

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 20**

TRACY AUTO, L.P. dba TRACY TOYOTA

and

**Cases 32-CA-260614
32-CA-262291
32-RC-260453**

**MACHINISTS AND MECHANICS LODGE NO. 2182,
DISTRICT LODGE 190, INTERNATIONAL
ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS, AFL-CIO**

**COUNSEL FOR THE GENERAL COUNSEL'S RESPONSE
TO ORDER TO SHOW CAUSE WHY RESPONDENT'S MOTION TO PRODUCE
STATEMENTS/AFFIDAVITS OF WITNESSES SHOULD BE DENIED**

On December 11, 2020,¹ Tracy Auto, L.P. dba Tracy Toyota (Respondent) served Subpoena Duces Tecum B-1-1B2HZJV (the Subpoena) on Counsel for the General Counsel Jason Wong. The Subpoena requested statements and affidavits given to Region 20 or 32 of the National Labor Relations Board (the Board) by Cesar Caro (Caro), Tyrome Jackson (Jackson), Steve Lopez (Lopez), Kevin Humeston (Humeston), and several other current and former employees of Respondent. On December 14, during the hearing in this matter, Counsel for the General Counsel made an oral petition to revoke the Subpoena, and Administrative Law Judge Mara-Louise Anzalone (the Judge) granted that petition.

Its Subpoena having been revoked, on December 14, Respondent filed a Motion to Produce Statements/Affidavits of Witnesses Pursuant to Board Rule 102.118(e) (the Motion). The Motion asks the Judge to order Counsel for the General Counsel to produce any and all

¹ All dates refer to the year 2020 unless otherwise noted.

“statements/affidavits” of employees Caro, Lopez, Jackson, and Humeston. On December 15, the Judge issued a Notice to Show Cause why Respondent’s Motion should not be granted.

Respondent’s Motion should not be granted because it seeks the production of *Jencks* statements at a time when there is no legitimate purpose for Respondent to have such statements, which are normally protected from disclosure by Section 102.118 of the Board’s Rules and Regulations. In NLRB proceedings, a written statement made by a General Counsel witness and signed or otherwise adopted or approved by the witness is commonly referred to as a *Jencks* statement. See Jencks Act, 18 U.S.C. §3500 (1957); *Jencks v. U.S.*, 353 U.S. 657, 662 (1957); Section 102.118(g) of the Board’s Rules and Regulations. Although Section 102.118 of the Board’s Rules and Regulations generally prohibits Counsel for the General Counsel from disclosing witness statements, there is a limited exception: Section 102.118(e) *Production of statement for cross-examination*. As the title indicates, “the plain meaning” of Section 102.118(e) “limits the purpose of disclosure to cross-examination.” *Wal-Mart Stores, Inc.*, 339 NLRB 64, 64 (2003). The Board explained:

No other purpose is stated, nor is there any hint that disclosure may be for other uses. Had the Board intended for additional uses, it would have stated those uses in the rule or provided for them through its decision. *Id.*

Consistent with the narrow exception allowing disclosure of witness statements for the limited purpose of cross-examination, Section 102.118(e) clearly establishes that witness statements are producible by Counsel for the General Counsel only after the witness has testified for the General Counsel, only upon Respondent’s request, and only for use on cross-examination of the witness. Board’s Rules and Regulations Section 102.118(e).²

² A *Jencks* statement is not subject to production by subpoena in advance of trial. *H. B. Zachry Co.*, 310 NLRB 1037, 1037-1038 (1993). Nor is such statement or affidavit producible under the Freedom of Information Act (FOIA). See *Stride Rite Corp.*, 228 NLRB 224, 226 n. 3 (1977).

At the hearing in this matter, employees Caro, Lopez, Jackson, and Humeston were called as witnesses by Counsel for the General Counsel. Caro testified as a witness for the General Counsel on December 2, was cross-examined by Respondent Counsel Boggs for about 5 hours on December 2 and 3, and was then excused by the Judge at the conclusion of his testimony on December 3. Jackson testified as a witness for the General Counsel on December 3, was cross-examined by Respondent Counsel Boggs for 6 hours on December 8, and was then excused by the Judge at the conclusion of his testimony on the same day. Lopez testified as a witness for the General Counsel on December 8, was cross-examined by Respondent Counsel Boggs on the same day, and was then excused by the Judge at the conclusion of his testimony on the same day. Humeston testified as a witness for the General Counsel on December 14, was cross-examined by Respondent Counsel Boggs for 3 hours on the same day, and was then excused by the Judge at the conclusion of his testimony on the same day.

Counsel for Respondent had ample opportunity to request each of the witnesses' statements/affidavits in the manner well-established by Board law and Section 102.118(e) of the Board's Rules and Regulations in order to use the statements for cross-examination, the only permissible purpose for their disclosure. As clearly provided by Board law and Section 102.118(e) of the Board's Rules and Regulations, the appropriate time for Respondent Counsel to make his request was following the witness' direct-examination by Counsel for the General Counsel and before the witness' cross-examination by Respondent Counsel, so that the statements could be used for cross-examination, which is, again, the only purpose of their disclosure to Respondent. However, Respondent failed to request the witness statements for the appropriate purpose at the appropriate time, and its untimely Motion should be denied.

Respondent did not ask for the statements/affidavits of Caro, Lopez, Jackson, or Humeston after their direct examinations by Counsel for the General Counsel in order to use their statements for purposes of cross-examination. Respondent Counsel completed his cross-examinations of all four witnesses. Indeed, Respondent Counsel was permitted wide latitude in the length and breadth of his cross-examinations, which routinely exceeded the scope of the witnesses' direct examinations and lasted two and three times as long as the direct examinations. At this point in the proceeding, after hours of cross-examinations, even Respondent Counsel has run out of questions for the witnesses whose affidavits he belatedly seeks. There is no legitimate purpose for Respondent's Motion to be granted, and it should be denied.

A request for production of witness statements after the witness has completed testifying and been excused by the judge may be properly denied. *Walsh Lumpkin Wholesale Drug Co.*, 129 NLRB 294, 296 (1960) (upholding judge's denial of the respondent's request for any pretrial statements by two witnesses after the witnesses had been fully cross-examined and excused). See also *Earthgrains Co.*, 336 NLRB 1119, 1122 (2001) (request for affidavits was untimely when made immediately prior to the close of trial after the last witness had been excused); and *SBC California*, 344 NLRB 243 n. 3 (2005) (request for affidavit was untimely when made at the close of respondent's case).

The Board has also upheld the judge's discretion to deny a belated request for production even where the witness has not yet been excused. See *Raymond Engineering*, 286 NLRB 1210, 1214 n. 7 (1987) (judge declined to order production of a witness's affidavit after the General Counsel finished questioning the witness on redirect examination), cited with approval in *SBC California*, above. See also *I-O Services*, 218 NLRB 566 n. 1 (1975), where the Board held that

the judge did not abuse her discretion under the circumstances by denying a respondent's belated request that was made "well into" the cross-examination of the witness.

Respondent's Motion seeks the production of *Jencks* statements from four individuals who have already testified for the General Counsel, already been cross-examined by Respondent Counsel, and already been excused by the Judge. Section 102.118 of the Board's Rules and Regulations prohibits Counsel for the General Counsel from disclosing the witness statements to Respondent at this point in the proceeding, as there is no permissible purpose for disclosing witness statements after those witnesses have completed testifying for the General Counsel and been excused by the Judge. Respondent cites absolutely no legal authority for the proposition that it is entitled to *Jencks* statements from witnesses whose cross-examinations are complete. Respondent's Motion is an inappropriate, untimely request for *Jencks* statements and should be denied.

For the reasons set forth above, Counsel for the General Counsel requests that the Judge deny Respondent's Motion in its entirety.

DATED AT San Francisco, California, this 16th day of December, 2020.

/s/ Jason Wong

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