

rejected by the denial of more extensive intervention in *Campbell Soup*.⁶⁵ Apart from the FTC, whether public-interest intervention will have any significant impact on administrative agencies is difficult to forecast. Cases such as *Church of Christ*, in which the petitioners attempted unsuccessfully for more than ten years to have a television station's license revoked, illustrate the hurdles. The agencies have exhibited irritation and hostility toward efforts which have the effect of enlarging their constituencies. To the extent that there is such hostility it can result in the exercise of administrative discretion in a manner unfavorable to the intervenor and cause delay when the intervenor appeals such decisions.⁶⁶ Absent such hostility there will still be a great deal of litigation generated by public-interest intervenors who take a position adverse to that of the private party involved, as in *Firestone*. In addition to clogging the dockets, such delay may in some cases mitigate the effects of any just conclusion that is reached.⁶⁷ Moreover, to sustain such prolonged litigation, a public-interest intervenor must be well-organized and well-financed. Notwithstanding these difficulties, so long as public-interest intervenors can continue to participate in agency proceedings, even if in only a limited number of cases, it seems inescapable that such participation will ultimately result in more careful administrative action. The *Firestone* decision is an example of precisely this effect.

VI. HEARINGS

Administrative Discovery

The Court of Appeals for the Second Circuit held in *NLRB v.*

to individual intervenors who do not have adequate financial backing. The FCC granted the request of a student group that it be permitted to file only the original and one copy of its petition. Interview with Mr. Bass, Broadcasting Rules and Standards, FCC, July 9, 1970, concerning the *oral permission* in Petition for Rule Making of TUBE (Termination of Unfair Broadcasting Practices) for Adoption of Standards Designed to Eliminate Deceptive Advertising From Television, RM 1553, filed Jan. 13, 1970. The FTC granted two requests concerning transcripts in 1970. Student participants in *Campbell Soup Co.* were granted a free transcript and permission to file single copies of documents. 26 AD. L.2D at 1016. Second, a Washington consumer-protection group was permitted to buy a transcript of proceedings at the lesser FTC photocopying rate—30 cents per page instead of 50 cents. Letter from Joseph W. Shea, Secretary, FTC, to Benny Kass, February 25, 1970.

65. See separate statement of Commissioner Elman, 26 AD. L.2D at 1016.

66. See, e.g., *Office of Communication of United Church of Christ v. FCC*, 425 F.2d 543 (D.C. Cir. 1969).

67. See separate statement of Commissioner MacIntyre, 427 AD. L.2D at 880.

Interboro Contractors, Inc.,¹ that parties in a proceeding before the Board are not entitled to pre-hearing discovery procedures as provided under the Federal Rules of Civil Procedure.² An unfair labor practice charge had been filed against Interboro alleging that two employees engaging in protected activity had been discharged in violation of section 8(a)(1) of the National Labor Relations Act.³ Finding the allegations to be true and an unfair labor practice to have occurred, the Board obtained an enforcement order from the Second Circuit directing that the employees be compensated for any loss of pay accruing as a result of the violation.⁴ In furtherance of this order and in accordance with the Board's rules and regulations, a hearing was ordered to determine the amount due. Although Interboro did not use the subpoenas duces tecum and a subpoena ad testificandum which it acquired in preparation for the hearing, it repeatedly applied for permission to take depositions from the discharged employees. The first of these requests was denied for failure to show "good cause" as required by section 102.30 of the Board's rules.⁵ The subsequent requests were interpreted as motions for pre-hearing discovery and as such not authorized by section 102.30, which, according to the Board, permitted depositions to be taken only as a substitute for testimony of witnesses unavailable to appear at a hearing.⁶ Interboro moved for an adjournment at the close of cross-examination claiming that they were not prepared to meet the issues raised by the Board's exhibits or by unforeseen testimony of the Board's witnesses since they had not been permitted to utilize discovery. The motion was denied and the hearing was terminated without presentation of the company's case. Thereafter the trial examiner's award of back pay was affirmed by the Board⁷ over the company's objection, and enforcement of the order was subsequently granted by the Second Circuit.

In 1938, with the adoption of the Federal Rules of Civil Procedure, pre-trial discovery became firmly entrenched in federal

1. 432 F.2d 854 (9th Cir. 1970), *petition for cert. filed*, 39 U.S.L.W. 3362 (U.S. Feb. 16, 1971).

2. FED. R. CIV. P. 26-37.

3. Labor-Management Relations (Taft-Hartley) Act § 8(a)(1), 29 U.S.C. § 158(a)(1) (1964).

4. *NLRB v. Interboro Contractors, Inc.*, 388 F.2d 495 (2d Cir. 1967).

5. 29 C.F.R. § 102.30 (1970). See text accompanying note 26 *infra*.

6. See note 24 *infra* and accompanying text.

7. 432 F.2d at 857.

litigation, and most state courts soon adopted similar rules.⁸ However, the utilization of such discovery has generally been rejected in administrative adjudications; even those agencies whose hearings closely resemble judicial proceedings have not extensively employed it.⁹ The hesitancy of agencies to provide discovery procedures has been encouraged by judicial determinations that parties to judicial or quasi-judicial proceedings are not entitled to pre-trial discovery as a matter of constitutional right¹⁰ and by the absence of any specific requirement for discovery in the Administrative Procedure Act.¹¹ Indeed, the Court of Appeals for the Ninth Circuit has held that, in the absence of specific congressional approval, federal agencies may not fashion their own discovery rules under their general rule-making power.¹² However, notwithstanding the apparent reluctance of agencies and courts to promulgate discovery procedures, certain inroads have recently appeared which indicate a trend toward discovery before administrative bodies. In *FMC v. Anglo-American Shipping Co.*¹³ the Ninth Circuit commented that "at least three federal agencies . . . appear to have been vested with express statutory authority to authorize pre-hearing interparty discovery involving the production of documents."¹⁴ Of even more direct significance are the rules of the Federal Communications Commission, which give parties a general right to pre-hearing discovery,¹⁵ specifically providing broad discovery rights subject to control by the hearing examiner.¹⁶ Nevertheless, some hesitancy on the part of agencies to permit discovery remains, as is clearly demonstrated by the policies of the NLRB.

The NLRB has steadfastly maintained that its rules and regulations do not provide for pre-hearing discovery by parties

8. Kintner, *Discovery in Administrative Adjudicative Proceedings*, 16 AD. L. REV. 233 (1964).

9. *Id.*

10. *E.g.*, *Starr v. Commissioner*, 226 F.2d 721, 722 (7th Cir. 1955), *cert. denied*, 350 U.S. 993 (1956); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951).

11. *Berger, Discovery in Administrative Proceedings*, 12 AD. L. BULL. 28 (1959).

12. *Fairbank v. Hardin*, ___ F.2d ___, (9th Cir. 1970); *FMC v. Anglo-American Shipping Co.*, 335 F.2d 255, 261 (9th Cir. 1964).

13. 335 F.2d 255 (9th Cir. 1964).

14. *Id.* at 261 & n.9. (Interstate Commerce Commission, Civil Aeronautics Board, and Federal Power Commission).

15. 47 C.F.R. §§ 1.311-.325 (1970).

16. C.F.R. §§ 3.21-.33 (1970).

brought before the Board,¹⁷ irrespective of the Board's own right to engage in discovery.¹⁸ Informal attempts to engage in discovery may even be an unfair labor practice under section 8(a)(1) of the National Labor Relations Act.¹⁹ Although it is generally agreed that the Board has authority to promulgate a discovery rule if it so desires,²⁰ the rationale against such a procedure is that discovery might result in the intimidation of employees²¹ and complicate the administrative process by promoting delay and increasing costs.²² Such policy has thus far withstood due process attacks²³ as well as attempts to justify discovery under the Administrative Procedure Act.²⁴ The principal pro-discovery arguments, however, have relied on either section 10(b) of the National Labor Relations Act²⁵ or section 102.30 of the NLRB's rules.²⁶ The former provides that Board proceedings "shall, so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States under the rule of civil procedure for the district courts of the United States. . . ." ²⁷ while the latter specifies that:

[W]itnesses shall be examined orally under oath, except that *for good cause shown* after the issuance of a complaint, *testimony may be taken by deposition*. . . .

17. *E.g.*, *Electromec Design v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969); *Plumbers & Steamfitters Union Local 100*, 128 N.L.R.B. 398, 400, *enforced*, 291 F.2d 927 (5th Cir. 1961); *Walsh-Lumpkin Wholesale Drug Co.*, 129 N.L.R.B. 294, 296 (1960); *Del. E. Webb Constr. Co.*, 95 N.L.R.B. 377, n.2 (1951), *petition for enforcement denied on other grounds*, 196 F.2d 702 (8th Cir. 1952). *See generally* *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir.), *cert. denied*, 368 U.S. 823 (1961) (*dicta*).

18. Labor-Management Relations (Taft-Hartley) Act § 11(1), 29 U.S.C. § 161(1) (1964).

19. *See, e.g.*, *Winn-Dixie Stores, Inc.*, 143 N.L.R.B. 848 (1963), *enforced*, 341 F.2d 750 (6th Cir. 1965).

20. *E.g.*, *Electromec Design v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961).

21. Manoli & Joseph, *The National Labor Relations Board and Discovery Procedures*, 18 AD. L. REV. 9, 15 (1966); *Labor Law—Pre-Hearing Discovery of Employee's Statements*, 48 N.C.L. REV. 368, 378-80 (1970).

22. *See* Melnick, Little, & Tripp, *Discovery Prior to Administrative Adjudications—A Statutory Proposal*, 17 AD. L. REV. 262 (1965); 52 CALIF. L. REV. 823 (1964).

23. *Walsh-Lumpkin Wholesale Drug Co.*, 129 N.L.R.B. 294, 296 (1960); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951). The petitioners in *Interboro* are attempting to employ such an argument before the Supreme Court. Petitioner Brief for Certiorari at 9, *Interboro Contractors, Inc. v. NLRB*, 432 F.2d 854 (2d Cir. 1970).

24. 5 U.S.C. § 1002 (1964). *See, e.g.*, *Barceloneta Shoe Corp. v. Compton*, 271 F. Supp. 591 (D. P.R. 1967).

25. *See, e.g.*, *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961); *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751 (9th Cir. 1951); *Del E. Webb Constr. Co.*, 95 N.L.R.B. 377 n.2 (1951).

26. *See, e.g.*, *Walsh-Lumpkin Wholesale Drug Co.*, 129 N.L.R.B. 294, 296 (1960).

27. 29 U.S.C. § 160(b) (1964).

. . . (a) The regional director or trial examiner, as the case may be, shall upon receipt of the application, *if in his discretion good cause has been shown*, make and serve upon the parties an order which will specify the name of the witness whose deposition is to be taken and the time, the place, and the designation of the officer before whom the witness is to testify. . . .²⁸

One court has also found section 102.35 pertinent; that section states that the trial examiner has the power to "take or cause depositions to be taken whenever the ends of justice would be served thereby."²⁹ Reliance on section 10(b) of the NLRA has failed because it has been interpreted to apply only to rules of *evidence*, under the rules of civil procedure used in the federal system.³⁰ In justification of this interpretation the courts have relied not only on the language of section 10(b) but on the legislative history surrounding it. Typical of the congressional discussion which accompanied the present version of section 10(b) was the comment that

[section 10(b)] also changes the procedure as to the introduction of evidence before the Board. It must now be conducted according to the rules of evidence applicable in the district courts of the United States under the rules adopted by the Supreme Court . . . and the Board cannot exclude the rules of evidence as was heretofore done.³¹

The arguments relying on the apparently broad discretion given trial examiners and regional directors by the Board's rules have also failed because the Board and most courts have determined that the rules only provide for the taking of depositions for use as evidence when the witness will be unavailable at the hearing.³² Notwithstanding the weight of authority, the Court of Appeals for the Fifth Circuit has held—in decisions strongly refuted in *Interboro*—that discovery is provided for under the Board rules and by section 10(b) of the National Labor Relations Act.³³

28. 29 C.F.R. § 102.30 (1970) (emphasis added).

29. *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967), *cert. denied*, 390 U.S. 955 (1968); 29 C.F.R. § 102.35 (1970).

30. See cases cited note 23 *supra*.

31. 93 CONG. REC. 3529 (1947) (remarks of Representative Owens).

32. *Cf.*, *Walsh-Lumpkin Wholesale Drug Co.*, 129 N.L.R.B. 294, 296 (1960). *But see* *NLRB v. Southern Materials Co.*, 345 F.2d 240, 244 (4th Cir. 1965) (dictum) (NLRB, acting in a quasi-judicial capacity as it does, should freely permit discovery procedure in order that rights of all parties may be properly protected); *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 407 (7th Cir. 1961) (dictum) (administration of Board rules might be an abuse of discretion, providing a party made a sufficient showing of need for discovery).

33. *NLRB v. Miami Coca-Cola Bottling Co.*, 403 F.2d 994 (5th Cir. 1968); *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273 (5th Cir. 1967).

In *Interboro* the Second Circuit continued to uphold the Board's contention that rule 102.30 authorizes the taking of depositions only if the witness whose deposition is sought may be unavailable at the hearing and does not authorize general pre-hearing discovery. The court explained that rule 102.30 had evolved without substantial change from the original rule promulgated in 1935 which in form had been patterned after Equity Rule 47. The latter rule permitted depositions to be taken "upon good and exceptional cause" for the purpose of obtaining and preserving evidence for trial but not for the purpose of discovery.³⁴ Furthermore, the court held that the NLRA does not require the Board to adopt discovery procedures although the Board may promulgate such under its general rule-making power. The court denied that Congress had ever intended for the Administrative Procedure Act to provide for pre-trial discovery, supporting this position by stating that "our research discloses no federal agency which gives litigants the right to pre-hearing discovery in proceedings before it."³⁵ The Fifth Circuit's position that section 10(b) and Board rules provide for discovery was rejected for the reason that in both instances the Fifth Circuit had completely ignored or misinterpreted their respective legislative histories. Recognizing, however, that its sister court's interpretation of the rules on their face was at least arguably meritorious, the Second Circuit concluded that, even if discovery were provided for under the rules, the trial examiner's denial of discovery would be sustained for failure to show procedural error due to abuse of discretion.³⁶ After having disposed of any claims of prejudice arising directly from the denial of discovery, since no showing had been made that unforeseen evidence crucial to the company's case was introduced at the hearing, the court upheld the trial examiner's refusal to grant a continuance and ordered enforcement of the back pay order.

There is little question that section 10(b) of the NLRA does not literally afford discovery,³⁷ and it has thus far been futile to attempt to convince the Board that their rules mean other than what *they* say they mean.³⁸ Given these premises as well as supporting legislative history the Second Circuit was correct in denying the claim that pre-

34. See generally Sunderland, *The New Federal Rules*, 45 W. VA. L.Q. 5, 19 (1938).

35. 432 F.2d at 858-59.

36. See notes 28-29 *supra* and accompanying text.

37. See note 25 *supra* and accompanying text.

38. See, e.g., Walsh-Lumpkin Wholesale Drug Co., 129 N.L.R.B. 294, 296 (1960).

hearing discovery before the Board is specifically authorized. But whether the Board's basic policy of refusing to authorize discovery is sound and equitable remains unanswered. Those against discovery argue that such procedure would make NLRB hearings more costly and time consuming³⁹ and promote harrassment and intimidation of employees.⁴⁰ In rebuttal it is suggested that discovery minimizes gamesmanship and surprise, helps identify and simplify the issues,⁴¹ and could thereby expedite adjudications.⁴² Many authorities feel that there is no valid reason to suppose that such a result would not also accrue if discovery were permitted by the Board.⁴³

Denying discovery because of possible employee intimidation is unreasonable in a number of respects. First, subsequent to an employee testifying at the hearing, any pre-hearing statements made by him to a Board representative must be made available to company attorneys for use in cross examination.⁴⁴ This requirement at the least partially negates the protective secrecy with which the Board attempts to surround its witnesses and arguably questions the entire validity of the Board's position. Second, protection from both pre- and post-hearing intimidation is independently provided by the LMRA which makes it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under the Act.⁴⁵ Third, use of discovery procedures for harrassment or intimidation purposes would be most difficult since a Board representative could certainly be present at the taking of the deposition. Finally, future intimidation would be most unlikely since any wrongful actions taken toward the employee concerned would be extremely suspect and highly vulnerable to an unfair labor practice charge. In view of the success of discovery in our courts and in light of the inherent unfairness to litigants resulting

39. Melnick, Little, & Tripp, *supra* note 22, at 281.

40. Manoli & Joseph, *supra* note 21, at 15; 48 N.C.L. REV., *supra* note 21.

41. Berger, *supra* note 11, at 28.

42. Melnick, Little, & Tripp, *supra* note 22, at 262-63.

43. Berger, *supra* note 11, at 29; Berger, *Discovery in Administrative Proceedings: Why Agencies Should Catch Up With the Courts*, 46 A.B.A.J. 74 (1960); Cox, *Adherence to the Rules of Evidence and Federal Rules of Civil Procedure as a Means of Expediting Proceedings*, 12 AD. L. BULL. 51, 55 (1959); Gallagher, *Use of Pre-Trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings*, 12 AD. L. BULL. 44, 47 (1959); Melnick, Little, & Tripp, *supra* note 22, at 262-63.

44. 29 C.F.R. § 102.118(b)(1) (1970).

45. Labor-Management Relations (Taft-Hartley) Act § 8(a)(4), 29 U.S.C. § 158(a)(4) (1964).

from the “one-way street” discovery currently practiced by the Board, the remaining possibility of intimidation based upon discovered information should not deter the adoption of at least a modified form of discovery. Indeed, contrary to the Second Circuit’s conclusion in *Interboro*, the Board’s current policy in this respect is not a “logical one.” Furthermore, contrary to that court’s denial of knowledge of federal agencies which provide for discovery, a number of agencies now permit such a procedure.⁴⁶ Since there is substantial agreement that the Board has the authority to institute a discovery rule and neither Congress nor the courts appears disposed to impose discovery on the Board, it can only be hoped that the Board will follow the lead of the agencies permitting such a procedure. If and when a discovery rule is drafted, the drafters should not be confronted with a choice between administrative efficiency and fundamental fairness. Instead, they must achieve the attainable integration of the former with the latter,⁴⁷ while insuring that the rights of *all* parties are properly protected.⁴⁸

VII. DECISIONS AND SANCTIONS

ICC Continuing Jurisdiction

The Interstate Commerce Commission has been given broad statutory authority to rehear previously decided cases¹ and “reverse, change, or modify” its earlier orders.² Moreover, the Commission has asserted that through its inherent power as an administrative agency it may on its own motion reconsider any matter on a theory of continuing jurisdiction.³ However, once the Commission has issued a certificate of public convenience and necessity, certain statutory

46. See notes 14-16, *supra* and accompanying text. For a discussion of the Administrative Conference recommendation on discovery, see Tomlinson, *Discovery in Agency Adjudication*, 1971 DUKE L.J. 89.

47. Symposium, *The Role of Discovery in Federal Trade Commission Proceedings*, 21 AD. L. REV. 439, 442 (1969).

48. See *NLRB v. Southern Materials Co.*, 345 F.2d 240, 244 (4th Cir. 1965).

1. Interstate Commerce Act, 49 U.S.C. § 17(6) (1964) (parties may petition for rehearing at any time).

2. *Id.* § 17(7).

3. See *Eazor Express, Inc.—Purchase—Fleet Highway Freight Lines, Inc.*, 101 M.C.C. 719, 720 (1967).