

Upon cross-examination, it was obvious that the witness lacked expertise in the demolition and wrecking business and that his estimate was no more than a lay opinion based on casual observation. In these circumstances, the Trial Examiner refused to give any weight to this witnesses' estimate. In the absence of other evidence, the Trial Examiner assumed that the work was evenly distributed over the period of completion. Thus, he found that there were 24 working days between May 19 and June 19, 1959, and that 9 of those days, or three-eighths of the total, fell within the jurisdictional year. Accordingly, he allocated three-eighths of the contract price or \$2,400 to the jurisdictional year. With this method of allocation, the Trial Examiner found that the Employer-Respondent did a total of \$49,677.50 business with interstate companies, a sum insufficient to meet the Board's jurisdictional standards.⁴ He therefore granted the motion to dismiss the complaint.

In the absence of affirmative substantial evidence showing rate of completion of the work, the method of allocation used by the Trial Examiner was reasonable. Indeed, it was the only practicable method that could be used in the circumstances. Accordingly, we affirm the ruling of the Trial Examiner and shall dismiss the complaint.

[The Board dismissed the complaint.]

⁴ *Siemons Mailing Service*, 122 NLRB 81

Tidelands Marine Service, Inc. and Seafarers' International Union of North America, Atlantic and Gulf Districts, AFL-CIO. *Cases Nos 15-CA-922, 15-CA-951, and 15-CA-962 January 20, 1960*

ORDER REOPENING RECORD AND REMANDING PROCEEDING

The original hearing herein was held between April 15 and June 26, 1958, before Trial Examiner A Norman Somers. As the rule of the *A & P* case¹ was then in effect, Respondent's demands for the production of the pretrial statements of certain General Counsel witnesses were denied by the Trial Examiner in reliance on that rule. On August 28, 1958, the Board in *Ra-Rich Manufacturing Corporation*² overruled the *A & P* case, holding that the rule of the *Jencks*³ case applies to Board proceedings and affords parties thereto, upon proper demand, the right to production for purposes of cross-examination.

¹ 118 NLRB 1280

² 121 NLRB 700

³ *Jencks v United States*, 353 U S 657

of pretrial statements made by witnesses who have already testified in such proceedings. At the time of issuance of the *Ra-Rich* decision, the instant proceeding was still pending before the Trial Examiner. On September 3, 1958, he wrote to the parties, directing their attention to the *Ra-Rich* rule; advising the General Counsel to make available to the Respondent all the pretrial statements requested at the hearing; and asking the Respondent to notify him which witnesses it wanted recalled for further hearing. The General Counsel thereupon showed the pretrial statements of all witnesses, whether or not their pretrial statements had been requested, to the Respondent, and the Respondent moved to reopen the hearing for the purpose of cross-examining 14 witnesses.⁴ The Respondent did not request the appearance of witness Raynor, who had died, or Montgomery, both of whom had testified at the original hearing on behalf of the General Counsel.

By order, dated October 10, 1958, the Trial Examiner reopened the hearing for further cross-examination of 10 of the requested 14 witnesses. He did not order Wagner, Kennedy, Lee, or Murry to appear as the Respondent had not requested the pretrial statements of Wagner, Kennedy, or Lee at the original hearing, and the substance of Murry's pretrial statement had been stipulated at the original hearing and made available for cross-examination.

The reopened hearing was held on November 18-20, 1958. Only 5 of the 10 witnesses named in the Trial Examiner's order of October 10 appeared.⁵ Of the five who did not appear, the General Counsel was unable to serve four⁶ with subpoenas and one⁷ did not appear notwithstanding the service of a subpoena. As to the five witnesses who were subpoenaed but did not appear at the reopened hearing, and as to Raynor, the Trial Examiner stated in his Intermediate Report filed herein that he compared their pretrial statements with their testimony at the original hearing, and, finding no substantial variance, did not strike their testimony but relied thereon in making his findings on the merits. With respect to the five witnesses who appeared at the reopened hearing, the Trial Examiner implied at the hearing that cross-examination should be limited to questions seeking explanation of inconsistencies between the testimony of each witness and his pretrial statement. The Respondent excepted to the failure of the Trial Examiner to strike all evidence adduced by the General Counsel at the original hearing of witnesses not appearing at the reopened hearing, including Raynor, contending that such evidence was incompetent as the Respondent had not been afforded an oppor-

⁴ Jackson, Reams, Demarco, Dunn, Felker, Gaspard, Kennedy, Murry, Wagner, Farrar, Gautreau, Jacobus, Lee, and Stewart.

⁵ Reams, Dunn, Gautreau, Felker, and Farrar.

⁶ Stewart, Jacobus, Demarco, and Gaspard.

⁷ Jackson.

tunity to cross-examine the witnesses with the aid of their pretrial statements. As to the witnesses appearing at the reopened hearing, the Respondent also excepted to the Trial Examiner's failure to strike their testimony on the ground that its cross-examination of such witnesses had been unduly limited by the Trial Examiner.

In dealing with the testimony of both those witnesses who appeared and those who failed to appear, the Trial Examiner's basic assumption seems to have been that the essential purpose of the *Ra-Rich* rule is merely to bring to light at the hearing any discrepancy between a witness's direct testimony and his pretrial statement, and absent any such discrepancy the failure to cross examine the witness in the light of his pretrial statement is not prejudicial. This view seems to be shared by our dissenting colleague in urging that we accept the Trial Examiner's judgment that the purpose of the cross-examination of the absent witnesses had been "substantially accomplished" because he found no discrepancy between their pretrial statement and their direct testimony. Even if we accept the "substantially accomplished" test proposed in the dissent, we would not agree that that test has been met here. As we read the *Jencks* case, *supra*, upon which we bottomed our *Ra-Rich* rule, the Supreme Court there rejected basically the same position as that taken by the Trial Examiner and our dissenting colleague. In that case the prosecution contended that disclosure of pretrial statements made by Government witnesses should be limited to those parts thereof which were inconsistent with the witnesses' direct testimony. The court rejected this contention, saying:

Every experienced trial judge and trial lawyer knows the value for impeaching purpose of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in the emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony. . . . A requirement of a showing of conflict would be clearly incompatible with our standards for the administration of criminal justice in the Federal Courts and must be rejected. (Pp. 667-668.)

We believe that the foregoing statement of the Supreme Court requires us to find that the purpose of cross-examination on the basis of pretrial statements is not substantially accomplished by limiting such cross-examination to points where there is a square conflict between such statements and the witnesses' direct testimony or, in the

case of unavailable witnesses, by demonstrating, through a comparison of their direct testimony and their pretrial statements, that there is no flat contradiction between the two.⁸

The Board, having considered the matter, has decided (1) to reopen the record and remand the proceeding to permit the Respondent to cross-examine, in the light of their pretrial statements, and without the limitation implied by the Trial Examiner at the reopened hearing, all the General Counsel's witnesses, except Raynor, Montgomery, and Murry,⁹ and (2) to strike the testimony of Raynor and of any witness who fails to appear for cross-examination at the hearing directed below. Montgomery is not included herein because no request for his pretrial statement or for cross-examination of this witness in the light of his pretrial statement was made at any time prior to the transfer of this proceeding to the Board. Murry is not included because, as found by the Trial Examiner, he was cross-examined at the original hearing with respect to the substance of his pretrial statement.

ORDER

IT IS HEREBY ORDERED that this proceeding be, and it hereby is, reopened and that a further hearing be held before Trial Examiner A. Norman Somers to permit the Respondent to cross-examine, in the light of their pretrial statements, and without the limitation heretofore imposed by the Trial Examiner on such cross-examination, the following witnesses: Jackson, Reams, Demarco, Dunn, Felker, Gaspard, Kennedy, Wagner, Farrar, Gautreau, Jacobus, Lee, and Stewart; and that the entire testimony of Raynor and of any of the witnesses named above that does not appear for cross-examination at such hearing be stricken.

⁸ Cf. *Reilly v. Pinkus*, 338 U.S. 269, 275-276. The fact, cited in the dissent, that the unavailable witnesses had already been subjected at the first hearing to searching cross-examination on matters *apart from their pretrial statements* is, in our opinion, entitled to little weight in determining whether the cross-examination required by the Jencks rule had been substantially accomplished.

It is true, as noted in the dissent, that the Trial Examiner's statement to the Respondent's counsel about limiting his cross-examination at the reopened hearing to points of conflict between direct testimony and pretrial statements appears in the context of an attempt by such counsel to go over ground already covered in prior cross-examination. However, there is nothing in the statement itself to suggest, as the dissent seems to imply, that it was aimed only at repetitious cross-examination and did not purport to restrict cross-examination relating to the subject matter of the pretrial statements. That it was construed by Respondent's counsel as restricting such cross-examination is indicated by the subsequent colloquy between him and the Trial Examiner. Under these circumstances, we believe that, whatever the intent of the Trial Examiner, we should, out of an abundance of caution, lest we abridge fair hearing requirements, afford Respondent further opportunity to cross-examine, free from any real or apparent limitations upon the proper scope of such examination.

⁹ Members Jenkins and Fanning concur as to the inclusion of Wagner, Lee, and Kennedy in the remand, but only because the General Counsel, apparently misconstruing the Trial Examiner's instruction of September 3, 1938, furnished the Respondent with their pretrial statements

IT IS FURTHER ORDERED that this proceeding be, and it hereby is, remanded to the Regional Director for the Fifteenth Region for the purposes of arranging such further hearing, and that the said Regional Director be, and he hereby is, authorized to issue notice thereof.

IT IS FURTHER ORDERED that, upon conclusion of the further hearing, unless the parties waive their rights thereto, the Trial Examiner shall prepare and serve upon the parties a Supplemental Intermediate Report containing findings of fact upon the evidence received pursuant to the provisions of this Order, and such further conclusions of law and recommendations concerning the instant proceeding as he may deem appropriate, and that, following the service of such Supplemental Intermediate Report upon the parties, the provisions of Section 102.46 of the Board's Rules and Regulations shall be applicable.

MEMBER BEAN, concurring in part and dissenting in part:

The incidents which were the basis of the unfair labor practice charges in this case occurred almost 4 years ago. There have been two hearings held, the second of which was occasioned by the issuance of the Board's *Ra-Rich* decision.¹⁰ Both hearings were presided over by a well-qualified Trial Examiner. At the first hearing, the General Counsel's witnesses were exhaustively cross-examined by the Respondent. In the light of his entire experience with the case, the Trial Examiner made certain rulings at the reopened hearing which the majority now finds were erroneous and requires a remand for a third hearing. I think that these rulings on the whole were eminently fair and reasonable and I would adopt them. In view of the time lapse, I cannot see that the abundance of caution professed by the majority justifies, or that any purpose will be served by a reopened hearing, except further to defer the rendering of a definitive decision, already far too long delayed, and to disqualify some witnesses on dubious common law principles of evidence. My reasons for disagreeing with the majority are given in detail below. Since I see no reason for a remand I would proceed immediately to dispose of the case on the merits.

One of the witnesses, Benny Raynor, was killed on duty shortly after he testified at the original hearing. The General Counsel was unable to locate and serve subpoenas on Stewart, Jacobus, Demarco, or Gaspard. The majority has directed that the testimony of Raynor and of any other witness who does not appear for further cross-examination shall be stricken. Apparently, this ruling is based on a belief that it is required by law. I do not think it is.

Wigmore says of the general problem of what to do with a witness' testimony on direct examination where supervening death or illness prevents cross-examination:¹¹

¹⁰ *Ra-Rich Manufacturing Corporation*, 121 NLRB 700.

¹¹ 5 Wigmore, Evidence § 1390 (3d ed., 1940).

But where the death or illness prevents cross-examination under such circumstances that *no responsibility* of any sort can be attributed to either the witness or his party, it seems harsh measure to strike out all that has been obtained on the direct examination. Principle requires in strictness nothing less. But the true solution would be to avoid any inflexible rule, and to leave it to the trial judge to admit the direct examination so far as the loss of cross-examination can be shown to him to be not in that instance a material loss. Courts differ in their treatment of this difficult situation; except that, by general concession, a cross-examination begun but unfinished suffices if its purposes have been substantially accomplished.

Federal courts have followed the better rule enunciated by Professor Wigmore.¹² I think that we should also. Raynor, as the Trial Examiner found, was "searchingly and fully" cross-examined at the original hearing. The Trial Examiner asked the Respondent to point out any inconsistencies between Raynor's testimony and the statements contained in his signed statement. The Respondent was unable to do so. As the presiding officer at both hearings, the Trial Examiner was in a peculiarly favorable position to determine whether the inability to question Raynor about his statements had deprived the Respondent of any substantial right. He concluded "after full and careful consideration . . . that Respondent's right of cross-examination was fully and fairly exercised" as to Raynor as well as to other witnesses. I would accept his judgment.

The considerations applicable to Raynor, the Trial Examiner found, were equally applicable to Stewart, Jacobus, Demarco, and Gaspard. There is no evidence that these four witnesses had deliberately made themselves unavailable. The Trial Examiner found as to them that they had been exhaustively cross-examined at the original hearing, that there was no material variance between their testimony and their affidavits, and that their testimony should therefore remain in the record. I would again accept his decision.

With respect to Jackson who was served with a subpoena but failed to appear at the reopened hearing and failed to give any adequate explanation for such failure to appear, I would strike his testimony.

Reams,¹³ Dunn, Gautreau, Felker, and Farrar appeared at the reopened hearing and were questioned by Respondent. All these witnesses had appeared at the original hearing and had been exten-

¹² *Jaiser v. Milligan, et al.*, 120 Fed. Supp 599, 604 (D.C., D. Nebr.) ("A cross-examination begun, but unfinished through no fault of the witness or her attorney, suffices if, as is the case here, its purposes have been substantially accomplished"); cf. *United States of America v. Martin Malinsky, et al.*, 153 Fed. Supp. 321 (D.C., S.D.N.Y.).

¹³ The Trial Examiner did not regard either Jackson or Reams as reliable witnesses. He attached no weight to any controverted testimony of either witness unless it had the "strongest corroboration."

sively cross-examined. When the Respondent asked questions which had already been covered in the original cross-examination, the General Counsel objected and the Trial Examiner upheld the objection on the ground that the matter was repetitious. When the Respondent suggested that it would be very difficult to cross-examine without infringing upon the original examination, the Trial Examiner replied:

The manner in which that is done for the purposes of further cross examination, as distinguished from original cross examination, is to call the witness' attention to what he testified to, call his attention to anything in the statement bearing upon that, and if there is any inconsistency, ask him to reconcile it.

The Trial Examiner obviously felt the written statements did not require another freewheeling cross-examination to cover ground already fully covered in searching cross-examination. It seems to me that this is a matter of judgment peculiarly within the competence of the trier of the facts; it is within the Trial Examiner's allowable area of discretion. Unless the Board is clearly convinced that the Trial Examiner abused his discretion, it should not upset his ruling. I do not believe that it is true in this case. Accordingly, I would affirm him.¹⁴

The Trial Examiner did not require Wagner, Lee, and Kennedy to appear at the reopened hearing because the Respondent had not requested production of their pretrial statements at the original hearing. This is in accord with the Board's Rules and with its rulings based thereon.¹⁵ The Board has heretofore regarded as immaterial any argument that the failure to request production of pretrial statements of witnesses was attributable to the belief that such request would be futile. I cannot see that the Respondent's failure to make a timely request was excused by the General Counsel's subsequent error in showing the statements of these individuals to the Respondent. Certainly this error, which occurred after the event, was not the cause of the Respondent's omission. Since the General Counsel's error did not prejudice the Respondent, there is no reason for not adhering to the rule that a request for a pretrial statement of a witness must be requested immediately after the witness has testified or the right thereto is forfeited. The Trial Examiner's ruling was in accord with the Board's regulations. I would affirm him.

¹⁴ In the *Jencks* case, the Supreme Court decided only that a respondent was entitled to inspect pretrial statements of Government witnesses to decide whether to use them in his defense. (353 U.S. at p. 668) The Court did not decide that the ordinary discretion of a trial judge in limiting cross-examination is inoperative. (See *id.* at p. 669.)

¹⁵ Section 102.118 of the Board's Rules and Regulations provides:

After a witness called by the general counsel has testified in a hearing upon a complaint under Section 10(c) of the Act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner.

The majority has affirmed the Trial Examiner's ruling not requiring Murry and Montgomery to appear at the reopened hearing. I agree with this affirmation of the Trial Examiner.

MEMBER RODGERS took no part in the consideration of the above Order Reopening Record and Remanding Proceeding.

Raymond Construction Company of Puerto Rico¹ and Teamsters, Chauffeurs, Warehousemen and Helpers, Local 901, IBTCW & H of America, Petitioner. Case No. 24-RC-1256. January 20, 1960

DECISION AND DIRECTION OF ELECTION

Upon a petition duly filed under Section 9(c) of the National Labor Relations Act, a hearing was held before Henry R. Martin, hearing officer. The hearing officer's rulings made at the hearing are free from prejudicial error and are hereby affirmed.

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its powers in connection with this case to a three-member panel [Chairman Leedom and Members Rodgers and Fanning].

Upon the entire record in this case, the Board finds:

1. The Employer is engaged in commerce within the meaning of the Act.
2. The labor organizations involved claim to represent certain employees of the Employer.²
3. A question affecting commerce exists concerning the representation of employees of the Employer within the meaning of Section 9(c)(1) and Section 2(6) and (7) of the Act.

The Employer, having operations throughout the Island of Puerto Rico, is engaged in all phases of heavy construction, including port development work, powerplants, highway systems, and foundation construction. During the past 2 years, the Employer has commenced 52 projects in Puerto Rico. At the time of the hearing, it had four projects in operation, including the Palo Seco project here involved at which it is building the foundation and substructure of a powerplant.

The Petitioner seeks to represent a unit of construction and maintenance employees at the Palo Seco project alone. Since at least 1956, the Intervenor and the Employer have bargained for all employees of

¹ The name of the Employer appears as corrected at the hearing

² At the hearing, Union Insular de Trabajadores de la Construcion, FLT, herein called the Intervenor, intervened on the basis of a contract interest.