

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 93-72

December 2, 1993

To: All Regional Directors, Officers-in Charge,
and Resident Officers

From: William G. Stack, Associate General Counsel

SUBJECT: Board's Rules and Regulations
Section 102.118(b)(1) and (2)

On November 9, 1993, the Board issued an order in which it interpreted an administrative law judge's responsibilities under Section 102.118(b)(1) and (2) of the Board's Rules and Regulations.

In an unfair labor practice proceeding involving Caterpillar, Inc., the administrative law judge directed the counsel for the General Counsel to produce all statements testifying witnesses had given to the Board without regard to the specific issues or cases involved and regardless of whether the witness had testified in connection with those cases or issues. The case being litigated was one of numerous cases against Caterpillar, Inc. Other complaints had been issued against Caterpillar, Inc., while others were still under investigation at the time of the hearing. Thus, some testifying witnesses had given statements in many investigations. Overruling the counsel for the General Counsel's objections, the judge ruled that under the Jencks Act, 18 U.S.C. 3500, all affidavits of a testifying witness are producible. In addition, the judge ruled that the Board agent's notes of telephone and personal conversations with testifying witnesses must be produced despite the fact that the witnesses were unaware of the notes and had neither signed nor adopted them.

After the judge denied the counsel for General Counsel's motion to reconsider his ruling, the counsel for the General Counsel filed a special request to appeal from the judge's rulings. The Board granted the appeal and ruled that the judge had construed the Jencks Act too broadly and had ignored the Board's Rules and Regulations. The Board noted that the Board's Rules and Regulations specifically

direct that upon the General Counsel's claim that portions of a statement ordered to be produced are not related to the subject matter of the testimony, the judge shall order the General Counsel to deliver the statement for the inspection of the judge in camera. The Board emphasized that the rule provides that upon delivery the judge "shall excise the portion of such statements which do not relate to the subject matter of the testimony of the witness." The Board acknowledged that the judge had the discretion to decline to excise portions of the statement which while not related to the subject matter of the witness' testimony, do relate to other matters raised by the pleadings.

Citing Stride Rite Corp., 228 NLRB 224, 226, fn. 3 (1977), and the definition of "statement" set forth in Section 102.118(d), the Board also found that the judge erred by compelling the General Counsel to produce notes and memoranda in the absence of evidence that they were adopted by the witness. The Board noted that the judge had not exercised the discretion the Rule granted him but had instead ordered wholesale disclosure of information in the General Counsel's investigative files. Further, the Board noted that the judge's "unqualified assertion" that Jencks required the production of all exculpatory materials was not supported by decisions of the Board and the reviewing courts which have held that there is no general obligation to disclose any exculpatory evidence disclosed in a pretrial investigation. See North American Rockwell Corp. v. NLRB, 389 F.2d 866 (10th Cir. 1968).

Please have your staff familiarize themselves with the Board's holding in this case.


W. G. S.