

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

AMERICANOS U.S.A., LLC

and

Case 28-CA-23187

**INTERNATIONAL ASSOCIATION OF
MACHINISTS AND AEROSPACE WORKERS, AFL-CIO**

**ACTING GENERAL COUNSEL’S OPPOSITION TO RESPONDENT’S
MOTION FOR PRE-HEARING DISCLOSURE**

Respondent has filed numerous motions seeking to discover the specific evidence the Acting General Counsel will rely upon in its case in chief.¹ In this latest motion, dubbed a “Motion for Pre-Hearing Disclosure,” based on the possibility of an agreement it has reached with the charging party union to reimburse witnesses for travel costs, Respondent demands that the Acting General Counsel provide it with a list of witnesses he intends to call at trial. Not surprisingly, Respondent’s demand is unsupported by any citation to Board authority. On the contrary, it relies upon the Federal Labor Relations Act, 5 U.S.C. § 160(b), and the Federal Rules of Civil Procedure, both of which expressly provide for prehearing discovery. Respondent’s attempt to turn these proceedings into something they are not – namely, federal court litigation, complete with discovery, disclosure, and extensive motion practice – should be rejected.

¹ These motions include five motions for summary judgment which seek to impose the requirements of Fed. R. Civ. P. 56(c) and 56(e) on the Acting General Counsel, to identify “specific facts” to counter the testimony of Respondent’s supervisors and managers presented in affidavits taken by Respondent’s counsel specifically for purposes of the summary judgment motions. But see Rules and Regulations, § 102.24(b) (“It is not required that either the opposition or the response be supported by affidavits or other documentary evidence showing that there is a genuine issue for hearing”); §102.118 (generally prohibiting the General Counsel from disclosing contents of case files until after a witness testifies).

A. Pre-Hearing Disclosure is Unauthorized

In *Bashas', Inc.*, 352 NLRB 661 (2008), the Board sustained the General Counsel's special appeal of an administrative law judge's order requiring the General Counsel to provide a list of witnesses in advance of their testimony. This order, the Board held, "established a procedure for discovery," which is not authorized under the Board's rules or procedures. *Id.* The Board flatly instructed that parties to unfair labor practice proceedings "do not possess rights to pretrial discovery" and 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. *Star 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 (3rd 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 (2nd Cir. 1970), cert. denied 402 U.S. 915 (1971); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951).

Id. Thus, the Board concluded that "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. Rather, the Board's Rules generally prohibit the imposition of such requirements." *Id.* (footnote omitted).

The Board's decision in *Bashas', Inc.*, followed a long line of Board authority making it clear that a respondent is not entitled to pre-hearing discovery of the names of the General Counsel's witnesses. See *Sunshine Piping, Inc.*, 351 NLRB 1371 (2007) ("there was no requirement for ... the General Counsel to inform Respondent of the identify of this witness or any other witness prior to the witness testifying in a Board proceeding"); *Interlake, Inc.*, 218 NLRB 1043, 1048-49 (1975) (rejecting argument that pre-trial discovery rules should apply to Board proceedings to compel disclosure of witnesses); *Medicine Bow Coal*

Company, 217 NLRB 931, 932-33 (1975) (affirming ALJ' denial of respondent's request for "names and addresses of all persons whom the NLRB or General Counsel will or may call to testify at the hearing" in order to adequately prepare for cross-examination and to locate rebuttal witnesses); *Lyman Printing and Finishing Company, a Division of M. Lowenstein & Son*, 183 NLRB 1048 (1970); *Owen Steel Co. of Florida*, 172 NLRB 1381, 1385 n. 4 (1968) (pre-trial witness list constitutes pre-trial discovery not authorized under the Board's rules or procedures); *W. H. Sackett, d/b/a Sackett Transportation*, 169 NLRB 346 (1968); *Kreiger-Ragsdale & Company, Inc.*, 159 NLRB 490 (1966); *W.L. Rives, Co.*, 125 NLRB 772 n. 1, enf. denied on other grounds, *N.L.R.B. v. W. L. Rives Company*, 288 F.2d 511 (5th Cir. 1961). This guidance is also found in the NLRB Casehandling Manual Part One (Unfair Labor Practice Proceedings), § 10292.4, which instructs that the Federal Rules of Civil Procedure, which provide for compulsory pretrial discovery, are not applicable to Board proceedings, citing *NLRB v. Valley Mold Co.*, 530 F.2d 693 (6th Cir. 1976); *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978)).

The Board's position that a respondent is not entitled to pre-hearing discovery, and specifically disclosure of the names of witnesses, has been upheld by various courts of appeals, including the Ninth Circuit. See *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951) ("[t]here is no provision in the Act authorizing the use of the discovery procedure"); *Texas Industries, Inc. v. NLRB*, 336 F.2d 128, 132-33 (5th Cir. 1964) ("Board's rules do not permit general prehearing discovery of such statements [of witnesses] The validity of these rules on their face has been upheld"); *Movie Star, Inc.*, 361 F.2d 346, 352 (5th Cir. 1966) (contention that respondents were denied due process by refusal of pre-hearing discovery "without merit"); *Raser Tanning Co. v. NLRB*, 276 F.2d 80, 83 (6th Cir. 1960)

(“Administrative hearings of the Labor Board are governed by the Administrative Procedure Act rather than the Federal Rules of Civil Procedure”); *N.L.R.B. v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961) (Sec. 10(b) of the Act “does not require the Board to adopt the entire discovery procedure contemplated by the Federal Rules of Civil Procedure”).

Moreover, the Ninth Circuit has held that a Federal administrative agency, such as the Board, may not establish discovery procedures absent authorizing legislation. *Federal Maritime Commission v. Anglo-Canadian Shipping Co.*, 335 F.2d 255 (9th Cir. 1964).

B. A Pre-Hearing Witness List Violates the Principles of Section 102.118(a) of the Board’s Rules and Regulations

A pre-hearing disclosure of witnesses also violates the Board’s Rules and Regulations. Section 102.118(a) prohibits any past or present Board employee from disclosing, or causing the disclosure of, any “information, facts, or other matter coming to that person’s knowledge in his or her official capacity or with respect to the contents of any files, documents, reports, memoranda, or records of the Board or of the General Counsel, whether in answer to a subpoena or otherwise, without the written consent of the [General Counsel].” The *only* exception to this rule is contained in Section 102.118(b), which allows for the disclosure of any statement by a witness, *but only after* the witness has testified on behalf of the General Counsel or charging party. The penalties for violating Section 102.118(a)’s disclosure provisions are severe, including removal from Federal service.

Quite clearly, the Acting General Counsel’s knowledge of the identity of witnesses he intends to call in support of the complaint allegations, i.e., persons involved in the Region’s underlying unfair labor practice investigation, is “information, facts, or other matter” derived solely from the “files, documents, reports, memoranda, or records of the Board or of the General Counsel,” namely, the Region’s investigative file. This information is confidential

and not subject to disclosure unless and until required. See National Labor Relations Board Casehandling Manual, Part One, Unfair Labor Practice Proceedings, § 10054.4 (“Since the identity of a witness should be protected, the Board agent should, whenever possible, avoid providing details that would likely disclose the identity of the witness”).

C. Even in the Context of Proceedings that Permit Pre-Hearing Disclosure of Witness, Respondent Would Not Be Entitled to a Witness List in this Case

Although the Board’s Rules and Regulations do not require the Acting General Counsel to provide a respondent with a witness list before the hearing, it has been held that courts in criminal proceedings have the discretion to order the government to submit a witness list to the defendant. See, e.g., *U.S. v. Napue*, 834 F.2d 1311 (7th Cir. 1987). But a court will not order the government to provide such a list absent a strong showing of need or materiality. See, e.g., *U.S. v. Sclamo*, 578 F.2d 888 (1st Cir. 1978); *U.S. v. Ojeikere*, 299 F. Supp.2d 254 (S.D.N.Y. 2004). It is well-settled that a request for this information is not justified by the simple assertion that it would help the defendant prepare for trial, because the general need to prepare for trial is not a specific showing of necessity and is present in any proceeding. See, e.g., *U.S. v. Reyes*, 911 F. Supp. 64 (N.D.N.Y. 1996).

In this case, Respondent has made no particularized showing of necessity or materiality. The only basis for the motion is that Respondent has entered into preliminary discussions with the union to pay for the cost of witnesses from the El Paso, Texas, area to travel to the Dallas/Fort Worth area for the hearing. This monetary consideration falls far short of the type of necessity contemplated by the courts in criminal proceedings, and likely pales in comparison to time and resources wasted with this baseless motion. Further, the hearing is still scheduled to take place in El Paso, Texas, so the Respondent’s motion is moot. If, and when, the hearing is redesignated for a location other than El Paso, the Acting General

Counsel will be providing travel costs to any witness it subpoenas as standard practice dictates.

Finally, even if Respondent had made some showing of necessity, the courts have held that a witness list will still be denied when there is evidence of danger to the witness or obstruction of the judicial process. See, e.g., *U.S. v. Bolden*, 514 F.2d 1301 (D.C. Cir. 1975); *U.S. v. Schwimmer*, 649 F. Supp. 544 (E.D. N.Y. 1986). That is the case here. It would be singularly inappropriate to disclose the names of witnesses where the complaint alleges that Respondent violated Section 8(a)(3) by discharging one of its employees because he was involved in union activities.

D. CONCLUSION

Based on the foregoing, Respondent's Motion for Pre-Hearing Disclosure should be denied.

Dated at Phoenix, Arizona this 11th day of February 2011.

/s/ Sandra L. Lyons
Sandra L. Lyons
Counsel for the General Counsel
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, Arizona 85004
(602) 640-2133

CERTIFICATE OF SERVICE

I hereby certify that a copy of ACTING GENERAL COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION FOR PRE-HEARING DISCLOSURE in AMERICANOS U.S.A., LLC, Case 28-CA-23187, was served by E-Gov, E-Filing, E-Mail and Overnight Delivery via United Parcel Service, on this 11th day of February 2011, on the following:

Via E-Gov, E-Filing:

Lester A. Heltzer, Executive Secretary
Office of the Executive Secretary
National Labor Relations Board
1099 14th Street, N.W.
Washington, D.C. 20570

Via E-Mail:

Dan Hartsfield, Attorney at Law
Jackson Lewis, LLP
3811 Turtle Creek Boulevard, Suite 500
Dallas, TX 75219
E-Mail: dan.hartsfield@jacksonlewis.com

Via Overnight Delivery:

Americanos USA, LLC
1101 Texas Avenue
El Paso, TX 79901

International Association of Machinists and
Aerospace Workers, AFL-CIO
111 West Mockingbird Lane, Suite 1357
Dallas, TX 75247
E-Mail: rgarcia@iamaw.org

/s/ Katherine A. Stanley

Katherine A. Stanley
Secretary to the Regional Attorney
National Labor Relations Board, Region 28
2600 North Central Avenue, Suite 1800
Phoenix, AZ 85004
Telephone (602) 640-2163