

Bashas', Inc. and United Food and Commercial Workers Union, Local 99 and United Food and Commercial Workers International. Cases 28–CA–21435, 28–CA–21501, 28–CA–21590, 28–CA–21592, 28–CA–21639, 28–CA–21639, 28–CA–21640, 28–CA–21646, 28–CA–21676, 28–CA–21739, 28–CA–21785, and 28–CA–21803

May 30, 2008

ORDER¹

BY CHAIRMAN SCHAUMBER AND MEMBER LIEBMAN

The General Counsel's Request for Special Permission to Appeal from Administrative Law Judge William Schmidt's ruling that the General Counsel must furnish the Respondent's counsel with the names of witnesses whom the General Counsel intends to call at the hearing is granted, and the judge's ruling is reversed.

By ordering the General Counsel to provide a list of witnesses in advance of their testimony, the judge has, in effect, established a procedure for discovery. Board proceedings do not provide for such procedures, and parties to such proceedings do not possess rights to pretrial discovery. The Board has held that:

it is well settled that parties to judicial or quasi-judicial proceedings are not entitled to discovery as a matter of a constitutional right. *Starr v. Commissioner of Internal Revenue*, 226 F.2d 721, 722 (7th Cir. 1955), cert. denied 350 U.S. 993 (1956). Furthermore, the Administrative Procedure Act does not confer a right to discovery in federal administrative proceedings. *Frilette v. Kimberlin*, 508 F.2d 205, 208 (3d Cir. en banc 1974), cert. denied 421 U.S. 980 (1975). Moreover, the National Labor Relations Act does not specifically authorize or require the Board to adopt discovery procedures. *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970), cert. denied 402 U.S. 915 (1971); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951).²

¹ Effective midnight December 28, 2007, Members Liebman, Schaumber, Kirsanow, and Walsh delegated to Members Liebman, Schaumber, and Kirsanow, as a three-member group, all of the Board's powers in anticipation of the expiration of the terms of Members Kirsanow and Walsh on December 31, 2007. Pursuant to this delegation, Chairman Schaumber and Member Liebman constitute a quorum of the three-member group. As a quorum, they have the authority to issue decisions and orders in unfair labor practice and representation cases. See Sec. 3(b) of the Act.

² *Kentucky River Medical Center*, 352 NLRB 194, 199 (2008).

In this proceeding, the General Counsel has voluntarily agreed to provide advance notice of the dates on which current employees or managers of the Respondent, who are under subpoena, will be called. Where appropriate, voluntary agreements of this character can aid in the efficient administration of the Act. However, no provision of the Act or the Board's Rules and Regulations authorizes an administrative law judge to require the General Counsel to provide a witness list.³ Rather, the Board's Rules generally prohibit the imposition of such requirements. See *Sunshine Piping, Inc.*, 351 NLRB 1372, 1402 (2007) (there was "no requirement for counsel for the General Counsel to inform Respondent of the identity of this witness or any other witness prior to the witness testifying in a Board proceeding"); and see generally Section 102.117 and 102.118 of the Board's Rules and Regulations. Nor is there any indication that the Respondent has demonstrated a need for advance notice of the General Counsel's witnesses that cannot be met by alternate measures such as granting a continuance, where appropriate, after the General Counsel's witnesses have testified. See *Medicine Bow Coal Co.*, 217 NLRB 931, 932–933 (1975). See also *Interlake, Inc.*, 218 NLRB 1043, 1048–1049 (1975).⁴

We find, then, that the judge abused his discretion by ordering the production of a witness list, by conditioning testimony of the General Counsel's witnesses on their having been included on the list, by informing the General Counsel that in calling witnesses he could not deviate from the order of the witnesses as they were listed, and by any further requirements or penalties imposed on the General Counsel relating to the requirement that the names of witnesses be disclosed. Accordingly, we reverse the judge's rulings.

³ Of course, the judge's order would require advance disclosure of any witness, including Union agents, nonemployees, and former employees of the Respondent.

⁴ Accordingly, we need not reach the issue of whether an order requiring advance disclosure of witnesses would be appropriate if such a showing were made. Also not at issue here is the authority of the judge to regulate the course of the hearing by, among other things, ruling on requests that the testimony of witnesses be scheduled, where appropriate, so as to minimize the burden on the witness, his or her employer, or any party.