

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 94-23

March 18, 1994

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

FROM : William G. Stack, Associate General Counsel

SUBJECT: Training Monograph No. 14 Concerning Sequestration
of Witnesses in Administrative Proceedings

Under separate cover, you will be receiving a supply of Training Monograph No. 14, Sequestration of Witnesses in Administrative Proceedings. This monograph was prepared by the Division of Advice.

Monographs have issued earlier with respect to Section 10(b); Solicitation/Distribution Rules; Duty of Fair Representation; Jurisdiction and Coverage of the Act; Duty to Furnish Information; Wright Line; Section 10(j); Hiring Halls; Procedural Bars to the Litigation of Unfair Labor Practice Charges; Backpay; Deferral of Unfair Labor Practice Charges; Section 8(b)(4)(B) of the Act; and Successors and Alter Egos.

As noted in prior memoranda, these training monographs are intended to provide a general introduction to the subject, rather than an exhaustive treatment, and should serve as a focal point for additional discussion between employees and supervisors. It is recommended that you place at least one copy of each monograph in a binder in your library.

I wish to thank the Division of Advice for its work in developing Training Monograph No. 14.


W. G. S.

cc: NLRBU

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SEQUESTRATION OF WITNESSES IN ADMINISTRATIVE PROCEEDINGS

Introduction

The purpose of this monograph is to provide a summary of legal principles concerning the purpose, scope, operation and enforcement of sequestration orders in administrative proceedings (i.e., unfair labor practice hearings). It is designed to assist the reader in identifying potential issues and in conducting legal research when faced with an actual sequestration situation.

Section 10(b) of the NLRA (29 U.S.C. Section 160[b]), provides that insofar as it is practicable, unfair labor practice proceedings should be conducted in accordance with the rules of evidence applicable in Federal district courts.

Rule 615 of the Federal Rules of Evidence¹ requires that, upon the request of a party, the court "shall" order witnesses removed from the hearing so that they cannot hear the testimony

¹ The specific language of FRE 615 provides as follows:

At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of the party's cause.

of other witnesses. Thus, the sequestration of prospective witnesses is mandatory when requested by either party. The primary object of the rule is to deprive later witnesses of the opportunity to conform their testimony to that of prior witnesses.²

Rule 615 specifies three exceptions: (1) a party who is a natural person is not subject to exclusion; (2) an officer or employee of a party which is not a natural person designated by its attorney to be the party's representative may not be excluded;³ (3) a person whose presence is shown by a party to be essential to the presentation of his cause may not be excluded.⁴

The Board has held that at the request of a party all witnesses who are not alleged discriminatees shall be excluded from the hearing room. The Board has also held that individual discriminatees under the National Labor Relations Act are tantamount to "parties" for sequestration purposes without regard to whether they actually filed an unfair labor practice charge. *Unga Painting Corporation*, 237 NLRB 1306 (1978). However, in *Unga*, the Board weighing the importance of a discriminatee's unrestricted presence during the hearing as required by FRE Rule 615 with the objectives of the exclusion process, which is to

² See Wigmore, *Evidence*, Section 1838 (Chadbourn rev. 1976).

³ *Chas. P. Young Houston*, 299 NLRB 958, 960 (1990) (sequestration rule permits witnesses designated as assistants of Charging Party and Respondent to be present throughout hearing).

⁴ *Advo System, Inc.*, 297 NLRB 926, fn. 1 (1990) (Respondent not prejudiced by ALJ's ruling exempting Board witness from sequestration at the close of General Counsel's case-in-chief to assist with preparation of rebuttal).

discover truth, and the overall purposes of the Act, the Board concluded that it would exclude discriminatees from hearings to a limited extent.⁵ Accordingly, in *Unga* the Board determined that discriminatees should be excluded from the hearing room:

. . . only during that portion of the hearing when another of the General Counsel's or charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal, unless, in the judgment of the Administrative Law Judge, there are special circumstances warranting the unrestricted presence of discriminatees or total exclusion when not testifying.⁶

General Principles Concerning Sequestration

While each situation must be examined on the basis of the particular facts, following are several general principles applicable to sequestration situations.

1. Discriminatees, whether or not they are Charging Parties, should be treated as a "party" in a Board proceeding for sequestration and be excluded *only* during testimony given by other general counsel or charging party witnesses about the same events. This rule permits discriminatees, before or after their testimony, to observe at least a portion of the hearing. *Unga*, 237 NLRB at 1308.

⁵ In fashioning its sequestration rule for discriminatees, the Board noted that Section 10(b) of the Act makes the Federal Rules of Evidence applicable to Board proceedings only "so far as practicable."

⁶ *Unga Painting Corporation*, 237 NLRB at 1307 (footnotes omitted).

2. Where discriminatees will be testifying about separate events, they should be allowed to attend the entire hearing. See *Unga*, 237 NLRB at 1308; *Curlee Clothing Company*, 240 NLRB 355 fn. 1 (1979) (ALJ did not err in denying motion to sequester General Counsel's witnesses based, in part, on the fact that witnesses would not be testifying about the same event).
3. All other nondiscriminatee witnesses must be sequestered upon request. *Unga*, 237 NLRB at 1307. These witnesses should not be permitted to reenter the hearing upon completion of their testimony, since such reentry would preclude their further use as a witness (e.g., for rebuttal).
4. Making the hearing transcript available to prospective witnesses improperly circumvents the sequestration rule. E.g., *El Mundo Corp.*, 301 NLRB 351 (1991); *Seattle Seahawks*, 292 NLRB 899, 907 (1989). To avoid any confusion concerning the scope of the sequestration order, counsel for the General Counsel should request that such conduct be explicitly prohibited. See *Gossen Company*, 254 NLRB 339 fn. 1 (1981).
5. If circumstances arise which make it necessary to inform a witness about certain testimony, prior permission should be sought from the ALJ. See *Seattle Seahawks*, 292 NLRB at 907; *Gloversville Embossing Corp.*, 297 NLRB 182, 193 (1989) (sequestered witness readmitted to hearing to hear certain testimony).

6. Any other conduct which, in effect, informs a prospective witness of the specific testimony provided by other witnesses should be challenged as a violation of the sequestration rule. Cf., *Marcus Management, Inc.*, 292 NLRB 251, 258-259 fn. 8 (1989) (informal "coffee klatch" attended by Respondent's counsel and witnesses while hearing was in progress constituted joint preparation session violative of sequestration order); *United States v. Wodtke*, 13 FRES 233 (N.D. Iowa, 1983) (courtroom "observer" taking copious notes to keep prospective witnesses informed as to progress of the hearing violative of sequestration rule).
7. Witness sequestration is primarily intended to prevent a witness from hearing the testimony of other witnesses for the same side. However, learning the testimony of the opposing parties' witnesses will also constitute a violation of the sequestration rule. See, *UARCO, Inc.*, 286 NLRB 55 (1987) and *Seattle Seahawks*, 292 NLRB 899.
8. Where the sequestration rule has been violated, the ALJ shall "scrutinize the tainted testimony closely, mindful of that taint as a factor in determining credibility." *El Mundo Corp.*, 301 NLRB at 351-352. The Board has not yet approved the striking of testimony as a remedy. *Zartic, Inc.*, 277 NLRB 1478, 1481 (1986); *UARCO, Inc.*, 286 NLRB 55 fn. 1.
9. Counsel for the General Counsel should consider, in consultation with the Regional Director, requesting

that respondent's counsel be disciplined for violating a sequestration order. Where an attorney has demonstrated a propensity for circumventing sequestration orders, harsher discipline may be warranted pursuant to Section 102.44 of the Board's Rules and Regulations. See *National Football League*, 309 NLRB 78, 86 (1992).

SUMMARY

1. Section 10(b) of the Act provides that insofar as practical, unfair labor practice hearings should be conducted in accord with the Federal Rules of Evidence. Rule 615 of the Federal Rules of Evidence requires that upon request of a party, the court shall order witnesses removed from the hearing room so they cannot hear the testimony of other witnesses.

2. The Board in *Unga Painting*, 237 NLRB 1306, held that individual discriminatees are parties for sequestration purposes, and shall be excluded from the hearing room only under the limited circumstances set forth above.

3. *Unga* and subsequent cases discussed above have dealt with additional issues and refinements with respect to sequestration, including the question of discipline against a party which violates the sequestration rule.

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