\(^{47}\) NLRB unfair labor practice procedure is generally outlined in 29 C.F.R. §§ 101-02 (1976).

\(^{48}\) *The Developing Labor Law* 832-33 (C. Morris ed. 1971):

Under the Wagner Act, agents of the Board itself investigated charges, issued complaints, and prosecuted the complaints. Hearings were conducted by trial examiners, but their decisions were frequently reviewed by supervisors prior to issuance and, at the Board level, by a Review Section rather than by attorneys reporting directly to Board members.

To satisfy widespread criticism of this system, the Taft-Hartley amendments . . . established an independent General Counsel with final authority over investigation of charges, issuance of complaints, and prosecution of cases before the Board. In addition, trial examiners were freed from supervisory influence over their decisions and were forbidden to consult with the Board about exceptions to their rulings. The Review Section was abolished . . . .

(The title "trial examiner" was changed to "administrative law judge" in 1972. 37 Fed. Reg. 16,787 (1972).) The General Counsel has delegated the investigative and complaint-issuance functions to the NLRB regional directors.

\(^{49}\) The regional director utilizes members of the field staff to do the investigative work but retains control over the investigation and may dispense with unnecessary por-
defenses to the charges.50 Access to these statements, however, is permitted under NLRB rules only after the person making the statement has testified at the hearing. Even then, access is limited by requirements that only those portions of the statement relevant to the subject matter of the testimony need be disclosed and that the statement must be signed or otherwise approved by the witness.51 As a result of these severe restrictions, access to witness statements is almost nonexistent.

In addition to the limited discovery available under NLRB rules, another possible method of obtaining information from the Board or the General Counsel is by use of the Freedom of Information Act (FOIA).52 Since 1967, when the FOIA became effective, numerous attempts have been made to utilize its provisions to secure witness statements and other information in the NLRB's possession.53 The Supreme Court has noted, however, that discovery for the benefit of private litigants is not one of the express purposes of the FOIA,54 and parties in Board proceedings generally have been unsuccessful in invoking the FOIA as a discovery tool.55

50. In Jencks v. United States, 353 U.S. 657 (1957), the Supreme Court held that a defendant in a federal criminal case is entitled, once a prosecution witness has testified, to all prior statements by that witness touching the events and activities to which testimony was given. The basis of the decision was the notion that access to such statements was necessary because of their impeachment value during cross-examination. In NLRB v. Adhesive Prods. Corp., 258 F.2d 403, 406-08 (2d Cir. 1958), the Second Circuit held "Jencks-type" discovery to be required in NLRB proceedings. The Board thereafter amended its rules in order to conform. See 29 C.F.R. § 102.118 (1976); discussed in Alleyne, The "Jencks Rule" in NLRB Proceedings, 9 B.C. INDUS. & COM. L. REV. 891 (1968); cf. Ra-Rich Mfg. Co., 121 N.L.R.B. 700, 701-02 (1958) (NLRB acquiescence to Jencks rule).

51. 29 C.F.R. § 102.118 (1976). If the General Counsel elects not to comply with an administrative law judge's order to disclose, the only apparent sanction is striking the witness' testimony.

The Board's rules generally prohibit any NLRB employee from producing information in the Board's possession, whether in response to a subpoena or otherwise, without the written consent of the NLRB. Id.


53. Garvey, supra note 23, at 710.


55. See Roger J. Au & Son v. NLRB, 538 F.2d 80, 82-83 (3d Cir. 1976); Title Guar. Co. v. NLRB, 534 F.2d 494, 491-92 (2d Cir.), cert. denied, 97 S. Ct. 98 (1976); Marathon LeTourneau Co., Marine Div. v. NLRB, 414 F. Supp. 1074, 1079 (S.D. Miss. 1976); Electri-Flex Co. v. NLRB, 412 F. Supp. 698, 702 (N.D. Ill. 1976); Capital Cities
Another avenue of discovery is sometimes available whenever the Board is a party in a federal court action. When this is the case, the other parties may obtain information from the Board or the General Counsel by direct application of the federal discovery rules. For example, these provisions may be utilized when (1) an FOIA action is brought against the Board in district court, (2) the Board seeks a district court injunction under the NLRA, (3) the Board seeks to enforce its order by petition to a court of appeals pursuant to the NLRA, or (4) the Board seeks


The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court . . . shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

The NLRA provides, in cases involving certain union unfair labor practices, that if there is reasonable cause to believe the unfair labor practices charges to be true, the investigating officer

shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person [charged] 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 restraining order as it deems just and proper, notwithstanding any other provision of law: Provided further, That no temporary restraining order shall be issued without notice unless a petition alleges that substantial and irreparable injury to the charging party will be unavoidable and such temporary restraining order shall be effective for no longer than five days and will become void at the expiration of such period. . . .


The Board shall have power to petition any court of appeals of the United
a civil contempt decree in a court of appeals after the Board's order has been enforced but not obeyed. This discovery avenue, however, is at best quite limited because of the extraordinary and restricted nature of federal judicial intervention in labor relations.

A final discovery alternative is that of compelling discovery by a bill of particulars.\(^5^9\) Such a bill is possible under the Board's unlimited motion practice.\(^6^0\) The NLRB has been reluctant to furnish bills of particulars for the same reasons it has opposed discovery generally.\(^6^1\) Judge Learned Hand has characterized these bills as being "of slight value in a trial by hearings at intervals,"\(^6^2\) such as NLRB adjudications.\(^6^3\) Bills of particulars are of limited utility since their purpose is to increase the specificity of the charges.\(^6^4\) Consequently, employers and unions have made little use of them.\(^6^5\)

II. THE NEED FOR CHANGE IN NLRB DISCOVERY

As discussed above, discovery is severely restricted in NLRB
adjudications. Except for the burdensome and slow process of filing an unfair labor practice charge, parties attempting to satisfy their primary needs for wage or financial data during collective bargaining and contract administration find little discovery to be available. This limited discovery is especially evident when subsidiary needs for information are involved. Similarly, in practice there is almost no discovery available against the NLRB under federal statutes or federal or Board rules.

Despite these restrictions on NLRB discovery, it has been argued that adequate discovery already exists in NLRB adjudications. This argument is usually propounded in one of four forms: (1) the NLRA makes at least part of the federal discovery rules applicable to NLRB adjudications;66 (2) bills of particulars are an effective discovery alternative in Board proceedings;67 (3) trial-by-interval, which is possible under the Board’s rules,68 allows respondents to adequately prepare their defenses during continuances, alleviating the need for prehearing discovery; or (4) the provisions made in the present Board rules for depositions69 and production of witness statements70 are sufficient. As has been noted above, however, the severe limitations on these discovery alternatives allow no “real opportunities for discovery.”71 The need for discovery in NLRB adjudications is illustrated by the following fact situations.

**Fact Situation #1.** Employee A has filed a charge and the NLRB regional director has issued a complaint alleging that employer X has engaged in unfair labor practices in discharging A. B, A’s former supervisor, reports to X’s management that A was fired because he was strongly implicated in thefts of X’s property. A asserts that he was discharged solely because of his union activities. X has reason to believe that A and other employees have given statements to Board investigators, but all current employees deny this and refuse to discuss the incident. In order to prepare a defense, X would like to verify the existence and examine

66. See notes 15-17 and accompanying text supra.
67. See notes 59-65 and accompanying text supra.
68. See 29 C.F.R. § 102.43 (1976) (granting discretion to administrative law judge to continue the hearing from day to day); cf., NLRB v. Remington Rand, Inc., 94 F.2d 862, 873 (2d Cir. 1938) (bill of particulars of slight value in trials-by-interval).
69. 29 C.F.R. § 102.30 (1976).
70. 29 C.F.R. § 102.118 (1976) (NLRB Jencks rule); see notes 49-51 and accompanying text supra.
the contents of any such statements that the NLRB might possess.72

Fact Situation #2. Employer A and union B are engaged in negotiations toward a new collective bargaining agreement. B has demanded a flat 12 percent increase in the hourly rates of the machinists B represents. A contends that it is unable to meet such a demand because of recent financial setbacks. A also asserts that the results of an industry-wide wage survey indicate that A's employees are already the best paid in the business. In order to represent its constituent employees effectively, B would like to have access to A's books and wage survey in order to verify A's claims.73

Recognition that these and other fact situations demonstrate that valid discovery needs exist has inspired numerous calls for NLRB adjudicatory discovery.74 In one oft-quoted passage, the Fourth Circuit observed that "the Board, acting in a quasijudicial capacity as it does, should freely permit discovery procedure in order that the rights of all parties may be properly protected."75 The failure of the Board to permit discovery, it is said, "complicates litigation and discourages settlements."76 A "thorough review" of the Board's present position has been urged.77

Administrative procedure study groups have consistently advocated administrative discovery.78 Indeed, the permanent

72. In current NLRB practice, access to these statements is possible only through the inadequate NLRB Jencks rule. See notes 49-51 and accompanying text supra.
73. Under current Board law and doctrine, access might be obtained only through the mechanism of filing an unfair labor practice charge and prosecuting a complaint unless A agrees to permit access. See notes 22-46 and accompanying text supra. Obviously, this is an ineffective discovery alternative.
75. NLRB v. Southern Materials Co., 345 F.2d 240, 244 (4th Cir. 1965).
77. 36 Mo. L. Rev. 537, 544 (1971); see Garvey, supra note 23, at 723.
78. In 1941 the Attorney General's Committee on Administrative Procedure recognized that the purposes served by discovery were also applicable to formal administrative proceedings and recommended certain prehearing procedures. Comm. on Administrative Procedure Appointed by the Attorney General, Administrative Procedure in Government Agencies, S. Doc. No. 8, 77th Cong., 1st Sess. 64 (1941). In 1953 a subcommittee of the Presidential administrative procedure conference was "fragmented" over discovery and failed to agree on a report. Discovery in Administrative Proceedings, 14 Fed. Com.
Administrative Conference of the United States has formally recommended that private parties to adjudicatory proceedings "have equal access to all relevant, unprivileged information at some point prior to the hearing," and has proposed certain minimum standards to guide administrative agencies in adopting discovery rules. Congressional groups have also favored administrative discovery. In fact, discovery-type rules have been adopted by several other administrative agencies. The Federal Trade Commission (FTC), in 1961, was the first major agency to adopt some sort of discovery. In 1968, both the Federal Maritime

B.J. 99, 100 (1955) (Committee on Pleadings, Chairman Rupert's report). The conference did, however, propose an illustrative rule for prehearing conferences. CONFERENCE ON ADMINISTRATIVE PROCEDURE, FIRST REPORT 10-11, 24-28 (1953). In 1955 the second Hoover commission recommended that agencies conform with certain federal discovery rules. TASK FORCE ON LEGAL SERVICES AND PROCEDURE, COMM'N ON ORGANIZATION OF THE EXECUTIVE BRANCH OF THE GOVERNMENT, REPORT ON LEGAL SERVICES AND PROCEDURE 197 (1955).

In 1962 the interim Administrative Conference of the United States formally approved the principle of administrative adjudicatory discovery and recommended that "each agency adopt rules providing for discovery to the extent and in the manner appropriate to its proceedings." Recommendation No. 30, S. Doc. No. 24, 88th Cong., 1st Sess. 37 (1963). The report of the Committee on Compliance and Enforcement Proceedings of the Conference discussed the advantages attendant to broader administrative discovery and concluded that the adoption of discovery would promote fairness and reduce delays. Id. at 115.

79. 1 C.F.R. § 305.70-4 (1976).

80. S. 1663, introduced by Senators Dirksen and Long in 1963 to amend the Administrative Procedure Act, provided in part: "Depositions and discovery shall be available to the same extent and in the same manner as in a civil proceeding in the district courts of the United States except to the extent an agency shall find such conformity is impracticable and shall otherwise provide by published rule." Hearings on S. 1663 Before the Subcomm. on Administrative Practice & Procedure of the Senate Comm. on the Judiciary, 88th Cong., 2d Sess. 26 (1964). The Senate Judiciary Subcommittee on Administrative Practice and Procedure revised this section to read: "To the extent an agency shall find it practicable, depositions and discovery shall be available to the same extent and in the same manner as in the Federal Rules of Civil Procedure." Id. at 7. The full committee, however, failed to report out the bill, no doubt due to the more controversial nature of the bill's other provisions.

Senators Dirksen and Long introduced a nearly identical bill in the next Congress. S. 1336, 89th Cong., 1st Sess., 111 CONG. REC. 4090 (1965). This bill retained the substance of the original discovery provision of S. 1663. S. 1336 passed the Senate, 112 CONG. REC. 13,759 (1966), but died in committee in the House. S. 1336 was reintroduced as S. 518, 90th Cong., 1st Sess., 113 CONG. REC. 946, 951 (1967), but, like its predecessor, S. 1663, it failed to clear the Senate Judiciary Committee.


82. 1 RECOMMENDATIONS AND REPORTS OF THE ADMINISTRATIVE CONFERENCE OF THE UNITED STATES 578 (1971); see 16 C.F.R. §§ 3.31-.39 (1976). The FTC rules were broadened in 1967. For a discussion of the FTC rules, both before and after the 1967 changes, see Kintner, Discovery in Administrative Adjudicative Proceedings, 16 ADM. L. REV. 293 (1964);
Commission (FMC)\textsuperscript{83} and the Federal Communications Commission (FCC)\textsuperscript{84} responded to the Administrative Conference's recommendation and adopted new discovery rules. Since then, the recommendation has been implemented in whole or in part by the Interstate Commerce Commission (ICC),\textsuperscript{85} the now-defunct Atomic Energy Commission,\textsuperscript{86} the Occupational Safety and Health Review Commission, and the Postal Rate Commission.\textsuperscript{87} Limited discovery is available by rules of the Federal Power Commission,\textsuperscript{88} the Civil Aeronautics Board,\textsuperscript{89} the Securities and Exchange Commission,\textsuperscript{90} the Federal Reserve System,\textsuperscript{91} the Foreign Claims Settlement Commission,\textsuperscript{92} the Federal Energy Administration,\textsuperscript{93} and the Federal Aviation Administration.\textsuperscript{94}

In addition to the facts that NLRB discovery has been widely advocated and that discovery rules have been adopted by many other administrative agencies, one potent argument in favor of adoption of NLRB discovery is that discovery would eliminate surprise in the adjudicatory process.\textsuperscript{95} The Supreme Court has


\textsuperscript{86} ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, 1971-72 REPORT 33 (1972).


\textsuperscript{90} See 12 C.F.R. §§ 263.7-.8 (1976).

\textsuperscript{91} See 45 C.F.R. §§ 501.2, .5-.6 (1976).

\textsuperscript{92} See 10 C.F.R. §§ 205.8, 303.8 (1976).


stated that discovery and other pretrial procedures “make a trial less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent.” The purpose of eliminating surprise would be served by the adoption of liberal discovery rules by the NLRB. As the first fact situation above illustrates, the present lack of discovery in NLRB adjudications can lead to circumstances where the respondent to an unfair labor practice complaint may be seriously disadvantaged in his preparation for adjudication and consequently may be confronted at the hearing with new factual and legal issues for which he is inadequately prepared. Notions of basic fairness would indicate that the respondent and the General Counsel should have equal opportunities to prepare their cases. With the decline of the “sporting theory of justice,” parties in civil actions have found discovery tools to be useful in trial preparation; similarly, adoption of discovery rules by the NLRB would help equalize the ability of parties to Board proceedings to prepare their cases.

Because of the inadequacy of present NLRB discovery and the need for discovery in Board adjudications, there is a distinct need for the Board to adopt discovery rules. The major consideration here is what form those rules should take. While original rules could be drafted for Board discovery, it has been suggested that the discovery provisions of the Federal Rules of Civil Proce-


97. Elements of procedural due process are closely allied with notions of fairness. Thus, it may be argued that the Board's failure to allow formal discovery in unfair labor practice proceedings is a denial of due process. This argument has generally been rejected, however. See NLRB v. Valley Mold Co., 530 F.2d 693, 695 (6th Cir.), cert. denied, 97 S. Ct. 77 (1976); NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407 (7th Cir.), cert. denied, 368 U.S. 823 (1961) (Board regulations on their face not violative of due process); NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1961) (denial of deposition subpoena not violative of due process); Walsh-Lumpkin Wholesale Drug Co., 129 N.L.R.B. 294, 296 (1960), enforced per curiam, 291 F.2d 751 (8th Cir. 1961) (lack of Board rule for production of documents not a denial of due process); Plumbers & Steamfitters Union Local 100, 128 N.L.R.B. 398, 400 (1960), enforced per curiam, 291 F.2d 927 (5th Cir. 1961) (denial of bill of particulars not a denial of due process). But see McClain Indus., Inc. v. NLRB, 381 F. Supp. 187 (E.D. Mich.), rev'd on other grounds, 521 F.2d 596 (6th Cir. 1974). An in-depth procedural due process analysis, however, is wanting in all these decisions.

98. One of the underlying purposes of the federal discovery rules is to escape from this sporting theory. Developments—Discovery, supra note 3, at 1028.

99. See, e.g., Garvey, supra note 23.
dure be adopted. This comment is limited to discussion of the applicability of the federal rules.

III. THE APPLICABILITY OF THE FEDERAL DISCOVERY RULES TO NLRB PROCEEDINGS

A. General Objections

Several arguments have been raised against adoption of discovery rules by the NLRB. A general discussion of five of these arguments—intrusion, expense, formalization, abuse, and unique circumstances—is included at this point as a necessary preface to an analysis of the federal rules' specific applicability to Board proceedings.

Some fear that expanded discovery will be overly intrusive into the affairs of labor and management. This apprehension is evidenced by decisions that limit the union's right to information concerning the employer's financial condition. In fact, elements of this misgiving may be found in almost every refusal-to-disclose case. Management may have justifiable concerns, for in many instances unions have attempted to secure, and occasionally have succeeded in securing, such data as executive salary lists, customer lists, company books, profit/loss statements, and other information usually considered to be within the "management prerogative." The existence of the "internal affairs" doctrine embodied in the NLRA, which makes it an unfair labor practice for an employer "to dominate or interfere with the formation or administration of any labor organization," illustrates that union leadership may also validly fear intrusion.

It is doubtful, however, that this fear justifies a refusal to adopt discovery rules. Mere cries of potential intrusion carry little weight. The federal discovery rules implicitly recognize the prob-


101. Other sets of rules have been suggested for NLRB adoption. See 1 C.F.R. § 305.70-4 (1976) (Recommendation 70-4 of the Administrative Conference of the United States); Garvey, supra note 23, at 720-23. As a whole, the federal rules seem preferable to these other sets. Practitioners are familiar with the use of the federal rules, and extensive case law and commentary discussing and interpreting the rules exists. (Perhaps it is for these reasons that the Administrative Conference's discovery recommendation is similar in form to the federal rules.) Garvey's proposed rules may be criticized for their imbalance toward discovery by respondents and from the Board.


lem of intrusion by providing exceptions for "privileged" matters and by allowing discovery to be terminated upon a showing of annoyance, embarrassment, or oppression. If the federal rules were adopted without major change, protective orders would be available upon a proper showing of good cause; the Board and the courts would likely not be hesitant in granting such orders.

A second fear is that discovery might require a party to make unreasonable expenditures. Although any use of discovery devices entails expense, the issue is whether the rule adopted would provide adequate protection against discovery imposing unreasonable expense. Rule 26 of the Federal Rules of Civil Procedure, recognizing a policy designed to minimize litigation expense, permits protective orders on a showing of "undue burden or expense." Other rules provide for the shifting of expenses when one party is dilatory or uncooperative, a solution that not only encourages disclosure, but also provides some relief for the party who is forced to go to great expense to produce evidence that is readily available to his opponent. Thus, it generally appears that the federal rules satisfactorily answer the threat of unreasonable expense in NLRB adjudications, absent a showing that the peculiar circumstances of NLRB proceedings require more stringent protection of the parties than the federal rules provide.

Another frequently mentioned concern is that adoption of formal rules would inject an undesirable amount of legal formality into what is otherwise a relatively informal procedure. Unlike the specters of intrusion and expense, the threat of formalization has no direct analog in civil actions; even summary dispositions of civil actions, through devices such as summary judgment, are formal in nature. The question, then, is whether adoption of discovery rules would formalize and complicate the NLRB adjudicatory process, and whether this formalization and complication would be undesirable.

The adoption of discovery rules actually may simplify, not complicate, the process. Such rules, it has been suggested, put

109. See Fed. R. Civ. P. 30(g), 37(a)(4), 37(b)(2), 37(c), 37(d). But see Fed. R. Civ. P. 37(f). See generally Fed. R. Civ. P. 1 (rules to be "construed to secure the just, speedy, and inexpensive determination of every action").
110. For a brief discussion of informal discovery in the collective bargaining process, see notes 9-11 and accompanying text supra.
the parties "in a frame of mind to settle." Early settlement of disputes would tend to expedite the process. Indeed, Justice Brennan has observed that perhaps discovery procedures are most needed in the small case where the detriment of formalization would presumably be felt the strongest.

But assuming arguendo that some formalization would result if the federal discovery rules were adopted, there remains for discussion the question whether such formalization is indeed undesirable and unwarranted. The major concern voiced is that formalization might lead to delay in the adjudicatory proceeding. Delay is of particular concern in labor-management controversies, where it has been said that "[t]ime is of the essence." Because of the susceptibility of NLRB proceedings to delay, it has been suggested that NLRB discovery should be more restricted than other administrative discovery. On the other hand, prehearing discovery has been urged on administrative agencies as a device to shorten normal time spans in adjudication. Thus, it is uncertain whether adoption of NLRB discovery rules would actually result in unwarranted delays in adjudications.

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112. Id.; Jones II, supra note 10, at 842.
113. Delay has been termed the "nemesis" of discovery. Jones I, supra note 9, at 572.
116. Gallagher, Use of Pre-trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings, 12 Ad. L. Bull. 44 (1959). Pretrial discovery in NLRB proceedings has likewise been advocated:

Another factor which contributes to delay is the absence of pretrial discovery. Its availability would shorten the time required for hearings and probably lead to fairer trials and settlements. This has been the experience under the Federal Rules of Civil Procedure, and there is nothing peculiar to the law under the National Labor Relations Act which would suggest a contrary result.

Another concern is the potential for abuse. Discovery might be misused to force injudicious settlements, to embarrass the adverse party, to delay the proceeding, to burden the parties with costs and inconveniences disproportionate to their interest in resolving the dispute, to invade privileges, or to intrude into management prerogatives and union internal affairs. While all of these potential abuses are present in some form in proceedings to which the federal discovery rules now apply, the fact is that abuse of these rules has been minimal. Safeguards have been built into the rules and counsel have exercised restraint in their use. Similar safeguards could be incorporated into any NLRB discovery rules, and no reason appears why counsel would not exercise similar restraint.

Additional arguments have been raised that the unique circumstances of labor relations and Board proceedings make discovery rules impracticable. One area of potential discovery abuse unique to the labor context is the intimidation of employees by employers. The misgiving here is that employers would identify by discovery and harass employees who gave evidence against their employers' practices to Board investigators or at hearings. Also, there is fear that the Board's investigative function might be impaired, since employees, knowing that their statements were freely discoverable, might be less candid in their disclosures. Of course, prehearing statements of employees who actually testify are available to employers for cross-examination purposes. The threat of intimidation of these witnesses would apparently be the same regardless of whether or not discovery was employed.

The rules could be drafted to include safeguards against potential reprisals. One suggested alternative is to incorporate into the proposed rules a rebuttable presumption that any subsequent detrimental change in the employment of a laborer who gave the Board information is retaliatory and itself an unfair labor practice. With such a procedural safeguard, witness lists and statements could be made discoverable without impairing Board investigations or subjecting employees to too great a risk of intimidation and harassment.

A second area unique to NLRB proceedings is discovery in

118. Texas Indus., Inc. v. NLRB, 336 F.2d 128, 134 (5th Cir. 1964).
119. See notes 49-51 and accompanying text supra.
120. See NLRB v. Schill Steel Prods., Inc., 406 F.2d 803, 805 (5th Cir. 1969).
121. See Garvey, supra note 23, at 718-23.
the primary need situation. Although both primary and subsidiary needs for information exist, it should be recognized that the federal discovery rules are mainly designed to fulfill only subsidiary needs. Only rarely will a civil action be brought when the only remedy sought is disclosure of information by the other party.122 Primary needs are met either through nonjudicial means, or not at all. In labor law, however, primary needs have arisen sufficiently often to produce a large body of "NLRB common law" on the subject.

The concern here is whether a body of rules developed to meet subsidiary needs for information between adverse parties may be transplanted into a field where primary needs arise more frequently. Arguably, the federal discovery rules would meet primary needs too well, giving the charging party in a refusal-to-disclose case too much leverage in the bargaining process. Reason and experience suggest, however, that the Board and the courts would develop rules and doctrines that would insure continued balance in the negotiating process.123

B. Analysis of Specific Discovery Provisions

The federal discovery rules authorize depositions, interrogatories, requests for admissions, physical and mental examinations, and requests for production of documents and things and entry upon land. The applicability to NLRB proceedings of these discovery devices as permitted by the federal rules, together with the possible sanctions for failure to make discovery, is discussed below.

122. Obviously, FOIA actions are exceptions to the general rule.
123. There are no obvious conflicts between the somewhat amorphous relevancy restriction of the federal discovery rules and the relevancy doctrine that can be distilled from labor case law in refusal-to-disclose cases. Compare Fed. R. Civ. P. 26(b)(1) and 8 C. Wright & A. Miller, Federal Practice and Procedure §§ 2008-09 (1970) with notes 36-42 and accompanying text supra. Similarly, the primary need cases rejecting claims of privilege are not in conflict with corresponding civil cases.

Arguably, some primary need cases would be decided differently if the federal rules applied. For example, in Tool & Die Makers' Lodge No. 78, [1976] 5 Lab. L. Rep. (1975-76 NLRB Dec.) ¶ 16,814 (May 28, 1976), the Board refused an employer's request to order production of documents in the union's possession that the union claimed were dispositive of a grievable and arbitrable dispute. The Board distinguished other refusal-to-disclose cases by stating that they involved information which had been specifically identified, enabling the Board to make an initial determination of relevancy. Under the federal rules, the documents most likely would have been ordered disclosed because they were obviously germane to the subject matter of the unfair labor practice proceeding. Curiously, the Board's majority opinion failed to discuss the appropriateness of an in camera inspection of the documents, and the dissenters were unclear whether they favored such an inspection.
1. Depositions

Probably the most widely utilized discovery device is the deposition. Even among administrative agencies with limited discovery rules its use is common. In fact, all seven major federal agencies permit the taking of evidence by some form of deposition procedure.

The need for discovery depositions in NLRB adjudications is acute. Although evidentiary depositions are presently allowed under NLRB practice, the Board has steadily refused to grant discovery depositions because of fears of harassment and intimidation of employees. Nevertheless, the availability and use of discovery depositions may actually protect employees from such risks if testifying at a deposition is considered to be giving NLRA-protected testimony. With the addition of a presumption of retaliation if there are subsequent detrimental changes in a worker's employment, the federal rule for depositions upon oral examination, Rule 30, should effectively meet the need for NLRB discovery depositions.

Rule 30 authorizes oral depositions for discovery purposes. Leave of court is generally not a requirement for the taking of a deposition. The rule also provides for means of preserving objections to the proceedings and terminating or limiting examinations "conducted in bad faith or in such manner as unreasonably to annoy, embarrass, or oppress the deponent or party." This procedural safeguard, exercised upon motions to terminate or limit examination, should prove to be particularly useful in NLRB adjudications.

However, two other federal rules relating to depositions need

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124. For example, depositions are authorized by the Federal Aviation Administration, 14 C.F.R. § 13.53 (1976); the Federal Reserve System, 12 C.F.R. § 263.8 (1976); the Foreign Claims Settlement Commission, 45 C.F.R. § 501.5 (1976); and the Postal Rate Commission, 39 C.F.R. § 3001.33 (1976).


127. See notes 18-21 and accompanying text supra.


not be adopted by the Board. Rule 31, authorizing depositions upon written questions, and Rule 27, permitting precomplaint and postdecision depositions, are both rarely used in civil practice. Unless future experience by the NLRB showed otherwise, similar disuse could be expected of analogous NLRB rules.

Rule 32, specifying the uses of depositions in court proceedings, should be adopted with appropriate modifications. Such a rule is necessary in a working discovery scheme in order to insure that both the evidentiary and discovery natures of depositions are preserved.

2. Written interrogatories

Perhaps the second most commonly used discovery tool in judicial proceedings is the written interrogatory. Rule 33 makes available the use of interrogatories by any party against any other party without leave of court. In civil practice, these interrogatories have proven useful, popular, and versatile. Unlike the deposition, however, the interrogatory has had limited usage in administrative proceedings; of the major agencies, only the three with broad discovery rules patterned on the federal rules, the FCC, FMC, and ICC, permit written interrogatory practice. No such provision is made in the NLRB rules.

The adoption of an NLRB interrogatory rule raises two concerns. First, the use of interrogatories might cause significant delay in the adjudicatory process. Some delay would be inevitable, for it has been observed that a large organization may be unable to answer even a simple interrogatory in fifteen days, but most delays could be avoided by clearly defining in the rules the time period during which interrogatories might be propounded and perhaps by limiting the number of interrogatories that might be used. Second, interrogatories, while relatively inexpensive to draft, may impose considerable burdens on the

130. 8 C. WRIGHT & A. MILLER, supra note 123, at § 2163; Developments—Discovery, supra note 3, at 959.
132. Speck, supra note 3, at 1144.
133. Such numerical limits could be set by the rules or be determined at a prehearing conference. Such a conference for the express purpose of considering the proper use and timing of discovery is authorized by the FCC rules. 47 C.F.R. § 1.311(c)(1) (1976). However, this purpose is apparently not served by prehearing conferences in current NLRB practice. See 32 Fed. Reg. 13,348 (1967) (NLRB prehearing conferences to immediately precede hearings).
 answering party,\textsuperscript{134} thus, the temptation for their misuse is great. Misuse could be discouraged, however, if the Board and the courts were liberal in limiting discovery upon a proper showing of undue burden or expense, as the federal rules allow.

These two concerns are outweighed by the utility of interrogatories in aiding parties to prepare their cases. Administrative law practitioners have generally favored their availability because they are easy to use.\textsuperscript{135} Written interrogatories are essential in an effective discovery scheme since they “provide a much needed vehicle for inquiring of another party about the existence and location of documents and other relevant evidence.”\textsuperscript{136} Rule 33 should be adopted by the Board because of its conciseness and proven workability. The adopted rule should allow interrogatories to be served on any party to the proceeding, including the General Counsel.\textsuperscript{137}

3. Other discovery devices

Requests for admissions are permitted by the FCC,\textsuperscript{138} the FMC,\textsuperscript{139} the FTC,\textsuperscript{140} and the ICC.\textsuperscript{141} The FTC experience has shown that a modest role is played by this device in administrative adjudications. Admittedly, requests for admissions are somewhat cumbersome. Nevertheless, a rule on requests for admissions should prove useful in many cases where a prehearing conference is not necessary or would be wasteful in securing stipulations concerning facts, law, or the admissibility of evidence.\textsuperscript{142} The federal rule on requests for admissions, Rule 36, should be

\begin{itemize}
  \item \textsuperscript{134} Developments—Discovery, supra note 3, at 960.
  \item \textsuperscript{135} 1 Recommendations and Reports of the Administrative Conference of the United States 627 (1971).
  \item \textsuperscript{136} Id.
  \item \textsuperscript{137} Id. The Administrative Conference’s discovery recommendation suggested that interrogatories directed to the agency be permitted. 1 C.F.R. § 305.70-4(4)(b) (1976). The interrogatory provision of the Administrative Conference’s discovery recommendation is substantially similar to the federal interrogatory rule. Compare 1 C.F.R. § 305.70-4(4) (1976) with Fed. R. Civ. P. 33. Rule 33 also affords the option to produce business records whenever the answer to an interrogatory requires an examination or audit of such records and the burden of deriving the answer is substantially the same for either party. This provision should also be adopted by the Board, since, for example, a union’s request for relevant information in an employer’s possession sometimes may be met only by extensive compilations of employer’s records.
  \item \textsuperscript{138} 47 C.F.R. § 1.246 (1976).
  \item \textsuperscript{139} 46 C.F.R. § 502.208 (1976).
  \item \textsuperscript{140} 16 C.F.R. § 3.31 (1976).
  \item \textsuperscript{141} 49 C.F.R. § 1100.63 (1976).
  \item \textsuperscript{142} 1 Recommendations and Reports of the Administrative Conference of the United States 632 (1971).
\end{itemize}
adopted without major modification because it is an effective, proven method for implementing this portion of discovery. As with written interrogatories, admissions should be allowed to be requested from the General Counsel.\textsuperscript{143}

Another discovery tool permitted by the federal rules is the physical or mental examination. No major agency has adopted a rule allowing this discovery device, and arguments against its adoption by the NLRB exist. Primarily, those arguments emphasize the possibility of abuse. Nevertheless, there are occasions in labor relations when a party has a legitimate need to inquire about the physical or mental condition of a party or a person in a party's control, as with an employer's concern with the health of an employee or former employee. In such situations, and upon good cause shown, the administrative law judge should be able to order the examination sought. Rule 35 appears to safeguard adequately the privacy rights of the person sought to be examined while recognizing that circumstances may warrant examinations and should, therefore, be adopted by the Board.

Rule 34 authorizes discovery through requests for production of documents and things and for entry upon land. Rule 34 applies only to discovery between parties; production of documents or things in the possession of a nonparty apparently may be obtained only by serving notice to take the nonparty's deposition and then securing a subpoena duces tecum designating the documents or things to be produced.\textsuperscript{144} The relevant portion of the Administrative Conference's discovery recommendation is similar in major respects to Rule 34.\textsuperscript{145} The NLRB should adopt Rule 34 because of its reasoned approach to the problems in this area. However, because of common employer resistance to union requests to come onto an employer's land to conduct time studies, to organize or inform employees, or to audit or examine the employer's books or records, any rule adopted by the NLRB permitting entry could, for example, provide for entry by disinterested third parties rather than by the requesting party\textsuperscript{146} and for the enforcement of express contract terms authorizing entry.\textsuperscript{147}

\textsuperscript{143} See 1 C.F.R. § 305.70-4(5)(b) (1976).
\textsuperscript{144} Compare Fed. R. Civ. P. 34 with Fed. R. Civ. P. 45(b).
\textsuperscript{145} Compare 1 C.F.R. § 305.70-4(6) (1976) with Fed. R. Civ. P. 34.
\textsuperscript{146} See Metlox Mfg. Co. v. NLRB, 378 F.2d 728, 729 (9th Cir. 1967); Arthur A. Borchert, 90 N.L.R.B. 944, 953 (1950), modified and enforced per curiam, 188 F.2d 474 (4th Cir. 1951). A unique condition imposed by the ICC rules is that entry is permitted "subject to appropriate liability releases and safety and operating considerations." 49 C.F.R. § 1100.66 (1976).
\textsuperscript{147} See J.B. Lion Corp., 66-3 LAB. ARB. AWARDS ¶ 8793 (1966) (Summers, Arb.).
4. Sanctions and their enforcement

Rule 37 specifies the sanctions that a court may impose on parties or persons who fail to comply with discovery orders. Disobedience of an order compelling discovery may be penalized by the following additional court orders: taking as established disputed matters of fact, striking parts or all of pleadings, staying the proceeding, dismissing the action, rendering a default judgment, treating the failure to make discovery as contempt of court, and awarding reasonable expenses caused by the failure. Such sanctions and orders compelling discovery are generally not appealable since they are interlocutory. In fact, the effectiveness of the federal discovery rules seems to lie in their nonappealability; the trial court's decision is effective because of its practical finality.

Although varying in specifics, the FMC, the FTC, and the ICC discovery rules expressly delineate the sanctions that may be imposed for failure to make discovery. These rules, patterned after Rule 37, provide that the administrative law judge may make rulings that (1) imply that the information sought to be discovered would have been adverse to the party, (2) take as established the matters regarding which discovery was sought, (3) block support or opposition to designated claims or defenses, (4) prohibit introduction of designated matters in evidence, (5) disallow objections to the introduction and use of secondary evidence, (6) strike part or all of a pleading, (7) stay the proceeding, (8) dismiss the proceeding, or (9) render a decision against the party. All of the sanctions authorized by the FMC, FTC, and ICC rules seem appropriate for effective discovery in the administrative context. Their obvious advantage is that they are enforceable by the administrative law judge, the immediate overseer and arbiter of administrative discovery, without resort to the courts. This immediacy of enforcement and the limited appealability therewith are necessary for the effective operation of discovery.

The Board should therefore adopt a sanction rule patterned on both Rule 37 and the FMC, FTC, and ICC rules. The NLRB rule should include a broad variety of possible sanctions. These

149. 8 C. WRIGHT & A. MILLER, supra note 123, at § 2006; Developments—Discovery, supra note 3, at 992.
151. 16 C.F.R. § 3.38 (1976).
152. 49 C.F.R. § 1100.67 (1976).
sanctions should be enforceable by the administrative law judge, and any appeal from his rulings should be carefully limited.

IV. Conclusion

Forceful arguments exist for and against discovery rules in NLRB proceedings. The fears that expanded discovery will open the doors to intrusion, increased expense, formalization, and abuse are counterbalanced by the arguments that such discovery will reduce surprise, encourage settlement, and put the parties on more equal grounds, thus leading to fairer decisions. The resolution of these conflicting arguments depends on an examination of the applicability of the rules proposed for adoption. In the case of the discovery provisions of the Federal Rules of Civil Procedure, such an analysis shows, for the most part, that those provisions with slight modifications should be effective in meeting proper discovery needs in NLRB proceedings.