

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 85-5

September 23, 1985

TO: All Regional Directors, Officers-in-charge,
and Resident Officers

FROM: Rosemary M. Collyer, General Counsel

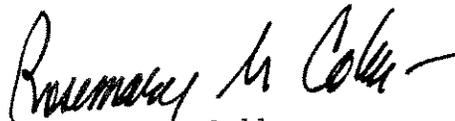
SUBJECT: Inclusion of Visitorial Clauses
in the Board's Remedial Orders

In view of the difficulties which many Regional Offices have encountered in monitoring compliance with court-enforced Board orders by respondents who refuse to provide adequate information regarding compliance, we have decided to routinely seek inclusion of a visitorial clause in all of the Board's remedial orders. Inasmuch as such clauses have not routinely been sought in the past, the complaint should, in all cases, contain a separate prayer for the inclusion of a visitorial clause in the order. (See National Labor Relations Board Pleading Manual Section 1000). The form of visitorial clause to be requested is set forth in the attachment.

The General Counsel's brief to the administrative law judge and to the Board should include the enclosed model brief as a section. If there are fact-specific reasons in individual cases for including a visitorial clause, those reasons and the evidence in support thereof should also be presented to the administrative law judge and the Board. However, even absent such special circumstances, visitorial clauses should routinely be sought.

Additionally, all formal settlement agreements should likewise include the visitorial language set forth in the attachment.

These instructions are effective immediately.


Rosemary M. Collyer

Attachments

cc: NLRBU

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MEMORANDUM GC 85-5

VISITURIAL CLAUSE - To be included in complaint

WHEREFORE, as part of the remedy for the unfair labor practices alleged above in paragraphs _____ and _____, the General Counsel seeks an order providing that Respondent:

Notify the Regional Director for Region _____, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.

The General Counsel further prays for such other relief as may be just and proper to remedy the unfair labor practices herein alleged.

MODEL BRIEF

THE ORDER SHOULD INCLUDE A VISITORIAL PROVISION

For the reasons set forth herein, the General Counsel requests that the recommended remedial order include a visitorial clause, authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure ("FRCP") so that it will be able to monitor compliance with the Board's order, as enforced by the court of appeals.^{1/}

A. The Board has Historically Recognized the Need for Visitorial Protection in its Orders

Obtaining compliance with the Board's orders is, of course, essential to enforcement of the Act. A decree of enforcement issued by the court of appeals, "like the order it enforces, is aimed at the prevention of unfair labor practices, an objective of the Act, and so long as compliance is not forthcoming that objective is frustrated." NLRB v. Warren Co., 350 U.S. 107, 112 (1955). "If the decree of enforcement is disobeyed, the unfair labor practice is still not prevented," and the purposes and policies of the Act are not effectuated. For that reason, Congress provided that there would be "immediately available to the Board an existing court decree to serve as a basis for contempt proceedings." Amalgamated Utility Workers v.

^{1/} A visitorial clause permits an agency to examine the books and records of a respondent and to take statements from its officers and employees and others for the purpose of determining or securing compliance with a court's judgment. The discovery rules of the Federal Rules of Civil Procedure provide a mechanism for achieving the objectives of a visitorial clause.

Consolidated Edison Co., 309 U.S. 261, 270 (1940), quoting Conference Report, Cong. Rec., 74th Cong., 1st Sess., pt. 9, p. 10,299. Accordingly, "public policy cannot permit such a valid order of the Board to be thwarted or escaped, if there is any sound way to prevent it." NLRB v. Killoren, 122 F.2d 609, 612 (8th Cir. 1941), cert. denied, 314 U.S. 696.

Since the inception of the Act, the Board has recognized the importance of compliance to the effectuation of its purposes and policies. The Board initially addressed the problem of monitoring compliance by requiring respondents to submit reports describing the action taken to comply with its order. See Clinton Cotton Mills, 1 NLRB 97. However, when it became apparent that compliance reports prepared by the respondent were inadequate to permit its Regional Offices to police compliance, the Board began including visitorial clauses in certain of its remedial orders.^{2/} Thus, since its 1950 decision in F.W.

^{2/} Authority for inclusion of visitorial language in Board orders is derived from Section 10(c) of the Act, which provides in relevant part that the Board shall require persons found to have violated the Act to "take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act." Thus, Section 10(c) "charges the Board with the task of devising remedies to effectuate the policies of the Act." NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 346 (1953). To this end, the Board has "wide discretion in ordering affirmative action; its power is not limited to the illustrative example of one type of permissible affirmative order, namely, reinstatement with or without backpay." Virginia Electric & Power Co. v. NLRB, 319 U.S. 533, 539 (1943). Moreover, this "power is a broad discretionary one, subject to limited judicial review."

Woolworth Co., 90 NLRB 289 (1950), the Board has routinely included, in orders that require the payment of backpay, a provision requiring the respondent to preserve and make available to the Board for examination and copying all payroll records and reports and all other records necessary to analyze the amount of backpay due under the Board's order. The Board adopted this policy based upon its experience "that in numerous cases [it had] been hampered in its efforts to secure compliance with backpay and reinstatement orders by the refusal of some employers to permit access to their payroll and other records." F.W. Woolworth Co., 90 NLRB at 294 (1950).^{3/}

The Board has also utilized a type of visitorial clause in cases involving the discriminatory operation of hiring halls. In many such cases, the Board, with court approval, has ordered the respondent to maintain records of its hiring hall operations and make such records available to the Board and its representative upon request. See Local 138, International Union of Operating Engineers v. NLRB, 321 F.2d 130, 138 (2d Cir.

Footnote Continued

Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964). For "the relation of remedy to policy is peculiarly a matter for administrative competence" NLRB v. Seven-Up Bottling Co., 344 U.S. at 349, quoting Phelps Dodge Corp., 313 U.S. 177, 194 (1941). The Board's determination should stand "unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act." Virginia Electric & Power Co., 319 U.S. at 540.

^{3/} Prior to 1950, the Board had included provisions requiring access to records in some decisions. See e.g., Sandy Hill Iron & Brass Works, 69 NLRB 355, 384 (1946), enf'd, 165 F.2d 660, 663 (2d Cir. 1947).

1963); Plumbers Local 403 (Pullman Power Products), 261 NLRB 257, 258 (1982), enf'd, 710 F.2d 1418 (9th Cir. 1983); International Brotherhood of Boilermakers, Local 154 (Western Pennsylvania Service Contractors Association), 253 NLRB 747, 748 (1980), enf'd, 676 F.2d 687 (3d Cir. 1982); Laborers International Union Local 282 (Millstone Co.), 236 NLRB 621, 645 (1978); Ironworkers Local 433, 228 NLRB 1420, 1442 (1977), enf'd, 600 F.2d 770 (9th Cir. 1979); International Association of Ironworkers Local 480 (John A. Craner), 235 NLRB 1511, 1514 (1978), enf'd, 598 F.2d 611 (3d Cir. 1979); International Association of Ironworkers, Local 45, 235 NLRB 211, 213 (1978), enf'd, 586 F.2d 834 (3d Cir. 1978); International Association of Ironworkers, Local 373 (Henry Arminas), 232 NLRB 504, 506 (1977); Ironworkers, Local 290 (Mid-States Steel Erection Co.), 184 NLRB 177 (1970).

B. Routine Inclusion of Visitorial Clauses
Would Facilitate Prompt and Full
Compliance With Board Orders

Although, as the above-cited cases demonstrate, the Board has long recognized the need for visitorial clauses in specific remedial contexts, the experience of the Board's Regional Offices in securing compliance with Board orders demonstrates a much broader need for visitorial protection. Indeed, that experience indicates that visitorial access is potentially necessary in almost every Board case where a violation is found. Thus, in policing compliance with court-enforced Board orders, the Regional Offices are often unable to obtain sufficient

cooperation from respondents to enable them to determine with certainty whether or not compliance is possible or has been achieved. For example, respondents frequently assert financial inability to comply, but fail to furnish documentation sufficient to enable the Region to fully verify its claim. In another common example, the respondent may bear such a relationship to a non-party to the Board proceeding that the non-party is itself properly chargeable with remedial responsibility under a judgment if certain facts can be established. However, the respondent and such non-parties often refuse to cooperate, so that the Region does not have enough information to ascertain whether the non-party is an alter ego, a disguised continuance, or a bona fide successor, or is, in fact, in no way liable for compliance.

In these and other circumstances, the Board is faced with the need to engage in discovery before a determination can be made as to whether contempt or other ancillary proceedings are warranted. Engaging in discovery prior to initiating contempt proceedings is especially important, in cases where the facts are uncertain, because the Board must meet the higher burden of establishing a violation by "clear and convincing evidence." In addition, the Board faces potential liability under statutes such as the Equal Access to Justice Act (28 U.S.C. 2412) if it proceeds in contempt without a sufficient basis for doing so. Obviously, discovery is preferable to uninformed and possibly unwarranted institution of contempt proceedings. NLRB v. Dixon,

189 F.2d 38, 39 (8th Cir. 1951). See also NLRB v. Deena Artware, Inc., 361 U.S. 398, 404 (1960). A visitorial provision, routinely included in the Board's remedial orders, would permit such discovery and enable the Board to determine promptly and fully whether contempt proceedings are appropriate.

Nor is it inequitable to require a respondent to substantiate through discovery any unsupported claims it may have that compliance is impossible or has already been accomplished. All that the proposed visitorial clause would do is subject the law violator and possible abettors to the same discovery that parties to civil litigation in federal district court are subjected to as a matter of course, and that both the Board and respondent are routinely exposed to once contempt proceedings are initiated in the court of appeals. In addition, the kind of relief contemplated in the proposed visitorial provision--that which permits the successful party in litigation to police compliance with the court's judgment--is virtually identical to the relief provided under Rule 69, FRCP, which entitles the prevailing party to engage in full post-judgment discovery against any person in aid of a money judgment. In sum, requiring a respondent who has already been found to have violated the Act to submit to post-judgment discovery works no undue hardship upon it.^{4/}

^{4/} Discovery pursuant to a visitorial clause would, of course, only be necessary in cases where the respondent or those who may be acting in concert with the respondent do not voluntarily provide the information needed to determine

C. There are No Viable Alternatives to a
Visitorial Clause

In the absence of a visitorial clause, the Board must either apply to a court of appeals for a discovery order or obtain enforcement, in a federal district court proceeding, of an investigatory subpoena issued under Section 11 of the Act. Neither of these procedures, however, affords the kind of visitorial access that the Board's compliance efforts require.

Section 11 subpoenas do not provide a viable alternative for at least two reasons. First, inherent in a Section 11 proceeding in district court is the potential for considerable delay in obtaining the subpoenaed information from a respondent. See, e.g., NLRB v. Dutch Boy, Inc., 606 F.2d 929 (10th Cir. 1979) (delay of 21 months); NLRB v. Martins Ferry Hospital Association, 654 F.2d 455 (6th Cir. 1981) (34 month delay). Second, even assuming that Section 11 may routinely be utilized at the compliance stage to discover whether there are grounds for instituting a contempt proceeding in the court of appeals (compare NLRB v. Thayer, Inc., 201 F. Supp. 602 (D. Mass. 1962) with F.T.C. v. Turner, 609 F.2d 743 (5th Cir. 1980)), it is more appropriate that such discovery be conducted under the aegis of the enforcing court inasmuch as questions of compliance

Footnote Continued

whether compliance is possible or has been achieved. Moreover, the scope of discovery would be limited to compliance matters and would in any case be subject to the supervision of the enforcing court.

are matters properly to be considered by the court issuing the enforcement decree. See, NLRB v. Deena Artware, Inc., 251 F.2d 183, 187 (6th Cir. 1958) (opinion of then-Judge Potter Stewart, dissenting from denial of post-judgment discovery). Cf. NLRB v. Warren Co., 350 U.S. 107, 112 (1955).

Like Section 11 subpoenas, formal requests for authority from the court issuing the enforcement decree to engage in discovery on a case by case basis whenever a respondent refuses to cooperate carries with it the likelihood of considerable delay in obtaining the necessary discovery order. In addition, the Board has not always been successful in obtaining discovery orders in the absence of a visitorial clause in the remedial order. Indeed, one circuit has held that, in certain circumstances, the Board is not entitled to a discovery order prior to the filing of a contempt petition, in the absence of a visitorial provision in the Board's order. NLRB v. Steinerfilm, Inc., 702 F.2d 14 (1st Cir. 1983). See also NLRB v. Deena Artware, Inc., 251 F.2d 183 (6th Cir. 1958) (motion for discovery order to determine possible alter ego status denied by court on grounds that no contempt petition had been filed by the Board). But cf. NLRB v. Dixon, 189 F.2d 38, 39 (8th Cir. 1951). Such a view places the Board in the untenable position of having to file an unsubstantiated contempt petition in order to obtain the very discovery order that would disclose whether contempt proceedings are warranted.

For these reasons, seeking discovery orders from the courts of appeals in order to monitor compliance in individual cases is not always a workable alternative to inclusion of visitorial clauses in remedial orders. Moreover, as the court observed in Steinerfilm, pre-contempt discovery can readily be obtained simply by including visitorial clauses in Board orders. In the court's words, "the Board, like other agencies, can provide for 'visitorial' (information gathering) authority in its decrees," since "all agencies are free to insert visitorial clauses in decrees" (702 F.2d at 15, 17).

D. Other Federal Agencies Utilize Similar Visitorial Clauses in Remedial Orders

Other agencies use visitorial clauses in their decrees in order to monitor compliance. See NLRB v. Steinerfilm, Inc., 702 F.2d 14 (1st Cir. 1983). Thus, the Antitrust Division of the Justice Department routinely incorporates such visitorial clauses in district court consent decrees and remedial orders as a basis for future compliance investigations. See, e.g., United States v. Associated Milk Producers, Inc., 394 F. Supp. 29, 56 (W.D. Mo. 1975), aff'd, 534 F.2d 113 (8th Cir.), cert. denied, 429 U.S. 940 (1976); United States v. Singer Manufacturing Co., 231 F. Supp. 240, 244 (S.D.N.Y. 1964); United States v. International Nickel Co., 203 F. Supp. 739 (S.D.N.Y. 1962).

Moreover, the courts have recognized the importance of such visitorial clauses to government agencies. For example, in United States v. Bausch & Lomb Co., 321 U.S. 707 (1944), the Supreme Court upheld a decree under the Sherman Act which

allowed future discovery by the Department of Justice in order to police the decree. In affirming the inclusion of visitorial provisions in the decree, the Court stated (321 U.S. at 725-726):

The provision was evidently sought and allowed to enable the Government to obtain information as to the operations of [the company] subsequent to the judgment declaring [the company's] distribution operations unlawful, to guide the responsible officials of the Department of Justice in their duty of protecting the public against a continuance of the illegal combination and conspiracy without the necessity of the expense and difficulty of extended investigation or renewed hearings under the jurisdiction retained for modification or enforcement. If reasonably necessary to wipe out the illegal distribution system, we see no constitutional objection to the employment by equity of this method The test is whether or not the required action reasonably tends to dissipate the restraints and prevent evasions. Doubts are to 'be resolved in favor of the Government and against the conspirators.'

Accord: United States v. Grinnell Corp., 384 U.S. 563, 579 (1966) (order provides for post-judgment reports, access to documents, and right to examine company personnel); United States v. United States Gypsum Co., 340 U.S. 76, 95 (1950) (order provides post-judgment access to company records and personnel); United States v. Greyhound Corp., 370 F. Supp. 881, 885, 886, 888 (N.D. Ill. 1974) (order provides post-judgment access to company documents and right to examine company personnel).

Accordingly, in order to assure that the Board can effectively monitor and secure compliance with its orders, the

recommended remedial order in this case should include a visitorial clause authorizing the Board to engage in discovery under the Federal Rules of Civil Procedure. That clause should provide that the respondent:

Notify the Regional Director for Region _____, in writing, within 20 days from the date of this Order, what steps have been taken to comply therewith. For the purpose of determining or securing compliance with this Order, the Board, or any of its duly authorized representatives, may obtain discovery from the Respondent, its officers, agents, successors or assigns, or any other person having knowledge concerning any compliance matter, in the manner provided by the Federal Rules of Civil Procedure. Such discovery shall be conducted under the supervision of the United States Court of Appeals enforcing this Order and may be had upon any matter reasonably related to compliance with this Order, as enforced by the Court.