

Wal-Mart Stores, Inc. and United Food and Commercial Workers International Union, AFL-CIO, CLC. Cases 28-CA-16831, 28-CA-16886, 28-CA-16887, 28-CA-16932, 28-CA-17001, 28-CA-17012, 28-CA-17056, 28-CA-17157, and 28-CA-17208.

May 19, 2003

ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN
AND WALSH

The issue raised in this matter is whether the administrative law judge has discretion to allow Respondent's counsel to retain pretrial statements and materials, provided pursuant to Section 102.118(b) of the Board's Rules and Regulations, after the close of the hearing. We agree with counsel for the General Counsel that the administrative law judge has no discretion to allow Respondent's retention of these so-called *Jencks*¹ statements beyond the close of the hearing.

As the hearing was about to close, counsel for the General Counsel requested the administrative law judge (ALJ) to order Respondent's counsel to return all pretrial statements provided to him pursuant to Section 102.118(b) of the Board's Rules and Regulations. No party had attempted during the hearing to enter the affidavits into evidence or otherwise make them part of the official record. Respondent's counsel demurred at the request and claimed they were needed for use in any appeals in the case. The judge closed the hearing and suggested the parties resolve the issue among themselves. He indicated he would entertain a posthearing motion if there were no resolution. Unable to reach agreement with Respondent's counsel on the matter, counsel for the General Counsel filed a motion with the judge seeking return of the statements. Acknowledging that disclosure of the statements is for the purpose of cross-examination, the judge in his decision stated, however, that he did not "read the rule to limit respondent's use of statements to

¹ Jencks Act, 18 U.S.C. § 3500 (1957). See also *Jencks v. U.S.*, 353 U.S. 657 (1957). The Board's provision for disclosure of pretrial statements is provided in Sec. 102.118 of the Board's Rules and Regulations. Par. (b)(1) states in relevant part:

after a witness called by the General Counsel or by the charging party has testified in a hearing . . . , the administrative law judge shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the General Counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the administrative law judge shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

cross-examination."² Concluding that he had discretion to allow retention, the judge then weighed the General Counsel's concern for potential misuse if the statements are retained by counsel against Respondent counsel's need for the statement throughout the course of litigation. He found that on balance Respondent's need for continued access to preserve and prosecute its case outweighed the conjecture that the statements could be used for untoward purposes. Counsel for the General Counsel filed exceptions to the judge's decision on this issue and filed a separate motion seeking the immediate return of the statements. Respondent filed an opposition.

Section 102.118 of the Board's Rules and Regulations is a prohibition on the release of Board and General Counsel files without permission. Subsection 102.118(b)(1) is a specific exception to that prohibition. It provides for the release of a witness statement, after that witness has testified, for use in cross-examination of that witness. The rule, thus, embraces the *Jencks* requirement. After that limited purpose is served, the exception no longer applies and the prohibition of the rule is restored.

In our view, the plain meaning of Section 102.118(b) of the Board's Rules and Regulations limits the purpose of disclosure to cross-examination. No other purpose is stated, nor is there any hint that disclosure may be for other uses. Had the Board intended for additional uses, it would have stated those uses in the rule or provided for them through its decision. Further, allowing respondents to retain statements until the close of the hearing should not be construed to expand the stated purpose of disclosure. It merely facilitates the hearing in the event the affiant is recalled.

Manbeck Baking Co., 130 NLRB 1186, 1189 (1961), is not to the contrary. There the ALJ *refused* to permit the Respondent to copy the statements or to permanently retain them. The Board affirmed. Concededly, the Board said,

Where, as here, these statements are not made a part of the record, the Trial Examiner may nevertheless, in the exercise of his discretion, permit the Respondent to copy the statements where to do so would not impede the hearing process.

The quoted language does not aid the Respondent. In the first place, it refers to the "copying" part of the decision, not the "permanent retention" part. Secondly, it refers to copying during "the hearing process," not thereafter.³

² JD(SF)-74-02, p. 37.

³ The Board subsequently approved an "operating procedure" under which a copy would be furnished as a matter of courtesy to counsel. "If

Based on the foregoing, we conclude that the administrative law judge did not have the discretion to expand the stated purpose for disclosure provided in Section 102.118(b) of the rules. Further, the Respondent's reasons for retention of the statements have not persuaded us to expand the stated purpose. Therefore, counsel for the General Counsel's motion is granted. Accordingly,

he so desires, counsel may retain the copy throughout the hearing to use for any legitimate trial purpose, but on the close of the hearing he will be expected to return the copy provided, as well as any other copies made from it, to counsel for the General Counsel. *1970 Committee Reports*, Sec. of Labor Relations Law, American Bar Association, Vol. II, p. 12.

the Respondent's counsel is hereby ordered to return to counsel for the General Counsel within 14 days of service of this decision all copies of statements and attachments thereto that were provided pursuant to Section 102.118(b) of the Board's Rules and Regulations. Counsel will certify that all such copies have been returned and certify the names of those with whom he/she has shared the statements.⁴

⁴ We are confident that the Respondent will comply with this Order, even if it wishes to preserve its legal position in any argument it might make in a court that reviews the ultimate Board decision.