1978

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NLRB DISCOVERY AFTER ROBBINS: MORE PERIL FOR PRIVATE LITIGANTS

Despite criticism by courts and commentators, the National Labor Relations Board (Board) has traditionally restricted prehearing discovery in unfair labor practice proceedings in order to forestall intimidation of potential witnesses and to promote administrative efficiency. The Supreme Court recently bolstered the Board’s position by holding in NLRB v. Robbins Tire & Rubber Co. that prehearing witness statements are exempt from disclosure under the Freedom of Information Act (FOIA) at least until the completion of the Board’s unfair labor practice proceedings. Robbins’ conclusive presumption that witness intimidation will result from prehearing disclosure of any witness affidavit would appear to end litigants’ use of the FOIA as a discovery device in Board proceedings.

The salient issue after Robbins is whether the Supreme Court’s refusal to consider the factual exigencies surrounding employer requests for witness statements will further restrict the use of other methods to obtain relevant information prior to Board hearings. This Note argues that, on the contrary, courts should scrutinize more closely Board rules that often deny litigants access to such information regardless of the factual circumstances of each case. In contrast to the mechanical approach used by the Court in Robbins, courts should weigh the Board’s interest in protecting its witnesses from coercion and retaliation against the needs of private litigants to prepare their defenses. This approach would produce demonstrably fairer results than would extension of the Robbins rationale to obstruct avenues of discovery other than the FOIA.

Part I of this Note discusses the Board’s restrictive discovery rules and Robbins’ rejection of the FOIA as an alternative prehearing device to gather information. Part II analyzes the current split in the circuits regarding the applicability of discovery rules in Board proceedings and advocates an ap-

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2. See notes 7-21 infra and accompanying text.


5. 98 S. Ct. at 2327.

approach that more equitably balances the rights of the Board and of charged parties. Part III examines the courts' use of a balancing approach to determine the lawfulness of attempts to circumvent restrictive discovery rules by interviewing employees to obtain information or by requesting prehearing statements directly from potential witnesses rather than from the Board.

I. Robbins and the FOIA Discovery Device

A. The Scope of Board Discovery Rules

Litigants' attempts to use the FOIA as a discovery device were primarily a response to the narrow scope of the Board's discovery rules. These rules are premised on the assumption that revealing the identity of witnesses and the content of their statements prior to the hearing will invariably result in economic and physical coercion. The Board contends that individuals, usually employees, would be unwilling to give candid testimony to the Board if they knew that their statements could be divulged to employers prior to the hearing. In addition, such disclosure would delay adjudicative proceedings and consequently interfere with the Board's dual role as prosecutor and adjudicator of unfair labor practice disputes. Accordingly, the Board grants the right to


10. The prosecutorial and adjudicative functions are served by the General Counsel and the Board, respectively. See 29 U.S.C. § 153 (1976); Prehearing Discovery, supra note 1 at 337. The Board has authority under the Administrative Procedure Act to promulgate its own procedural rules to govern the conduct of hearings. 5 U.S.C. §§ 554-556 (1976). Although there is no constitutional or statutory requirement to provide discovery in agency proceedings, Frilette v. Kimerling, 508 F.2d 205, 208 (3d Cir. 1974), cert. denied, 421 U.S. 980 (1975), the administrative hearing must still comply with the fundamentals of due process. See Silverman v. Commodity Futures Trading Comm'n, 549 F.2d 28, 33 (7th Cir. 1977); Swift & Co. v. United States, 308 F.2d 849, 851 (7th Cir. 1962).
take depositions only to obtain evidence from witnesses who will be unavailable at trial, and prohibits its employees from producing any investigative files or records pursuant to subpoenas.

Critics have argued that the Board’s denial of pretrial discovery promotes “trial by ambush.” Respondents claim they are afforded little opportunity before the hearing to determine the nature of the Board’s case or to prepare an adequate defense. Parties typically complain that they are frequently unaware of the witnesses who will be called to testify. Often they do not know the specific facts of the alleged discriminatory or coercive incident which forms the basis of the charge against them. The parties contend that the Board should be able to prevail in its hearings on the strength of its own case and not because of the “Board-fostered” difficulties in preparing a defense.

The Board, however, asserts that the lack of pretrial discovery does not result in unfairness to charged parties. If an unfair labor practice charge is not

11. 29 C.F.R. § 102.30 (1977). This rule states in pertinent part: “Witnesses shall be examined orally under oath, except that for good cause shown after the issuance of a complaint, testimony may be taken by deposition. . . . The regional director or administrative law judge, as the case may be, shall upon receipt of the application, if in his discretion good cause has been shown, and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken. . . .” The Board has interpreted the “good cause” requirement to permit depositions only “where the witness will not be available to testify at the hearing.” NLRB Casehandling Manual § 10352.3 (1975), reprinted in NLRB Casehandling Manual (CCH) ¶ 3523 (1976). See also United Terrazzo Precast Co., 221 N.L.R.B. 612, 612 (1975); Locke Insulators, Inc., 218 N.L.R.B. 653, 654 (1975).


13. See New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 383 (1st Cir. 1976); Capital Cities Communications, Inc. v. NLRB, 409 F. Supp. 971, 977 (N.D. Cal. 1976). One court, although it felt bound by the Board’s general discovery policy to uphold denial of an FOIA request, also took the opportunity to criticize that policy: “We join in plaintiff’s condemnation of NLRB discovery practices. We are, indeed, shocked that such discovery is so stringently limited. Counsel for parties charged with unfair labor practices must, of necessity, engage in considerable guesswork. The N.L.R.B. has in this proceeding, and apparently all across the country, fought the Counsel for parties charged with unfair labor practice must, of necessity, engage in considerable guesswork. The N.L.R.B. has in this proceeding, and apparently all across the country, fought the

14. See Garvey, supra note 8, at 718; Prehearing Discovery, supra note 1, at 340-41.


17. See, e.g., NLRB v. Dutch Boy, Inc., [1978] 4 Lab. L. Rep. (CCH) (Lab. Cas.) ¶ 10,635 (W.D. Okla. Apr. 24, 1978) (no denial of due process when a subpoena duces tecum issued by the Board to acquire employer’s documents is enforced even though the Board refuses to produce its documents prior to hearing); Midwest Paper Prods. Co., 223 N.L.R.B. 1367 (1976) (Board’s refusal to release affidavits prior to the hearing is not a denial of due process); United Terrazzo Precast Co.,
sufficiently clear, parties can request a bill of particulars to inform them of the specific facts underlying allegations.\textsuperscript{18} Furthermore, the Board holds pretrial conferences for simplification of issues and for purposes of settlement,\textsuperscript{19} and delivers copies of witnesses’ prehearing statements to opposing counsel after the witnesses have testified to ensure proper cross-examination.\textsuperscript{20} According to the Board, these procedures are adequate to protect the interests of all parties.\textsuperscript{21}

In response, many disgruntled litigants turned to the FOIA to obtain witness statements, affidavits, and similar records compiled by the Board which it would otherwise refuse to disclose.\textsuperscript{22} The courts recognized the lack of discovery procedures provided by the Board, and acknowledged that “if pre-hearing discovery is to be obtained as a matter of right by a party charged . . . with an unfair labor practice, the source for the right must be found within the Freedom of Information Act.”\textsuperscript{23}

\textsuperscript{19} \textit{Id.} § 10350, \textit{reprinted in} NLRB Casehandling Manual (CCH) ¶ 3500 (1976).
\textsuperscript{20} 29 C.F.R. § 102.118(b)(1) (1977). The Board patterned this rule after the holding in Jeneks v. United States, 353 U.S. 657 (1957). In that case, the Court held that a union official charged in a criminal proceeding with filing false affidavits was entitled to compel production of FBI informers' reports after direct examination of the informers for the purpose of impeaching their testimony. The Board contends that this rule is fair and practical because it minimizes the potential for witness intimidation by keeping the witness' name and testimony confidential until after he testifies, insures a voluntary supply of information to the Board, and affords adequate opportunity to respondents for rebuttal of the government's arguments. See Pepsi-Cola Bottling Co. v. NLRB, 92 L.R.R.M. 3527 (D. Kan. 1976); Gerico, Inc. v. NLRB, 92 L.R.R.M. 2713 (D. Colo. 1976); Vegas Village Shopping Corp. v. NLRB, 92 L.R.R.M. 2683 (C.D. Cal. 1976); Hook Drugs, Inc. v. NLRB, 91 L.R.R.M. 2797 (S.D. Ind. 1976).
\textsuperscript{22} \textit{See generally} A. Levenson & H. Pitt, \textit{Government Information} 43-51 (1978); J. O'Reilly, \textit{Federal Information Disclosure} 17-20 to 24 (1977). The statute imposes upon federal agencies obligations to disclose certain information, and establishes the procedure and criteria for determining the availability of requested material. 5 U.S.C. § 552(a) (1976); \textit{see Guidelines for Freedom of Information Requests}, NLRB Casehandling Manual (CCH) ¶ 30,001 (1976). Various types of information have been requested from the Board pursuant to the FOIA. \textit{See} Committee on Masonic Homes v. NLRB, 556 F.2d 214 (3d Cir. 1977) (authorization cards); Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977) (tax records, payroll records, statements, and notes relating to interim earnings of backpay claimants); Getman v. NLRB, 450 F.2d 670 (D.C. Cir. 1971) (lists of names and addresses of employees).
\textsuperscript{23} \textit{Title Guarantee Co. v. NLRB}, 534 F.2d 484, 487 (2d Cir.), \textit{cert. denied}, 429 U.S. 834 (1976). \textit{See also} Capital Cities Communications, Inc. v. NLRB, 409 F. Supp. 971, 977 (N.D. Cal. 1976). Most courts passing on Board denials of FOIA requests found the discovery rights of respondents relevant to their determinations. \textit{See}, e.g., Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 726 (5th Cir. 1977), \textit{rev'd}, 98 S. Ct. 2311 (1978); Goodfriend W. Corp. v. Fuchs, 535 F.2d 145, 147 (1st Cir.), \textit{cert. denied}, 429 U.S. 895 (1976). \textit{But see} Cessna Aircraft Co. v. NLRB, 405 F. Supp. 1042, 1046 (D. Kan. 1975), \textit{rev'd}, 542 F.2d 834 (10th Cir. 1976) ("The Board cannot seriously contend that it is somehow exempt from provisions of the [FOIA], or that its internal rules and regulations regarding discovery may apply to nullify provisions of that Act.")
B. The Impact of Robbins on the FOIA as a Discovery Alternative

The FOIA was not originally intended as a discovery device, but was designed to assure public access to all federal records whose disclosure would not significantly harm specific governmental interests. The statutory presumption is in favor of disclosure, but the agency that has custody of the record may rebut this presumption with evidence that the particular item requested falls within one of nine specific exemptions. The Board, relying on exemption 7(A), has repeatedly denied requests for witness statements. That exemption provides that disclosure is not required of "investigatory records compiled for law enforcement purposes, but only to the extent that production of such records would . . . interfere with enforcement proceedings." The Board argues that release of prehearing statements compiled during its investigations of unfair labor practice charges would deter witnesses from testifying, and would thus interfere with its proceedings.24

24. Renegotiation Board v. Bannercraft Clothing Co., 415 U.S. 1, 24 (1974); EPA v. Mink, 410 U.S. 73, 80 (1973). "Congress passed the [FOIA] in response to a persistent problem of legislators and citizens, the problem of obtaining adequate information to evaluate federal programs and formulate wise policies. Congress recognized that the public cannot make intelligent decisions without such information, and that governmental institutions become unresponsive to public needs if knowledge of their activities is denied to the people and their representatives. The touchstone of any proceedings under the Act must be the clear legislative intent to assure public access to all governmental records whose disclosure would not significantly harm specific governmental interests. The policy of the Act requires that the disclosure requirement be construed broadly, the exemptions narrowly." Soucie v. David, 448 F.2d 1067, 1080 (D.C. Cir. 1971). See generally H.R. Rep. No. 1497, 89th Cong., 2d Sess. 2-6 (1966), reprinted in Subcomm. on Administrative Practice and Procedure of the Comm. on the Judiciary, 93d Cong., 2d Sess., Freedom of Information Act Source Book 22-27 (Comm. Print 1974) [hereinafter cited as 1974 Source Book].

25. 5 U.S.C. § 552(b)(1)-(9) (1976). These exemptions were "not intended by Congress to be used either to prohibit disclosure of information or to justify automatic withholding of information. Rather, they merely mark the outer limits of information that may be withheld where the agency makes an affirmative determination that the public interest and the specific circumstances presented dictate that the information should be withheld. Agencies have been slow to adopt this attitude, but enlightened judicial decisions reflect this approach to interpreting the force of the FOIA exemptions." 1974 Source Book, supra note 24, at 2.


27. 5 U.S.C. § 552(b)(7)(A) (1976). A document is an "investigatory record" if it was created as part of an agency inquiry into conduct which may have violated a statute or regulation administered by that agency. J. O'Reilly, supra note 22, at 17-17.

The investigatory records exemption in its entirety applies whenever "production of such records would (A) interfere with enforcement proceedings, (B) deprive a person of a right to a fair trial or an impartial adjudication, (C) constitute an unwarranted invasion of personal privacy, (D) disclose the identity of a confidential source and, in the case of a record compiled by a criminal law enforcement authority in the course of a criminal investigation, or by an agency conducting a lawful national security intelligence investigation, confidential information furnished only by the confidential source, (E) disclose investigative techniques and procedures, or (F) endanger the life or physical safety of law enforcement personnel." 5 U.S.C. § 552(b)(7) (1976).

28. See, e.g., NLRB v. Scrivener, 405 U.S. 117, 121, 124 (1972); Trustees of Boston Univ. v. NLRB, 575 F.2d 301, 309-11 (1st Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3097 (U.S. July
Most courts agreed with the Board that it need not accede to requests for statements that would enable employers to intimidate witnesses or allow them to learn the Board's case in advance.29 Undaunted, charged parties continued to make FOIA requests for prehearing information.30 The Supreme Court


30. The Supreme Court's language in NLRB v. Sears, Roebuck & Co., 421 U.S. 132 (1975), may have spurred much of this litigation. The Court intimated that the FOIA is coextensive with agency discovery procedures in certain circumstances. It found that Congress intended exemption 5 of the FOIA, relating to "intra-agency memoranda," 5 U.S.C. § 552(b)(5) (1976), "to permit disclosure of those intra-agency memoranda which would 'routinely be disclosed' in private litigation . . . and we accept this as the law." 421 U.S. at 149 n.16 (citations omitted). This language was construed to support the argument that the FOIA was intended as a discovery device. See Connolly & Fox, supra note 7, at 233-34. The Court in Sears, however, held only that access to documents under exemption 5 could not exceed that permitted under normal agency discovery procedures. 421 U.S. at 148-49. It did not find that an agency must yield to an FOIA request where the agency's discovery rules would permit disclosure. The Court stated: "The ability of a private litigant to override a privilege claim set up by the Government, with respect to an otherwise disclosable document, may itself turn on the extent of the litigant's need in the context of the facts of his particular case. . . . However, it is not sensible to construe the Act to require disclosure of any document which would be disclosed in the hypothetical litigation in which the private party's claim is the most compelling." Id. at 149 n.16 (citations omitted). Moreover, the tendency of the courts to equate FOIA disclosure in Board proceedings, with the rights to discovery permitted by the Board, has been criticized as ignoring the separate purposes of the FOIA and discovery procedures. The policy behind the FOIA is public disclosure without a demonstration of need, whereas the goal of discovery is the elimination of surprise and unfair trial practices. Project, Government Information
responded to the ensuing flood of litigation in NLRB v. Robbins Tire & Rubber Co.\textsuperscript{31}

In Robbins, after a contested representation election, the Board issued an unfair labor practice complaint against the employer alleging interference with the protected rights of its employees.\textsuperscript{32} Pursuant to the FOIA, the employer requested copies of all potential witness statements compiled by the Board during its investigation.\textsuperscript{33} When the Board refused to comply with these requests, the employer sued to compel disclosure of the statements.\textsuperscript{34} The district court directed the Board to provide the statements for copying because the Board had not "demonstrated how the delivery to plaintiff several days prior to the scheduled hearing . . . will interfere with enforcement proceedings . . . ."\textsuperscript{35} The Fifth Circuit affirmed, and found that the Board had failed to sustain its burden of demonstrating the applicability of exemption 7(A) because it had introduced no evidence that witness intimidation was likely to occur in the brief period between disclosure and the hearing.\textsuperscript{36} The Supreme Court reversed, and held that "witness statements in pending unfair labor practice proceedings are exempt from FOIA disclosure [under exemption 7(A)] at least until the completion of the Board's hearing."\textsuperscript{37}

The Court first looked to the statutory language of the FOIA to uphold the Board's policy of denying disclosure of witness statements prior to the completion of its hearings. In a cursory analysis, the Court found that the specific provisions of the statute do not require case-by-case scrutiny of an agency's

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\textsuperscript{31} 98 S. Ct. 2311 (1978).

\textsuperscript{32} The employer was charged with violating § 8(a)(1) of the National Labor Relations Act (NLRA), 29 U.S.C. § 158(a)(1) (1976), by interfering with employees' protected rights during a representation campaign after which the union failed to win a majority of the ballots cast in the election. 98 S. Ct. at 2314.

\textsuperscript{33} These requests are generally made contemporaneously with or after applications to the administrative law judge for depositions, interrogatories, or notices to produce affidavits. See, e.g., New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 383 (1st Cir. 1976) (requests for supervisors' and nonemployees' statements); Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1141 (9th Cir. 1976) (requests for employees' statements); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 81 (3d Cir. 1976) (requests for statements of charging parties and potential witnesses).

\textsuperscript{34} Robbins Tire & Rubber Co. v. NLRB, 92 L.R.R.M. 2586, 2587 (N.D. Ala. 1976). Federal district courts have "jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant." 5 U.S.C. § 552(a)(4)(B) (1976).

\textsuperscript{35} 92 L.R.R.M. at 2589.

\textsuperscript{36} Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724 (5th Cir. 1977). The Fifth Circuit suggested several criteria to determine whether disclosure of witness statements prior to the hearing would "interfere" with enforcement proceedings. The factors included: "whether the history of labor relations in the community and at the plant makes intimidation of these witnesses reasonably foreseeable; whether the witnesses work in jobs . . . or have records of job performance that make intimidation of them a likely result of disclosure; the nature of the testimony which the unknown affiants are expected to give." Id. at 732. The court observed that in camera inspection may be helpful in that determination. Id. at 732 n.27.

\textsuperscript{37} 98 S. Ct. at 2324.
claimed exemption.38 The employer had argued that because the statute places the burden of justifying nondisclosure on the agency, expressly permits in camera review of document,39 and mandates the release of reasonably segregable non-exempt material,40 the FOIA "necessarily contemplates that the Board must specifically demonstrate in each case that disclosure would interfere with a pending enforcement proceeding."41 The Court disagreed. It found that the provision for in camera review does not mandate individual examinations, since it is discretionary and "is designed to be invoked when the issue before the District Court could not be otherwise resolved."42 Similarly, the Court argued that the provision directing release of segregable portions of records does not address "the prior question of what material is exempt."43 Finally, although Congress placed the burden on the agency to justify application of an exemption, the statute does not indicate what kind of burden the agency must satisfy.44 The Court thus refused to rely on these provisions alone to determine the propriety of the employer's demand for disclosure.45

The Court next examined the legislative history of exemption 7(A) to ascertain the type of interference required to justify nondisclosure of witness affidavits. The original exemption 7 applied to "investigatory files compiled for law enforcement purposes except to the extent available by law to a private party."46 The Court found that Congress enacted this exemption to prevent harm to the government's case which would result from allowing litigants "earlier or greater access" to agency investigatory files than they would otherwise have had under the agency's own discovery rules.47 Such premature disclosure would interfere with Board enforcement proceedings by enabling litigants to "construct defenses which would permit violations to go unremedied."48 Furthermore, disclosure would inevitably deter witnesses from

38. Id. at 2317.
39. 5 U.S.C. § 552(a)(4)(B) (1976) provides that upon complaint, the district court "shall determine the matter de novo, and may examine the contents of such agency records in camera to determine whether such records or any part thereof shall be withheld under any of the exemptions set forth in subsection (b) of this section, and the burden is on the agency to sustain its action."
40. Id. § 552(b) provides: "Any reasonably segregable portion of a record shall be provided to any person requesting such record after deletion of the portions which are exempt under this subsection."
41. 98 S. Ct. at 2317-18.
42. Id. at 2318; see EPA v. Mink, 410 U.S. 73, 85-94 (1973); Mervin v. FTC, No. 77-1204,
slip op. at 5-6 (D.C. Cir. Nov. 12, 1978) (per curiam); Vaughn v. Rosen, 484 F.2d 820, 824 (D.C. Cir. 1973), cert. denied,
43. 98 S. Ct. at 2318.
44. Id.
45. Id. The Court also compared the literal language of subdivision 7(A) with the other subdivisions of exemption 7. These latter provisions "refer to particular cases—a person," "an unwarranted invasion," "a confidential source"—and thus seem to require a showing that the factors made relevant by the statute are present in each distinct situation. By contrast, since subdivision (A) speaks in the plural voice about 'enforcement proceedings,' it appears to contemplate that certain generic determinations might be made." Id. at 2317.
46. Administrative Procedure Act, ch. 234, § 3(e)(7), 80 Stat. 251 (1966) (current version at 5
U.S.C. § 552(b)(7) (1976)).
48. 98 S. Ct. at 2326 (quoting New England Medical Center Hosp. v. NLRB, 548 F.2d 377,
making "uninhibited and non-evasive statement[s]" during the course of the investigation and hearing of unfair labor practice cases.49

The Court also declared that the 1974 amendment of exemption 7 did not reflect a change in the original congressional intent. The purpose of the amendment was to rectify erroneous judicial decisions that had held all material in investigatory files to be automatically nondisclosable even though disclosure would not interfere with pending enforcement proceedings.50 The amendment changed the language of the exemption to deny disclosure of investigatory materials if it would "interfere with enforcement proceedings."51 The Court concluded that Congress had thereby intended not to change the original purpose of the exemption, but to construe it more narrowly by looking to the specific reasons for denying disclosure.52 Nevertheless, the Court found that Congress had intended that the Board's burden is to prove only that the "disclosure of particular kinds of investigatory records while a case is pending would generally "interfere with enforcement proceedings." 53

Lastly, the Court focused on the peculiar nature of unfair labor practice proceedings to conclude that disclosure of witness statements prior to completion of Board hearings would "necessarily" interfere with those proceedings.54 Since denials of FOIA requests are immediately reviewable in the district

49. 98 S. Ct. at 2319 (quoting NLRB v. National Survey Serv., Inc., 361 F.2d 199, 206 (7th Cir. 1966)); see 1974 Source Book, supra note 24, at 110-11.

50. 98 S. Ct. at 2319-23. The District of Columbia Circuit had "erected a 'stone wall' against public access to any material"; it refused to permit disclosure if the requested information was part of an investigatory file, without considering whether disclosure would interfere with enforcement proceedings, or whether any proceedings were pending. Id. at 2320 (citing Center for Nat'l Policy Review on Race and Urban Issues v. Weinberger, 502 F.2d 370 (D.C. Cir. 1974); Ditlow v. Brinegar, 494 F.2d 1073 (D.C. Cir.), cert. denied, 419 U.S. 974 (1974); Aspin v. Department of Defense, 491 F.2d 24 (D.C. Cir. 1973); Weisberg v. United States Dept' of Justice, 489 F.2d 1195 (D.C. Cir. 1973), cert. denied, 416 U.S. 993 (1973)); see 1974 Source Book, supra note 24, at 110-11.


52. 98 S. Ct. at 2322-23.

53. Id. at 2323-24. The Court noted that President Ford had vetoed the amendment of exemption 7(A) because he viewed it as requiring agencies to "prove . . . —separately for each paragraph of each document—that disclosure 'would' cause a specific harm." Id. at 2323 (quoting Freedom of Information Act—Veto Message from the President of the United States, H.R. Doc. No. 93-383, 94th Cong., 1st Sess. (1974), reprinted in Comm. on Government Operations, 94th Cong., 1st Sess., Freedom of Information Act and Amendments of 1974 Source Book 398-99 (Comm. Print 1975) [hereinafter cited as 1975 Source Book]). In the debate leading to Congress' override of the veto, supporters of the amendment suggested that the President's remarks were "ludicrous" and that "the burden is substantially less than we would be led to believe by the President's message." 1975 Source Book at 406 (remarks of Rep. Moorhead), 450 (remarks of Sen. Hart).

54. 98 S. Ct. at 2327. "The danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage. . . . The possibility that a FOIA-induced change in the Board's prehearing discovery rules will have a chilling effect on the Board's sources cannot be ignored." Id. at 2326.
courts, Board personnel would be constantly involved in FOIA discovery contests. Disclosure would therefore potentially delay adjudicatory proceedings. More importantly, disclosure of witness statements would invite employers or unions to coerce or intimidate employees and others who have given statements, "in an effort to make them change their testimony or not testify at all." Finally, although the Court noted that the Board's general discovery procedures have been criticized, it refused to interpret a statute designed for a different purpose to compel the type of disclosure particularly abhorrent to the Board's traditional policy. Thus, the Court concluded that disclosure of witness statements under the FOIA could be no more extensive than the degree of discovery actually permitted by the Board's regulations.

Justices Powell and Brennan disagreed with the majority's reliance on the Board's discovery rules to define the scope of FOIA disclosure. They first observed that Congress' overall purpose in enacting the FOIA was to discourage agencies from withholding information from the public by promulgating restrictive rules of discovery under their "housekeeping" rulemaking authority. By abandoning the language of the original exemption 7, Congress intended the courts to make "a more focused inquiry into the likelihood of harm resulting from disclosure of investigatory records." Thus, the mere determination that FOIA disclosure would expand the normal discovery permitted by an agency is insufficient to support a finding that disclosure would disrupt an enforcement proceeding. The Board therefore should have

55. Id. at 2324-25.
56. Id. at 2325. The Court rejected the respondent's argument that 29 U.S.C. § 158(a)(4) (1976) adequately deters employers from harassing employees who provide statements to the Board. Section 8(a)(4) makes it an unfair labor practice for an employer to discriminate against any employee who has testified to the Board. The Court declared that "the possibility of deterrence arising from post hoc disciplinary action is no substitute for a prophylactic rule that prevents the harm to a pending enforcement proceeding which flows from a witness having been intimidated." 98 S. Ct. at 2325.
57. 98 S. Ct. at 2324, 2326. Despite this reluctance, the Court did acknowledge that "those drafting discovery rules for the Board might determine that this 'interference' is one that should be tolerated in order to promote a fairer decisionmaking process . . . ." Id. at 2326.

In a concurring opinion, joined by Chief Justice Burger and Justice Rehnquist, Justice Stevens agreed that "[a] statute that authorized discovery greater than that available under the rules normally applicable to an enforcement proceeding would 'interfere' with the proceeding" in the sense of the word "meddling." Id. at 2327 (Stevens, J., concurring).
58. Id. at 2326-27.
59. Id. at 2328 (Powell, J., concurring in part and dissenting in part).
60. Id. at 2328 n.1 (Powell, J., concurring in part and dissenting in part). The Board's rulemaking authority is granted under the NLRA. 29 U.S.C. § 156 (1976).
61. 98 S. Ct. at 2328 (Powell, J., concurring in part and dissenting in part).
62. The dissent observed that the Fifth Circuit in Robbins had also criticized courts' use of a discovery standard to determine the scope of FOIA disclosure. The Fifth Circuit stated that "[i]f the mere fact that one could not have obtained the document in private discovery were enough, the Board would have made naught of the requirement that nondisclosure be permitted 'only to the extent that . . . production . . . would . . . interfere' in some way." Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 730 (5th Cir. 1977). The dissent also noted that the Board's denial of discovery rights to litigants had not been accorded uniform approval by the lower courts, thus making a discovery standard for FOIA disclosure "unworkable." 98 S. Ct. at 2328-29 (Powell, J., concurring in part and dissenting in part); see pt. II infra.
been required to make a specific factual showing that disclosure of witness statements would obstruct pending enforcement proceedings.\textsuperscript{63}

The two justices admitted that nondisclosure of unfavorable statements by current employees is justified, since disclosure is likely to foster intimidation by employers or unions.\textsuperscript{64} They would permit, however, disclosure of favorable witness statements, and statements of former employees and union representatives when there is no basis to presume that such witnesses are susceptible to retaliation for testifying to the Board.\textsuperscript{65} In those instances, the Board should be required to show a reasonable possibility of interference with enforcement proceedings by employer or union reprisal.\textsuperscript{66} In sum, the dissent found that the majority's conclusive presumption of witness intimidation "threatens to undermine the [FOIA's] overall presumption of disclosure" by failing to balance adequately the right to information in the government's possession with the likelihood that disclosure will result in specific harm to the agency.\textsuperscript{67}

C. Criticisms of the Robbins Opinion

The Court's establishment of a conclusive presumption that disclosure of witness statements in any unfair labor practice case will result in witness intimidation is inconsistent with the objective of the FOIA to provide the fullest possible disclosure of government information.\textsuperscript{68} Moreover, the decision portends inequitable consequences for litigants seeking information relevant to their cases prior to Board hearings.

The Court's rejection of a case-by-case approach to determine whether disclosure of investigatory records would interfere with Board proceedings seems to contradict the purposes of certain provisions of the FOIA. In amending the statute in 1974, Congress allowed courts to use in camera examination of requested documents to review the propriety of an agency's claims of exemption.\textsuperscript{69} Congress also directed agencies to release factual material in requested documents that is "reasonably segregable" from exempt material.\textsuperscript{70} These provisions were intended to complement the language of the exemptions in order to guard against automatic withholding of investigatory records.\textsuperscript{71} In

\textsuperscript{63} Id. at 2329-30 (Powell, J., concurring in part and dissenting in part).
\textsuperscript{64} Id. at 2331-32 (Powell, J., concurring in part and dissenting in part) (citing Climax Molybdenum Co. v. NLRB, 539 F.2d 63, 65 (10th Cir. 1976); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976)).
\textsuperscript{65} Id. at 2332 (Powell, J., concurring in part and dissenting in part).
\textsuperscript{66} Id. at 2332 (Powell, J., concurring in part and dissenting in part).
\textsuperscript{67} Id. (Powell, J., concurring in part and dissenting in part).
\textsuperscript{70} Id. § 2 (codified at 5 U.S.C. § 552(b) (1976)).
\textsuperscript{71} Senator Kennedy, a leading sponsor of the 1974 amendments, articulated the congressional objective: "With the new provisions it should be clear that there can be no blanket claim of confidentiality under any of the exemptions. In connection with this objective, S. 2543 proposes specifically to reaffirm the discretion of the courts through in camera inspection to examine each and every element of requested files or records. . . . That procedure is consistent with our intent that only parts of records which are specifically exempt may be withheld from public disclosure."
fact, to insure that the Board had met its burden of proving that disclosure would interfere with its proceedings, many courts prior to Robbins conducted camera examinations of the requested witness statements. If the requested documents included statements of current employees, many courts refused to divulge them.

After Robbins, however, courts must conclusively presume that disclosure of witness affidavits will interfere with Board enforcement proceedings. Thus, in considering the propriety of a Board refusal to produce requested documents, the only remaining issue is whether an enforcement proceeding is imminent or in progress. Since there is no need for in camera inspection to determine that a case is pending, this important function of the courts to insure the existence of an adequate factual basis for an exemption has been eliminated. By rejecting the argument that the amended language of exemption 7(A) and the provisions for in camera review and segregability demand closer scrutiny of an agency's reasons for withholding information, the Court has reestablished a wooden interpretation of the investigatory records exemption.

This should result in maximum possible disclosure and is consistent with the original purpose in enacting the [FOIA].” 120 Cong. Rec. 17019 (1974); see H.R. Rep. No. 1419, 92d Cong., 2d Sess. 5-6 (1972), reprinted in 1975 Source Book, supra note 53, at 10-11.

The legislative history clearly indicates that the agency must demonstrate the applicability of an exemption: “The proceedings are to be de novo so that the court can consider the propriety of the withholding instead of being restricted to judicial sanctioning of agency discretion. The Court will have authority whenever it considers such action equitable and appropriate to enjoin the agency from withholding its records and to order the production of agency records improperly withheld. The burden of proof is placed upon the agency which is the only party able to justify the withholding. A private citizen cannot be asked to prove that an agency has withheld information improperly because he will not know the reasons for the agency action.” H.R. Rep. No. 1497, 89th Cong., 2d Sess. 9, reprinted in 1974 Source Book, supra note 24, at 30; see EPA v. Mink, 410 U.S. 73, 93 (1973).

See, e.g., Deering Milliken, Inc. v. Irving, 548 F.2d 1131, 1136 (4th Cir. 1977); Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139, 1143 (9th Cir. 1976); Title Guarantee Co. v. NLRB, 534 F.2d 484, 486 (2d Cir.), cert. denied, 429 U.S. 834 (1976); Kent Corp. v. NLRB, 530 F.2d 612, 624 n.30 (5th Cir.), cert. denied, 429 U.S. 920 (1976).

See Abrahamson Chrysler-Plymouth, Inc. v. NLRB, 561 F.2d 63 (7th Cir. 1977); NLRB v. Hardeman Garment Corp., 557 F.2d 559 (6th Cir. 1977); Deering Milliken, Inc. v. Irving, 548 F.2d 1131 (4th Cir. 1977); New England Medical Center Hosp. v. NLRB, 548 F.2d 377 (1st Cir. 1976); Harvey's Wagon Wheel, Inc. v. NLRB, 550 F.2d 1139 (9th Cir. 1976); Climax Molybdenum Co. v. NLRB, 539 F.2d 63 (10th Cir. 1976); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80 (3d Cir. 1976); Goodfriend W. Corp. v. Fuchs, 535 F.2d 145 (1st Cir.) (per curiam), cert. denied, 429 U.S. 895 (1976); Title Guarantee Co. v. NLRB, 534 F.2d 484, 491 (2d Cir.), cert. denied, 429 U.S. 834 (1976). In a clever use of the segregation device, one district court ordered the Board to release certain witness affidavits with the names and other identifying characteristics of the witnesses deleted. Furr's Cafeterias, Inc. v. NLRB, 416 F. Supp. 629, 631 (N.D. Tex. 1976).


See notes 38-45 supra and accompanying text. Commentators have criticized this rigid construction of FOIA requirements. “The 1974 amendments specifically rejected a no-balancing, absolute interpretation which would have excluded further judicial inquiry after a file's characteristics as a generic 'law enforcement file' were established.” J. O'Reilly, supra note 22, at 17-34;
More importantly, the Court's failure to require examination of the factual circumstances in each case will lead to inequitable consequences for several classes of litigants. Admittedly, nondisclosure is justified when substantial danger of intimidation of employee witnesses exists. For example, in *Local 30, United Slate, Tile & Composition Roofers v. NLRB*, the court upheld the Board's refusal to disclose all affidavits in its file to a union that had been charged with unfair labor practices. In *Local 30*, the Board alleged that the union had assaulted and threatened various persons, and prevented them from entering worksites. The union sought the affidavits of several employees. The court found that the Board had carried its burden of establishing interference with enforcement proceedings; it was "fair to infer" from the factual background that release of affidavits prior to the hearing would create a substantial danger that the witnesses would be intimidated.

When no evidence of violence or demonstrable opportunity for witness intimidation exists, however, the argument that disclosure of witness statements would necessarily interfere with enforcement proceedings is difficult to justify. For example, in *Temple-Eastex, Inc. v. NLRB*, the court ordered the Board to release to a requesting employer statements and affidavits collected by the Board that were favorable to the employer in his defense to unfair labor practice charges. The court, acknowledging the statutory purpose of providing "the fullest responsible disclosure," stated that it could not "envision any reprisal by a company against affiants who have made statements favorable to its position at the NLRB hearing." Furthermore, the court felt it would be particularly unfair to withhold favorable affidavits when sought under the FOIA. Because a Board prosecutor presumably will not call a witness whose

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78. Employers have also attempted to use the FOIA to obtain union authorization cards submitted to the Board during representation and unfair labor practice cases. The Board has denied disclosure of these cards on the basis of exemption 6, which states that disclosure is not required of "personnel and medical files and similar files the disclosure of which would constitute a clearly unwarranted invasion of personal privacy." 5 U.S.C. § 552(b)(6) (1976). In Committee on Masonic Homes v. NLRB, 556 F.2d 214 (3d Cir. 1977), the Third Circuit approved the Board's position and held that authorization cards could not be disclosed prior to an election because employees' exercise of the right to vote might be "chilled" if they knew an employer could see who signed the cards supporting the union. *Id.* at 221; see *Madeira Nursing Center v. NLRB*, 96 L.R.R.M. 2411 (S.D. Ohio 1976); NLRB v. Biophysics Sys., Inc., 91 L.R.R.M. 3079 (S.D.N.Y. 1976); *NLRB Memorandum 77-109*, reprinted in [1978] 4 Lab. L. Rep. (CCH) ¶ 9142. Since the Supreme Court's rationale in *Robbins* also emphasized the possibilities for intimidation and coercion inherent in the employer-employee relationship, *Robbins* may be relied upon as support for barring disclosure of authorization cards in order to avoid interference with the Board's carefully conducted representation proceedings.

80. *Id.* at 526.
81. *Id.*
83. *Id.* at 186.
84. *Id.*; see EPA v. Mink, 410 U.S. 73, 80 (1973).
85. 410 F. Supp. at 186. The court conducted an in camera review to make this determination.
prehearing testimony is favorable to the company, production of such affidavits at the hearing would be unlikely under the Board's rule permitting disclosure only after an affiant has testified.  

The Court in Robbins dismissed cases such as Temple-Eastex on the theory that, although the "risk of intimidation . . . may be somewhat diminished with regard to statements that are favorable to the employer, those known to have already given favorable statements are then subject to pressure to give even more favorable testimony." Neither the Court nor the Board offered any factual support for this assumption. Yet given the Court's conclusive presumption that interference with enforcement proceedings will always follow disclosure of witness statements, no evidence is necessary to justify the Board's claim of witness intimidation. It is submitted, however, that the FOIA presumption of disclosure is not overcome if the Board cannot prove that interference is likely to result from disclosure of favorable witness statements. In these circumstances, therefore, requests for information should be granted.

The Court's holding in Robbins is similarly unsupportable when applied to statements made by former employees or nonemployees. As discussed above, current employees may be subject to economic and physical coercion by an unscrupulous employer or union if they elect to testify at a Board hearing. However, when a case comes before the Board after an employee witness has left the charged employer, or if the witness is an outside union agent or official, it is less probable that disclosure of their affidavits would necessarily lead to employer or union retaliation. Prior to Robbins, the Fourth Circuit balanced these considerations in Charlotte-Mecklenburg Hospital Authority v. Perry. The court held it within the discretion of the district court to require the Equal Employment Opportunity Commission to release the affidavits of former employees whose willingness to testify in hearings would not be "chilled" by the fear of employer reprisals. This decision demonstrates that the FOIA pro-

86. Id.; see note 20 supra and accompanying text.
87. 98 S. Ct. at 2326.
88. See id. at 2332 (Powell, J., concurring in part and dissenting in part); notes 64-67 supra and accompanying text.
89. See NLRB v. Hardeman Garment Corp., 557 F.2d 559, 562 (6th Cir. 1977); Roger J. Au & Son, Inc. v. NLRB, 538 F.2d 80, 83 (3d Cir. 1976); notes 79-81 supra and accompanying text.
90. See United Supermarkets, Inc. v. NLRB, 449 F. Supp. 407, 409-10 (N.D. Tex. 1978). Although the possibility of physical or mental coercion exists even against nonemployees, see, e.g., New England Medical Center Hosp. v. NLRB, 548 F.2d 377, 382-83 (1st Cir. 1976); Decker Foundry Co., Inc., 237 N.L.R.B. No. 90 (Aug. 17, 1978), [1978] 5 Lab. L. Rep. (CCH) (NLRB Dec.) ¶ 19,649, it is presumably less than if that person were subject to the constant supervision of the employer in the confines of the work environment. See Trustees of Boston Univ. v. NLRB, 575 F.2d 301, 310 (1st Cir. 1978), petition for cert. filed, 47 U.S.L.W. 3097 (U.S. July 11, 1978) (No. 78-67).
91. 571 F.2d 195, 202 (4th Cir. 1978). The court determined that although affidavits procured by the Equal Employment Opportunity Commission from present employees should not be released to an employer charged with racial discrimination and retaliatory discharge, affidavits procured from former employees should be disclosed, since the agency had not demonstrated possible interference with the pending litigation. Id. at 202-03.
92. Id. at 202. Decisions involving the NLRB, the Equal Employment Opportunity Commission, and the Fair Labor Standards Authority have considered the peculiar character of the employer-employee relationship in making discovery determinations. See id.; Brennan v. En-
vides the courts with a realistic and equitable method to balance the right of access to information with the possibility of harm to the agency's proceedings that might result from disclosure.93

In sum, the breadth of the holding in Robbins, in contrast to the more studied considerations of "interference" in Local 30, Temple-Eastex, and Charlotte-Mecklenburg, is difficult to reconcile with Congress' intention in enacting the FOIA and exemption 7(A). Moreover, the Supreme Court's expectation that witness intimidation will necessarily result from prehearing disclosure beyond that permitted by the Board's discovery rules reflects an uncritical acceptance of dated Board assumptions.94 The Court determined that protection of the Board's potential witnesses is so crucial that it justifies depriving all private litigants of necessary information. Critics have recently suggested, however, that the behavioral assumption that employers will respond coercively to employees who cooperate with the Board is often unverified.95 Indeed, with the growth of the institutional power of many unions, employees are afforded more protection from retaliation by an employer than in the incipient years of labor unionism.96 Furthermore, to deter both employer and union intimidation, the NLRA makes it an unfair labor practice for an employer to discriminate against an employee who has testified before the Board,97 or for a union to coerce

gineered Prods., Inc., 506 F.2d 299, 302 (8th Cir. 1974); Wirtz v. Hooper-Holmes Bureau, Inc., 327 F.2d 939, 943 (5th Cir. 1964); Wirtz v. B.A.C. Steel Prods., Inc., 312 F.2d 14, 16 (4th Cir. 1962). Supreme Court labor law rulings have also "take[n] into account the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear." NLRB v. Gissel Packing Co., 395 U.S. 575, 617 (1969).


94. See Prehearing Discovery, supra note 1, at 340-41. "[I]t is not enough for the NLRB to express its own moral judgment or even community sentiment. To say 'there ought to be a law against it' does not demonstrate the propriety of the NLRB's imposing the prohibition." Cox, The Duty To Bargain in Good Faith, 71 Harv. L. Rev. 1401, 1437 (1958).


employees in the exercise of their protected rights. The Robbins Court rejected these remedial measures in favor of the more "prophylactic" nondisclosure rule. It is submitted, however, that consideration of the factual circumstances in each case would provide the safeguards that the Robbins Court stressed, by denying disclosure only when a reasonable possibility of witness intimidation exists.

Admittedly, the Court's concern that advance access to Board materials will permit charged parties to construct defenses and allow violations of the NLRA to go unremedied, is not without merit. In addition, the Court's observation that Board responses to FOIA requests would consume an excessive amount of agency time cannot be ignored. This analysis, however, not only precludes the availability of information that would aid an innocent employer in responding to charges, but also disregards the possibility that discovery will hasten the resolution of disputes. Thus, the Court's decision to deny FOIA disclosure in Board proceedings should be limited in order to account for the variety of circumstances in unfair labor practice cases.

II. IMPACT OF ROBBINS ON BOARD DISCOVERY

The Supreme Court's inadequate consideration of the factual variables in Robbins may plausibly be extended to close alternative avenues to information in the Board's possession. Although Robbins' conclusive presumption against disclosure is limited to witness statements, the opinion lends support to the Board's policy that its proceedings require insulation from possible employer and union interference. Robbins' rationale may therefore influence the current controversy among the circuits concerning the validity of Board decisions denying requests for traditional prehearing discovery.


99. 98 S. Ct. at 2325.

100. Id. at 2326.


102. One labor lawyer has noted that "anyone who regularly practices in Federal or state courts of general jurisdiction... appreciates the fact that discovery is, in reality, a timesaving procedure. Full discovery has the effect of clarifying the issues and expediting the trial. More importantly, however, full discovery is probably one of the greatest catalysts to settlement." Prehearing Discovery, supra note 1, at 340. See also Berger, Discovery in Administrative Proceedings: Why Agencies Should Catch Up with the Courts, 46 A.B.A. J. 74 (1960); Gallagher, Use of Pre-Trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings, 12 Ad. L. Bull. 44 (1959-1960); note 127 infra.

103. See 98 S. Ct. at 2324-27.

104. The Court in Robbins was careful not to intimate any view regarding this conflict. Id. at 2324 n.16.
The Second and Fifth Circuits represent opposite poles in the judicial conflict over the Board's authority to deny litigants the use of discovery techniques.\textsuperscript{105} The Fifth Circuit has held that the Board must permit discovery in unfair labor practice proceedings when the requesting party demonstrates "good cause."\textsuperscript{106} The Second Circuit, on the other hand, asserts that the permissibility of discovery is relegated solely to the Board's discretion.\textsuperscript{107}

The Fifth Circuit, which held in favor of FOIA disclosure in Robbins, argues that the Board "should freely permit discovery procedure in order that the rights of all parties may be properly protected."\textsuperscript{108} It asserts that section 10(b) of the NLRA, which requires that unfair labor practice proceedings be conducted in accordance with the rules of evidence,\textsuperscript{109} gives the Board authority to permit discovery pursuant to the Federal Rules of Civil Procedure.\textsuperscript{110} The

\textsuperscript{105} See Note, Discovery in Proceedings Before the NLRB: NLRB v. Interboro Contractors, Inc., 36 Mo. L. Rev. 537, 539 (1971) [hereinafter cited as Discovery].

\textsuperscript{106} NLRB v. Rex Disposables, Div. of DHJ Indus., Inc., 494 F.2d 588, 592 (5th Cir. 1974); NLRB v. Miami Coca-Cola Bottling Co., 403 F.2d 994, 996 (5th Cir. 1968); NLRB v. Safeway Steel Scaffolds Co., 383 F.2d 273, 277 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968).


The Seventh and Ninth Circuits' positions fall between those of the Second and Fifth Circuits. These circuits agree with the Second Circuit that the Board is not required by 29 U.S.C. § 160(b) (1976), to adopt the entire discovery procedure contemplated by the Federal Rules of Civil Procedure. See NLRB v. Vapor Blast Mfg. Co., 287 F.2d 402, 407 (7th Cir. 1961) (requests for investigatory files); NLRB v. Globe Wireless, Ltd., 193 F.2d 748, 751 (9th Cir. 1951) (requests for depositions). Like the Fifth Circuit, however, the Seventh and Ninth Circuits admit that in certain circumstances the application of the Board's rules might constitute an abuse of discretion if a party made a sufficient showing of need for prehearing discovery. Electromec Design & Dev. Co., Inc. v. NLRB, 409 F.2d 631, 635 (9th Cir. 1969); NLRB v. Vapor Blast Mfg. Co., 287 F.2d at 407. These circuits are nevertheless reluctant to find an abuse of discretion when the appealing party has received a full hearing, and obtains witness statements for cross-examination purposes. See Electromec Design & Dev. Co. v. NLRB, 409 F.2d at 635; NLRB v. National Survey Serv., Inc., 361 F.2d 199, 205 (7th Cir. 1966). See also NLRB v. Automotive Textile Prods. Co., 422 F.2d 1255, 1256 (6th Cir. 1970).

\textsuperscript{108} NLRB v. Miami Coca-Cola Bottling Co., 403 F.2d 994, 996 (5th Cir. 1968) (quoting NLRB v. Southern Materials Co., 345 F.2d 340, 244 (4th Cir. 1965)); accord, Robbins Tire & Rubber Co. v. NLRB, 563 F.2d 724, 729 (5th Cir. 1977), rev'd on other grounds, 98 S. Ct. 2311 (1978); NLRB v. Rex Disposables, Div. of DHJ Indus., Inc., 494 F.2d 588, 592 (5th Cir. 1974).


\textsuperscript{110} NLRB v. Rex Disposables, Div. of DHJ Indus., Inc., 494 F.2d 588, 592 (5th Cir. 1974); NLRB v. Miami Coca-Cola Bottling Co., 403 F.2d 994, 996 (5th Cir. 1968); NLRB v. Safeway Steel Scaffolds Co., 383 F.2d 273, 277 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968); accord, McClain Indus. v. NLRB, 381 F. Supp. 187 (E.D. Mich.), rev'd on other grounds, 521 F.2d 596 (6th Cir. 1974). The McClain court argued that "the rules of civil procedure often modify and sometimes alter the rules of evidence. The discovery provisions contained in the rules of civil procedure have such an effect. We think Congress intended to include the rules of civil procedure, as far as practicable, in proceedings before the Board." Id. at 189.
Fifth Circuit contends that the Board’s rule permitting depositions for “good cause” grants discretionary authority to allow depositions for the purpose of discovery when such a procedure would be “practicable in the circumstances of the case and if it is not used to harass or coerce employees . . . .” That authority imposes an affirmative duty upon the Board to provide for discovery where the denial thereof would result in actual prejudice to the moving party.113

Despite this liberal policy, the Fifth Circuit has yet to find that Board denials of requests for discovery were more than technical errors not requiring reversal.114 However, it held in NLRB v. Schill Steel Products, Inc.115 that statements of Board witnesses are discoverable prior to hearings in civil contempt proceedings brought to challenge noncompliance with appellate court decrees. In Schill, the court discounted the Board’s objection that witnesses will be intimidated if discovery is permitted before trial, since the identities of the witnesses are revealed in any event when they testify.116 The Schill rationale may conceivably be extended to compel discovery in unfair labor practice proceedings as well.

The Second Circuit has repeatedly refused to accept the Fifth Circuit’s view that the Board should allow discovery if “good cause” is shown.117 It has accorded Board denials of discovery a “heavy presumption of validity,”118 for several reasons. First, it argues that prehearing discovery is neither constitutionally nor statutorily required, leaving the adoption of discovery procedures to the Board’s discretion.119 Unlike the Fifth Circuit, the Second Circuit does not interpret the NLRA’s requirement that hearings be conducted in accordance with the rules of evidence to impose upon the Board “any particular pre-trial procedures—such as discovery—which do not by any standard constitute rules of evidence.”120 It also reasons that the Board’s rule permitting the taking of depositions “for good cause shown” is only for the purpose of obtaining evidence from witnesses who will be unavailable at the hearing.121 Furthermore, the Second Circuit supports the Board’s policy of insulating its

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111. 29 C.F.R. § 102.30 (1977); discussed at note 11 supra and accompanying text.
112. NLRB v. Miami Coca-Cola Bottling Co., 403 F.2d 994, 996 (5th Cir. 1968).
113. NLRB v. Rex Disposables, Div. of DHJ Indus., Inc., 494 F.2d 588, 592 (5th Cir. 1974); Morgan Precision Parts v. NLRB, 444 F.2d 1210, 1214 (5th Cir. 1971); NLRB v. Safway Steel Scaffolds Co., 383 F.2d 273, 277 (5th Cir. 1967), cert. denied, 390 U.S. 955 (1968); see Discovery, supra note 105, at 540.
114. See NLRB v. W.R. Bean & Son, Inc., 450 F.2d 93, 96 (5th Cir. 1971), cert. denied, 409 U.S. 849 (1972); Morgan Precision Parts v. NLRB, 444 F.2d 1210, 1214 (5th Cir. 1971).
115. 408 F.2d 803, 806 (5th Cir. 1969). The Fifth Circuit’s willingness to permit discovery in Schill may in part be explained by the seriousness of a civil contempt citation and the courts’ consequent reluctance to find a respondent in contempt. See Bartosic & Lanoff, Escalating the Struggle Against Taft-Hartley Contemnors, 39 U. Chi. L. Rev. 255, 276-81 (1972).
116. 408 F.2d at 807.
118. Discovery, supra note 105, at 541.
120. Id. at 859.
121. Id. at 857-59.
proceedings from discovery in order to avoid "such intimidation and harassment as would otherwise be possible because of the leverage inherent in the employer-employee relationship." It argues that the Board's rule permitting cross-examination adequately protects private litigants' interests in acquiring information relevant to their cases.

It is difficult to ascribe to either circuit the more meritorious view, since both appear guilty of some degree of statutory misinterpretation. The Fifth Circuit seems to err in asserting that section 10(b) of the NLRA warrants application of the Federal Rules of Civil Procedure, and that the Board's rule permitting depositions for "good cause" encompasses litigants' discovery as well as evidentiary needs. Congress' failure to mention the rules of procedure in discussing the enactment of section 10(b) supports the Second Circuit's contrary view that the provision is simply a rule of evidence. The Board's consistent refusal to grant depositions or interrogatories except when witnesses will be unavailable to testify thus seems at least technically justified.

Despite these inaccuracies, however, the Fifth Circuit's approach is preferable to the Second Circuit's persistent support of the Board's refusal to adopt any form of discovery. The Fifth Circuit correctly recognizes that the NLRA and the Board's rules do not prohibit the Board from allowing discovery; thus, the Board should permit discovery when the requesting party has demonstrated sufficient need. The Second Circuit's reliance on cross-examination as a

123. NLRB v. Interboro Contractors, Inc., 432 F.2d 854, 859-60 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971); see note 11 supra and accompanying text.
127. A recent task force on Board procedures found that "discovery is undoubtedly one of the most significant, controversial issues" requiring the Board's attention. Task Force, supra note 95, at 348. The task force observed that discovery would tend to quicken unfair labor practice proceedings by clarifying issues, eliminating peripheral concerns, and improving settlement practices. The task force also considered the arguments against discovery, which included fear of reprisals against employee witnesses, time-consumption, expensive administration, and the assertion that discovery is unnecessary because of the availability of bills of particulars. After weighing the opposing views, the task force agreed that "the most helpful tools in preparing for the types of issues which arise in NLRB cases would be a list of potential witnesses and an indication of their testimony." Id. at 350. However, because its members were unable to reach a consensus on the validity of witness intimidation as a reason to deny discovery, it did not suggest that the Board should begin to reveal the names and statements of potential witnesses. Its recommendations were limited to the following: complaints should be more specific; the names of outside experts should be disclosed prior to the hearing; documentary evidence should be exchanged prior to a pretrial
device to insure fairness to the charged party\textsuperscript{128} confuses effective rebuttal of evidence introduced at the hearing with adequate preparation of defenses to the underlying charges. Since the Fifth Circuit has not yet found that deprivation of the needs of litigants to prepare for hearings has constituted an abuse of discretion sufficient to compel discovery, the distinction between the circuits may appear somewhat academic. Nevertheless, the Fifth Circuit's unwillingness to accept Board rulings denying discovery, which do not consider the competing interests at stake, represents the more favorable judicial attitude.

In recognition of the fairness underlying the Fifth Circuit's balancing approach, commentators have suggested the adoption of liberalized discovery procedures by the Board.\textsuperscript{129} They stress the benefits of discovery,\textsuperscript{130} and argue that its abuses can be prevented by use of evidentiary and executive privileges,\textsuperscript{131} and by rigorous enforcement of section 8(a)(4) of the NLRA, which protects persons who have testified before the Board.\textsuperscript{132} Although the Supreme Court in Robbins did not find section 8(a)(4) effective enough to prevent potential interference with the Board's enforcement proceedings in the context of the FOIA,\textsuperscript{133} it did allude to the possible unfairness inherent in the Board's general discovery rules. Thus, Robbins' restrictive rationale should not be

\begin{quote}
conference, but without identification of employees; issues and positions of the parties should be clarified at a pretrial conference on the day of the hearing; all information compiled by the General Counsel in backpay proceedings should be disclosed; and a settlement conference should be held within the hour immediately preceding the hearing. \textit{Id.} at 352.

Recent comments by the Board's General Counsel suggest that adoption of these proposals is unlikely. The General Counsel listed four "essential prerequisites" to establishment of prehearing discovery in Board proceedings. First, disclosure must expedite rather than delay the Board's processes; second, disclosure must result in the settlement of more cases prior to litigation; third, methods must be devised to protect witnesses from intimidation and to insure the steady flow of information to Board investigators; fourth, pretrial discovery must provide the Board with "reciprocal access to information." \textit{NLRB General Counsel on Pre-Trial Discovery, [1976] Lab. Rel. Y.B. 165 (1977).}
\end{quote}

\textsuperscript{128} \textit{See} notes 20, 124 \textit{supra} and accompanying text.

\textsuperscript{129} \textit{See} Davis, \textit{Revising the Administrative Procedure Act}, 29 Ad. L. Rev. 35 (1977). In a letter to the Senate Subcommittee on Administrative Practice and Procedure, Professor Davis stated: "A rather clear inadequacy of the APA is its failure to provide for discovery. All lawyers know that the discovery practice in federal district courts has been entirely successful, but the APA contains no counterpart of Rule 34 of the Rules of Civil Procedure." \textit{Id.} at 44; accord, Garvey, \textit{supra} note 8, at 717-20; Manoli & Joseph, \textit{supra} note 8, at 10-16; Tomlinson, \textit{Discovery in Agency Adjudication}, 1971 Duke L.J. 89.

\textsuperscript{130} \textit{See} note 103 \textit{supra} and accompanying text. Justice Traynor has also noted that "[t]he Legislature's silence with respect to prehearing discovery in administrative proceedings does not mean . . . that it has rejected such discovery. . . . We are committed to the wisdom of discovery, by statute in civil cases . . . , and by common law in criminal cases." Shively v. Stewart, 65 Cal. 2d 475, 479, 421 P.2d 65, 67-68, 55 Cal. Rptr. 217, 219-20 (1966) (citation omitted).

\textsuperscript{131} For a discussion of the privileges asserted by the Board, see J. H. Rutter Rex Mfg. Co. v. \textit{NLRB}, 473 F.2d 223, 230 (5th Cir.), \textit{cert. denied}, 414 U.S. 822 (1973); \textit{NLRB v. Capitol Fish Co.}, 294 F.2d 868, 874 (5th Cir. 1961); Manoli & Joseph, \textit{supra} note 8, at 17.

\textsuperscript{132} 29 U.S.C. § 158(a)(4) (1976). One commentator suggested the use of a "rebuttable presumption" that any detrimental change in the terms, conditions, or status of employment of a named employee-witness subsequent to discovery was in retaliation for participation in the Board proceeding. Unless the employer came forward with a business justification for his action, the Board would find a violation of § 8(a)(4). Garvey, \textit{supra} note 8, at 719.

\textsuperscript{133} 98 S. Ct. at 2325-26; \textit{see} note 100 \textit{supra} and accompanying text.
used to deny other forms of discovery to Board litigants. Instead, the courts should adopt the Fifth Circuit’s balancing approach to permit discovery when it would be practical and equitable.

III AQUIRING INFORMATION DIRECTLY FROM POTENTIAL BOARD WITNESSES

In response to the Board’s discovery rules restricting access to information in the Board’s possession, litigants have sought the voluntary cooperation of potential witnesses to acquire relevant information. Examination of the flexible rules adopted by the courts in this area reveals that a balancing of interests approach is in fact a workable and acceptable way of resolving discovery issues, and further demonstrates the inadvisability of extending the Robbins rationale to close other routes to disclosure.

Employers customarily use two methods to elicit information directly from employees: interviewing employees, and requesting them to release copies of their prehearing statements made to the Board. In considering the propriety of these alternative discovery devices, the courts examine the factual context in which such activity arises to determine whether the possible infringement of employee rights is outweighed by the needs of employers to respond to unfair labor practice complaints. Both the Board and the courts recognize the right of an employer to interview employees for the purpose of investigating allegations of an unfair labor practice complaint when the questioning is necessary to prepare the employer’s defense. In Johnnie’s Poultry Co., the Board established specific safeguards to minimize the possible coercive impact of such interviews. These standards require the employer or his counsel to communicate to the employee the purpose of the questioning, to assure him that no reprisal will take place, to obtain his participation on a voluntary basis, and to conduct questioning in a context free from employer hostility to union organization. The questioning itself must not be coercive in nature; questions must not exceed the necessities of case preparation by prying into other union matters or eliciting information concerning an employee’s subjective state of mind, nor may they otherwise interfere with the statutory rights of employees.


136. See, e.g., National Rv. Monroe Tube Co., 545 F.2d 1320 (2d Cir. 1976); NLRB v. Tamper, Inc., 522 F.2d 781 (4th Cir. 1975); Retired Persons Pharmacy v. NLRB, 519 F.2d 486 (2d Cir. 1975).


138. 146 N.L.R.B. 770 (1964), rev’d on other grounds, 344 F.2d 617 (8th Cir. 1965).

139. Id. at 775.

140. Id. These requirements also apply to employer questioning of employees in preparation of
Although no "magic words" need be used to comport with these standards, questioning exceeds the permissible range if an employer or his attorney asks an employee to drop his case, fails to tell employees that they are free not to answer questions, or asks employees what they think will happen "if the union doesn't get in." Failure to achieve reasonable compliance with the Johnnie's Poultry standards subjects the employer to the penalties of section 8(a)(1) of the NLRA, which makes it an unfair labor practice to interfere with employees' protected rights. Thus, although the Board gives an employer some latitude in preparing his defense, questions must be confined to the perimeters designed by the Board to avoid still another unfair labor practice charge.

The courts have applied a totality of circumstances test in reviewing the propriety of employer questioning. Relevant factors include the history of employer hostility to employees and unionism, the nature of the information sought, the identity of the questioner, the place and method of interrogation, and the truthfulness of replies. If the employer has a legitimate interest in soliciting information under the circumstances, and the questioning does not have a reasonable tendency to intimidate interviewees, the courts generally will not find that an employer has committed an unfair labor practice by conducting the interviews. In sum, by weighing an employer's needs for information against an employee's right to make uninhibited use of the NLRA's protections, the Board and the courts have achieved an adequate accommodation of competing interests.

The Board, however, has not extended that rationale to the second method of acquiring information from employees. It has refused to permit employers to ask employees for copies of statements given to the Board during investigation objections to an election. Paymaster Oil Mill Co., 181 N.L.R.B. 396 (1970), enforced, 447 F.2d 147 (5th Cir. 1971). See also NLRB v. Lorben Corp., 345 F.2d 346 (2d Cir. 1965) (interrogations during union organization campaigns).

147. An employer who decides to question his employees has made a perilous choice. The risk of incurring an unfair labor practice violation while attempting to defend another one suggests the inadequacy of this method as an alternative to discovery procedures. See NLRB v. Hardeman Garment Corp., 557 F.2d 559, 563 n.9 (6th Cir. 1977).
149. Retired Persons Pharmacy v. NLRB, 519 F.2d 486, 492 & n.5 (2d Cir. 1975); Bourne v. NLRB, 332 F.2d 47, 48 (2d Cir. 1964).
of an unfair labor practice charge.\textsuperscript{151} The Board contends that a prehearing statement of an employee may contain information not relevant to the charge brought against the employer.\textsuperscript{152} Furthermore, if these statements can be made available to an employer simply at his request, the Board's ability to investigate unfair labor practices would be seriously hampered because of the inhibitory effect on employees' willingness to talk.\textsuperscript{153}

The unfairness of the Board's per se rule is demonstrated by its decision in \textit{Bayliner Marine Corp.}\textsuperscript{154} The employer had discharged certain employees, allegedly because of dereliction in their work duties. The discharges, however, occurred several days after the employees had attended a union meeting. The Board charged that the employer discriminated against employees for their involvement in union activities. In his defense, the employer contended that he had no knowledge of union activity beyond the rumors that had been circulating in the plant for many years.\textsuperscript{155} The Board found that the employer violated section 8(a)(1) of the NLRA when the employer's attorney attempted to secure the statements of employees who had told Board agents that all of the discussions concerning union activity were "secret," and that no members of management could have any knowledge of union activity.\textsuperscript{156}

In his dissent, Member Kennedy criticized the Board's per se rule.\textsuperscript{157} He noted the unfairness of the Board in ignoring the needs of employers to prepare their defenses thoroughly and stated: "If this Board is determined to deprive counsel [of] a reasonable opportunity to prepare their defense to unfair labor practice complaints . . . then we must be prepared to accept discovery procedures . . . . Board proceedings are not so unique that respondent's counsel must be prepared to defend their cases in the dark."\textsuperscript{158}

The courts also criticize the Board's per se rule, and permit employers more flexibility in using this method to secure information relevant to their defense.\textsuperscript{159} Again adopting a case-by-case approach to balance the competing interests, the courts uniformly hold that the mere request for a prehearing statement does not constitute an unfair labor practice.\textsuperscript{160} This approach does

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\item \textsuperscript{152} \textit{See} NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 480 (2d Cir. 1976); Robertshaw Controls Co., Lux Time Div. v. NLRB, 483 F.2d 762, 769 (4th Cir. 1973).
\item \textsuperscript{153} \textit{See} Johnnie's Poultry Co., 146 N.L.R.B. 770, 775 (1964), \textit{rev'd on other grounds}, 344 F.2d 617 (8th Cir. 1965).
\item \textsuperscript{154} 215 N.L.R.B. 12 (1974).
\item \textsuperscript{155} \textit{Id.} at 12.
\item \textsuperscript{156} \textit{Id.} at 13.
\item \textsuperscript{157} \textit{Id.} at 13-14 (Member Kennedy, dissenting).
\item \textsuperscript{158} \textit{Id.} at 14 (Member Kennedy, dissenting).
\item \textsuperscript{159} \textit{See} NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 479 (2d Cir. 1976); Suprenant Mfg. Co. v. NLRB, 341 F.2d 756, 762-63 (6th Cir. 1965); W.T. Grant Co. v. NLRB, 337 F.2d 447, 448-49 (7th Cir. 1964).
\item \textsuperscript{160} \textit{See}, \textit{e.g.}, NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 479 (2d Cir. 1976); Suprenant
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not hamper the Board's efforts in policing overly aggressive employers, yet sanctions reasonable attempts to acquire pertinent information.

The courts have found that employer's conduct has interfered with employee rights when an employer's requests caused the employees to become apprehensive,\(^1\) when the employer's attorney told an employee that delivery would put a "feather in his cap,"\(^2\) and when the employer sought to elicit all information given to Board agents.\(^3\) However, when there is no evidence to suggest that the employer's requests had an inhibitory effect upon an employee's exercise of his right to an effective investigation by the Board, the courts have overturned Board decisions prohibiting the request.\(^4\) For example, when employees were asked "if they would mind" supplying copies of their statements and the employees willingly complied with the request, it was held that the employer did not coerce its employees and was entitled to such information to prepare its defense.\(^5\) In another case, a company attorney sought to obtain employee witness statements favorable to the employer, and explained to employees that they would neither be punished for refusal nor rewarded for compliance with the request.\(^6\) Although the Board held that this conduct violated the NLRA, the court found that the employees had voluntarily complied and were "willing and anxious to aid" their employer.\(^7\) These cases demonstrate that when an employee is given clear assurances that no retaliation will follow, and the employer is properly engaged in pretrial preparation of a defense, there is little justification for holding the employer guilty of an unfair labor practice merely because it attempted to secure a copy of the employee's statement to the Board.\(^8\)

In summary, the courts' policy of allowing employers in certain circumstances to secure the cooperation of employees to obtain prehearing information casts further doubt on the validity of the Board's restrictive approach to discovery of information in the possession of either the Board or potential witnesses. As the above discussion has indicated, courts can distinguish between those situations in which witness intimidation is a probable consequence of disclosure, and those instances where such claims are unrealistic. The Board's interest in protecting employees' rights has thus not been sacrificed in the process. Accordingly, to extend Robbins' conclusive presumption that coercion inevitably follows disclosure beyond the scope of FOIA proceedings

\(^{161}\) Henry I. Siegel Co. v. NLRB, 328 F.2d 25, 27 (2d Cir. 1964).
\(^{162}\) NLRB v. Ambox, Inc., 357 F.2d 138, 141 (5th Cir. 1966).
\(^{163}\) Texas Indus., Inc. v. NLRB, 336 F.2d 128, 133-34 (5th Cir. 1964).
\(^{164}\) NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 481 (2d Cir. 1976); Robertshaw Controls Co., Lux Time Div. v. NLRB, 483 F.2d 762, 767 (4th Cir. 1973).
\(^{165}\) NLRB v. Martin A. Gleason, Inc., 534 F.2d 466, 481 (2d Cir. 1976).
\(^{167}\) Id. at 770.
\(^{168}\) In NLRB v. Martin A. Gleason, Inc., 534 F.2d 466 (2d Cir. 1976), the court acknowledged its previous holdings that parties to Board proceedings "are not entitled to the full panoply of discovery procedures provided by the Federal Rules of Civil Procedure as a matter of statutory or constitutional right," but found that "[i]t is not a violation of § 8(a)(1) to request such limited discovery and disclosure . . . ." Id. at 481.
can only exacerbate the inequities which a case-by-case determination is equipped to remove.

CONCLUSION

The Robbins Court's declaration that disclosure of all witness statements necessarily interferes with Board proceedings must of course be read in light of the specific provisions of the FOIA. Its broad presumption, however, that witness intimidation is the inevitable result of disclosure may arguably be extended to foreclose access to information that is now available to Board litigants. On the contrary, especially after Robbins, courts should scrutinize the Board's restrictive discovery decisions more closely in order to protect the interests of charged parties in securing relevant information. In addition, courts should take a more aggressive stance in reviewing Board decisions that stringently limit the right of private litigants to seek the cooperation of employees in preparing their defenses. The inequities of a per se refusal to grant access to information are particularly apparent when a charged party has little history of hostility to unionism, when a strong union diminishes the likelihood of employer reprisals, and when witnesses are neither employees nor susceptible to physical or economic coercion. Obviously, the possibility of intimidation should not be disregarded even in these instances. Yet examination of the peculiar circumstances surrounding each Board refusal to disclose should protect the Board's investigatory and prosecutorial processes, without simultaneously depriving litigants of opportunities to respond adequately to Board charges. A more restrictive approach sacrifices fairness in the adjudicatory process.

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