

DISCOVERY AT THE NLRB—WHY NOT?¹

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Table of Contents

I. INTRODUCTION	1
II. PURPOSE OF DISCOVERY	2
A. <i>Bill of Particulars</i>	5
B. <i>Depositions</i>	5
C. <i>Disclosure of Board Documents “At Trial”</i>	6
D. <i>Subpoenas</i>	7
E. <i>Pre-hearing Conferences</i>	12
F. <i>Interrogation</i>	12
G. <i>Freedom of Information Act Requests</i>	12
III. JUSTIFICATION FOR THE BOARD’S DENIAL OF PRE-HEARING DISCOVERY	14
IV. CONCLUSION	20

I. INTRODUCTION

Since its inception in 1935, the National Labor Relations Board (“NLRB”) has maintained that “[p]retrial discovery in Board proceedings is neither constitutionally nor statutorily required.”² Yet, for at least half a

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2. *Offshore Mariners United*, 338 N.L.R.B. No. 88, 2002 WL 31753330 (N.L.R.B. Nov. 22, 2002), quoting *Washington Heights*, 897 F.2d 1238, 1245 (2d Cir. 1990). *See also*, *Maywood, Inc.*, 251 N.L.R.B. 979, 980 n.2 (1980) (holding that “[D]iscovery is not a constitutional right in administrative proceedings and, therefore, the Board’s failure to

century Supreme Court opinions have reflected the premise that “the public . . . has a right to every man’s [or woman’s] evidence.”³ While the Federal Rules have permitted extensive discovery, the NLRB has resisted discovery, acting under its statutory mandate to “make such rules and regulations as may be necessary to carry out the provisions of [the National Labor Relations Act].”⁴ And while the Freedom of Information Act (“FOIA”) has provided the public with vast rights to procure copies of government documents and publications,⁵ potential witnesses’ statements collected during the Board’s investigation have been held to be exempt from disclosure.⁶ This paper will explore the justification for the NLRB’s position and will assert the value of preserving limited discovery practices in labor disputes.

II. PURPOSE OF DISCOVERY

Discovery in litigation is generally recognized as beneficial because it narrows and clarifies the issues in controversy⁷ and it determines the available testimony and other information that would support a resolution of the disputed issues.⁸ In general, these functions eliminate surprises and enhance the investigatory abilities of the parties. The Supreme Court has noted that “[m]odern instruments of discovery serve a useful purpose They together with pretrial procedures make a trial less a game of blindman’s buff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent. Only strong public policies weigh

provide for it is not a violation of due process of law”); *Beta Steel Corp.*, 326 N.L.R.B. 1267 n.3 (1998) (holding that “[u]nder the Board’s longstanding rules . . . , [the employer] was not entitled to prehearing discovery); *Equitable Life Assurance Soc’y*, 266 N.L.R.B. 732, 733 (1983) (holding that “[I]t is well settled that a party has no right to investigatory affidavits or the identity of witnesses in proceedings before the Board”) (citing *NLRB v. Robbins Tire and Rubber Co.*, 437 U.S. 214 (1978)).

3. *See* *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972); *United States v. Bryan*, 339 U.S. 323, 331 (1950) (quoting 8 JOHN H. WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2192 (John T. McNaughton rev. 1961)). *See also* *Elkins v. United States*, 364 U.S. 206, 234 (1960) (Frankfurter, J., dissenting) (stating that society is similarly entitled).

4. 29 U.S.C. § 156. *See also* *NLRB v. Valley Mold Co.*, 530 F.2d 693 (6th Cir. 1976) and *Pepsi-Cola Bottling Co.*, 315 N.L.R.B. 882 (1994) (holding that the Federal Rules of Civil Procedure providing for compulsory pretrial discovery are not applicable to Board proceedings).

5. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979) (observing that FOIA was passed as a response to fears of governmental secrecy and abuse of power).

6. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

7. *Hickman v. Taylor*, 329 U.S. 495, 501 (1947).

8. *Id.*

against disclosure.”⁹ The Federal Rules of Civil Procedure mandate construction and administration of the rules to secure “the just, speedy, and inexpensive determination of every action.”¹⁰ The widely held opinion appears to be that the truth should be uncovered efficiently and cooperatively unless it threatens a superior public interest.

Accordingly, the scope of discovery under the Federal Rules is broad and permits discovery of witnesses or evidence “that the disclosing party may use to support its claims or defenses.”¹¹ The promulgation of the Federal Rules in 1938 brought about a fundamental change in trial preparation in federal court, which until then had been based almost exclusively on pleadings.¹² The new rules allowed more extensive trial preparation through discovery mechanisms including depositions, written interrogatories, production of documents, and requests for admissions.¹³ Federal Rule of Civil Procedure 26(f), which was added to the Federal Rules in 1993 and amended in 2000, directs that the parties must “as soon as practicable” confer on “the possibilities for a prompt settlement or resolution of the case” and must either “make or arrange for” the automatic disclosures of information required by the Federal Rules.¹⁴ The parties must also jointly prepare a “proposed discovery plan that indicates the parties’ views and proposals” on the timing and scope of discovery and any limitations that should be imposed on discovery.¹⁵

Despite the goal of discovery to transform civil litigation into an efficient, swift, and inexpensive process, prominent critics have described discovery practice as a major problem.¹⁶ Ever since the formation of liberal discovery rules, dissenting views as to discovery’s appropriateness and costs have been present. William D. Mitchell, Chairman of the Federal

9. *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958) (citations omitted).

10. FED. R. CIV. P. 1.

11. FED. R. CIV. P. 26(a)(1)(A) & (B).

12. See Joel P. Bennett, *Post-Complaint Discovery in Administrative Proceedings: The FTC as a Case Study*, 1975 DUKE L.J. 329 (1975); Edward A. Tomlinson, *Discovery In Agency Adjudication*, 1971 DUKE L.J. 89 (1971).

13. FED. R. CIV. P. 26(a)(5).

14. FED. R. CIV. P. 26(f).

15. *Id.*

16. See, e.g., Griffin B. Bell et al., *Automatic Disclosure in Discovery—The Rush to Reform*, 27 GA. L. REV. 1, 8 (1992) (referring to our “litigious society” and criticizing cost and delay); Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals to Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189 (1992); Lawrence M. Frankel, *Disclosure in the Federal Courts: A Cure for Discovery Ills?* 25 ARIZ. ST. L.J. 249 (1993); Edward J. Imwinkelried, *A New Antidote for an Opponent’s Pretrial Discovery Misconduct: Treating the Misconduct at Trial as an Admission by Conduct of the Weakness of the Opponent’s Case*, 1993 BYU L. REV. 793 (1993).

Rules Advisory Committee, envisaged in 1936: “We are going to have an outburst against this discovery business unless we can hedge it about with some appearance of safety against fishing expeditions.”¹⁷ Significantly, the 2000 amendments to the Federal Rules nudge judges into more active involvement in and management of the discovery process to curtail abuses. For instance, the new rules add a presumptive limit on the length of depositions.¹⁸ In addition, the discovery rules have been amended to limit the quantity and length of interrogatories.¹⁹

The recent amendments also limit discovery to matters “not privileged, that [are] relevant to the claim or defense of any party For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action.”²⁰ Unlike the earlier rules that allowed broad discovery of information that “appear[ed] reasonably calculated to lead to the discovery of admissible evidence,”²¹ the new rules only allow expansive discovery with judicial permission. The latest amendments to the Federal Rules noticeably establish a trend towards court-managed limits on the discovery process, and in favor of judicial management of pretrial litigation. These recent amendments might be able to change civil litigation from a slow, expensive, inefficient system that is subject to manipulation by lawyers into a faster, cheaper, and more efficient system only if judges are willing to exert control over the process, in accordance with the rules.

In contrast to federal courts, limitless discovery has never been a possibility at the NLRB. The NLRB rules state unambiguously, “[a]ny attempt to use [the Federal Rules of Civil Procedure providing for compulsory pretrial discovery] should be resisted.”²² Authority for this rule can be found in the Supreme Court’s decision in *Robbins Tire & Rubber Co.*²³ and other courts’ holdings stating explicitly that the Federal Rules of Civil Procedure are not applicable to Board proceedings.²⁴ Once a charge

17. Proceedings of the Meeting of the Advisory Committee on Rules for Civil Procedure of the Supreme Court of the United States (Feb. 22, 1935), *quoted in* Stephen N. Subrin, *Fishing Expeditions Allowed: The Historical Background of the 1938 Federal Discovery Rules*, 39 B.C. L. REV. 691, 722 (1998).

18. FED. R. CIV. P. 30(d) (stating “Unless otherwise authorized by the court or stipulated by the parties, a deposition is limited to one day of seven hours.”).

19. *See* FED. R. CIV. P. 33(a) (stating “[w]ithout leave of court or written stipulation, any party may serve upon any other party” twenty-five written interrogatories, “including all discrete subparts”).

20. FED. R. CIV. P. 26(b)(1) (1991).

21. FED. R. CIV. P. 26(b)(1) (1991) (amended 2000).

22. N.L.R.B. Casehandling Manual ¶ 10292.4.

23. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

24. The N.L.R.B. Casehandling Manual ¶ 10292.4 mentions specifically *NLRB v. Valley Mold Co.*, 530 F.2d 693 (6th Cir. 1976) and *Pepsi-Cola Bottling Co.*, 315 N.L.R.B.

is filed with the Board's regional office, the agency undertakes its own investigation.²⁵ One purpose of the investigation is "to seek out all material evidence in the spirit of providing the Regional Director with a complete picture of the events so as to permit an informed decision on the case."²⁶ Initially, the investigation focuses on interviews with the charging party and other witnesses.²⁷ In order to "reveal the totality of the circumstances, including relevant background information," the Board agent has the responsibility to take the necessary steps to "ascertain the truth of the allegations of a charge" and to follow "all promising leads."²⁸ The Regional Director then determines whether to issue a complaint.²⁹ At this point the function of the regional office changes from being investigatory to being prosecutory in preparation of the case, which is to be tried before an administrative law judge (ALJ).³⁰

Notwithstanding the Board's resistance to pretrial discovery, its rules provide for pretrial motions, including motions for bills of particulars,³¹ depositions,³² subpoenas,³³ and pre-hearing conferences.³⁴ In addition, limited discovery can be gained through disclosure of Board documents "at trial," legal interrogation, and FOIA requests.³⁵

A. Bill of Particulars

A motion for a bill of particulars is available to obtain specificity regarding either a complaint that contains insufficient detail, or in rare instances, an affirmatively pleaded defense that lacks sufficient details.³⁶

B. Depositions

882 (1994).

25. N.L.R.B. Casehandling Manual ¶¶ 10050-10070 ("Investigation").

26. N.L.R.B. Casehandling Manual ¶ 10050.

27. N.L.R.B. Casehandling Manual ¶ 10054. The Board has consistently held that affidavits submitted to a regional director during the investigation of objections are not part of the record before the Board in a representation proceeding or in a related unfair labor practice proceeding. *Odom Sausage Co.*, 256 N.L.R.B. 284 (1981) (citing *Colonial Manor 1977, Inc.*, 253 N.L.R.B. 1183 (1981); *Klingler Elec. Corp.*, 245 N.L.R.B. 1247 (1979)).

28. N.L.R.B. Casehandling Manual ¶ 10054.

29. N.L.R.B. Casehandling Manual ¶ 10068.

30. ROBERT A. GORMAN, *BASIC TEXT ON LABOR LAW* 8 (1976).

31. 29 C.F.R. §§ 102.24-.28 (1999); N.L.R.B. Casehandling Manual ¶¶ 10292.1-.2.

32. 29 C.F.R. § 102.30 (1999).

33. 29 C.F.R. § 102.31 (1999).

34. 29 C.F.R. § 102.35(a)(7) (1999).

35. These methods of discovery will be discussed *infra* in sections C., F. and G.

36. N.L.R.B. Casehandling Manual ¶¶ 10292.1-.2.

Because compulsory pretrial discovery is not applicable to Board proceedings, the Board's rules state, "depositions may not be used merely for purposes of pretrial discovery," but require a showing of good cause.³⁷ "Good cause" generally relates to situations where a witness will not be available to testify at the hearing.³⁸

C. Disclosure of Board Documents "At Trial"

Upon request, certain statements and materials must be made available by the General Counsel after a witness has testified at a hearing for purposes of cross-examination.³⁹ But the General Counsel has no obligation

37. N.L.R.B. Casehandling Manual ¶ 10352.1. In *David R. Webb Co.*, 311 N.L.R.B. 1135, 1135 (1993), the Board affirmed its policy that prehearing discovery, including depositions, is available only under "special circumstances in which witnesses are distant or otherwise difficult to reach." Also, in *Valley Mold Co.*, 215 N.L.R.B. 211, 213 (1974), the Board affirmed an administrative law judge's finding that the respondent had sufficient opportunities to prepare its defense, reasoning that "(1) discovery through depositions is not a required practice in Board proceedings, and (2) there was no showing that the employers or other persons the witnesses had contacted in their efforts to get work would not be available for trial."

38. N.L.R.B. Casehandling Manual ¶ 10352.2. The NLRB Rules and Regulations provide that any party may make an application for deposition to the Regional Director before the hearing or, if the hearing has opened, to the Administrative Law Judge. See NLRB Rules and Regulations; 29 C.F.R. § 102.30(a) (2005). An order granting the application will be served on the parties if, in the discretion of the Regional Director or Administrative Law Judge, good cause has been shown. *Id.*

39. 29 C.F.R. § 102.118 (b) (2005). This rule follows the rule in *Jencks v. United States*, 353 U.S. 657, 668-69 (1957), allowing a defendant access to the prior statements of a witness once that witness has testified. The main reason for making witness statements accessible to the other party is the impeachment value of the statements for purposes of cross-examination. *Id.* at 667. See *Senftner Volkswagen Corp.*, 257 N.L.R.B. 178, 187 (1981) (holding that all parties "should have equal access to pretrial affidavits" after examination, for the purposes of cross-examination and impeachment); *In re Capehorn Indus., Inc.* 336 N.L.R.B. 364, 366 n. 7 (2001) ("[U]nder well-established Board precedent, a judge may properly credit a witness's prehearing affidavit over his or her testimony at the hearing."). But the Board has affirmed an administrative law judge's holding that a tape recording "does not fall within the meaning of the term 'statement' under the Jencks' Act and, therefore did not have to be turned over to [an employer] at the completion of [the witness's] direct examination." *Decca Ltd. P'ship*, 327 N.L.R.B. 980, 990 (1999) ("[C]ontemporaneous statements captured on a tape recording at a substantive event are not Jencks statements because they are not descriptions of past events.") (citing *Delta Mech., Inc.*, 323 N.L.R.B. 76 (1997). See also *Leisure Knoll Ass'n, Inc.*, 327 N.L.R.B. 470, 470 n. 1 (1999) (holding that the General Counsel was not required to turn over a tape recording, since it contained not a witness statement but a conversation by the employer's manager.).

to disclose any exculpatory evidence contained in investigatory files.⁴⁰

D. Subpoenas

Subpoenas are available to all parties in an unfair labor practice proceeding to require the attendance and testimony of witnesses and the production of any information in their possession or under their control.⁴¹ It is well established under the Act that the “Board may issue subpoenas requiring both the production of evidence and testimony during the investigatory stages of an unfair labor practice proceeding.”⁴² “The Board has held that in questions regarding the enforcement or revocation of subpoenas the Federal Rules of Civil Procedure, although not binding on [the] Agency, provide useful guidance”⁴³ Federal Rule of Civil Procedure 26(b)(3) provides that a party seeking to obtain documents “prepared by another party in anticipation of litigation” must show both that “the party seeking the documents has a substantial need for the materials in preparation of his case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means.”⁴⁴

On May 1, 2000, then General Counsel Leonard R. Page issued a memorandum substantially increasing the authority of the Regional Offices to issue investigative subpoenas without first obtaining approval from headquarters.⁴⁵ Accordingly, the new NLRB Casehandling Manual departs from prior practice by granting Regional Directors “full discretion” to issue investigative subpoenas against charged parties, as well as third parties,

40. *Erie County Plastic Corp.*, 207 N.L.R.B. 564, 570 (1973); *Caterpillar, Inc.* 313 N.L.R.B. 626, 627 n. 4 (quoting *N. Am. Rockwell Corp. v. NLRB*, 389 F.2d 866 (10th Cir. 1968)).

41. 29 C.F.R. § 102.31 (2005). The Board’s Rules and Regulations require that subpoenas be accompanied by witness and mileage fees. 29 C.F.R. § 102.66(g) (2005). See *Rolligon Corp.*, 254 N.L.R.B. 22 (1981) (holding that subpoenas were defective because they were not accompanied by witness and mileage fees); *O.K. Machine & Tool Corp.*, 279 N.L.R.B. 474 (1986).

42. *NLRB v. N. Bay Plumbing*, 102 F.3d 1005, 1008 (9th Cir. 1996) (discussing 29 U.S.C. § 161(1) (1980)). The Board in *North Bay Plumbing, Inc.*, 327 N.L.R.B. 899, 899 n.1 (1999), rejected “the contention that the Board [did] not have the statutory authority and/or administrative rules permitting the issuance and enforcement of precomplaint subpoenas.”

43. *Marian Manor for the Aged and Infirm, Inc.*, 333 N.L.R.B. 1084 (2001) (citing *Brink’s Inc.*, 281 N.L.R.B. 468 (1986)).

44. FED. R. CIV. P. 26(b)(3). In *Conagra, Inc.*, 311 NLRB 1056 (1993), the Board adopted a Regional Director’s order denying subpoena enforcement proceedings since the employer could have obtained by other means information regarding names of employees attending a union meeting.

45. *Investigative Subpoenas*, Memorandum GC 00-02 (May 1, 2000), 2000 WL 33958145 (N.L.R.B.G.C.).

when the charged party has not provided “full and complete cooperation”⁴⁶ or “whenever such evidence cannot be obtained by reasonable voluntary means.”⁴⁷ An investigative subpoena may even be issued against a charged party or its attorney who “has interfered with, unduly delayed, or impeded the investigation, including the Board agent’s interview.”⁴⁸ The Rules make clear that “[t]here is no right to an investigative subpoena available to parties other than the General Counsel.”⁴⁹

ALJ’s, in order to maintain the fairness and integrity of the hearing process, have imposed sanctions for parties who refuse to produce records as required by a subpoena. An example of such a sanction was an ALJ’s ruling that a company that refused to comply with a discovery order to produce documents and records, had “forfeited its right to cross-examine witnesses with reference to any matter which could have been produced by complying with the subpoena.”⁵⁰ The First Circuit held that the imposition of the ALJ’s sanction was proper when faced with such a recalcitrant party.⁵¹ A court also held that an ALJ was justified in drawing an adverse inference against a company that had failed for seven years to produce relevant documents within its control pursuant to a subpoena.⁵²

District courts have the exclusive authority to compel compliance with agency subpoenas.⁵³ Federal courts use a low standard of review in determining whether to grant an agency’s request for enforcement of a subpoena. For example, the Supreme Court has stated that duly issued subpoenas are to be enforced if the agency is seeking information “not plainly incompetent or irrelevant to any lawful purpose.”⁵⁴ The basic requirement for issuing and enforcing a subpoena is that the evidence called for by the subpoena must relate to a “matter under investigation or question.”⁵⁵

The kinds of information that may be obtained by subpoena are as varied as the issues that arise in the context of labor relations. For example,

46. N.L.R.B. Casehandling Manual ¶ 10054.5.

47. N.L.R.B. Casehandling Manual ¶ 11770.2.

48. N.L.R.B. Casehandling Manual ¶ 10058.5(b).

49. N.L.R.B. Casehandling Manual ¶ 117701.1.

50. NLRB v. C.H. Sprague & Son Co., 428 F.2d 938, 942 (1st Cir. 1970).

51. *Id.* at 943. *See also* NLRB v. Am. Art Indus., Inc., 415 F.2d 1223, 1230 (5th Cir. 1969) (holding that the ALJ acted properly in excluding secondary evidence of a party who refused to provide the primary evidence as required by subpoena, because of the need to maintain the fairness and integrity of the hearing process).

52. UAW v. NLRB, 459 F.2d 1329, 1338 (D.C. Cir. 1972).

53. NLRB v. Int’l Medication Sys., 640 F.2d 1110, 1115-16 (9th Cir. 1981).

54. *Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943).

55. NLRB v. Williams, 396 F.2d 247, 249 (7th Cir. 1968).

following a union's request for a Gissel bargaining order,⁵⁶ the Board required an employer to produce Internal Revenue Service forms for the purpose of comparing signatures on the forms with signatures on authorization cards.⁵⁷ An employer has been required to produce personnel handbooks, rulebooks, guidelines, codes of employee conduct, and the like.⁵⁸ Similarly, the Board required an employer to produce documents relating to the purchase of a video, which was designed to show an agency relationship between the employer and another company.⁵⁹ The Board has also approved a subpoena duces tecum to require an employer to produce affidavits and statements taken from employees by the employer's counsel.⁶⁰ And the Board has held that members of the news gathering media have no absolute privilege not to appear and testify when the

56. If the Board determines that the employer committed serious unfair labor practices that would render a free election improbable, the Board will grant a Gissel bargaining order on the basis of signed union authorized cards. *N.L.R.B. v. Gissel Packing Co.*, 395 U.S. 575, 596-97 (1969). The Board will certify the union as the exclusive bargaining representative of the unit of employees and order the employer to begin bargaining in good faith with the union. *Id.* at 583.

57. In *NLRB v. Martins Ferry Hospital Ass'n*, 649 F.2d 445, 448 (6th Cir. 1981), the court required the employer to obey the Board's subpoena duces tecum for IRS W-4 forms to compare signatures with signatures on authorization cards for the purpose of ruling on the union's request for a Gissel bargaining order. At the same time the court affirmed that the employer's request for union authorization cards was exempt from disclosure under FOIA. *Id.* at 449. The court found that enforcing the subpoena while denying the employer's request did not amount to a denial of substantive due process. *Id.*

58. *Graham-Windham Serv. to Families and Children, Inc.*, 312 N.L.R.B. 1199 (1993).

59. *Projections, Inc.*, 331 N.L.R.B. 1067 (2000).

60. *Tuf-Flex Glass*, 262 N.L.R.B. 445, 445 n. 4 (1982) (citing *Upjohn Co. v. United States*, 449 U.S. 383 (1981)). The employer argued that these affidavits were protected from disclosure by the attorney-client privilege. In *Upjohn*, the Supreme Court held that communications made by nonmanagerial employees to counsel at the direction of their corporate superiors in order to secure legal advice from counsel were covered by the attorney-client privilege since "the communications concerned matters within the scope of the employees' corporate duties" that could bind the corporation, the employees were made aware of the legal implications of the investigation, and the communications were considered highly confidential. *Upjohn*, 449 U.S. at 394-95 n.4. But in *Tuf-Flex Glass*, the Board considered that, unlike *Upjohn*, the affidavits "concern[ed] statements made by nonsupervisory employees about the upcoming union election," which were "clearly not matters within the scope of these employees' corporate duties which could [b]ind the employer." *Tuf-Flex Glass*, 262 N.L.R.B. at 445 n.4. The Board, noting that the employer was required to produce the affidavits for the purpose of cross-examination, only after the direct examination of each affiant called as a witness, held: "[O]nce a witness has testified on direct examination about the matters covered in his affidavit, neither the employer nor the employee can realistically assert much further interest in keeping the contents of his affidavit confidential." *Id.* See also *Patrick Cudahy, Inc.*, 288 N.L.R.B. 968 (1988) (discussing the attorney-client privilege).

situation does not involve a confidential source of information.⁶¹ But a “mere fishing expedition” does not entitle a party to a subpoena from the Board.⁶²

While subpoenas have been used to compel the General Counsel to disclose any and all evidence inconsistent with the evidence presented at the hearing, subpoenas cannot be used to compel testimony from Board employees or to obtain materials from the Board’s files.⁶³ Similar to other federal agencies, the NLRB has the authority to spell out guidelines for answering discovery requests for documents and testimony. In *Touhy v. Ragen*, the Supreme Court afforded protection to agency subordinates but refused to determine an agency head’s authority to disobey a discovery request.⁶⁴ After considering a prisoner’s request to subpoena a Federal Bureau of Investigation (“FBI”) agent whom he claimed had exculpatory evidence, the Court explained that it was essential for agencies to centralize the determination whether to challenge a subpoena because of the variety of agency information and “the possibilities of harm from unrestricted disclosure.”⁶⁵

Strong policies weigh against involving Board employees as witnesses in Board litigation considering the sensitive role of the Board agent in investigating and resolving unfair labor practice charges and the danger of appearing partisan.⁶⁶

61. *Valley Camp Coal Co.*, 265 N.L.R.B. 1683, 1684 (1982).

62. *Burns Int’l Sec. Serv., Inc.*, 278 N.L.R.B. 565, 566 (1986); *Millsboro Nursing & Rehab. Center, Inc.*, 327 N.L.R.B. 879, 879 n. 2 (1999); *United Ass’n of Journeymen and Apprentices of the Plumbing and Pipe Fitting Indus. of the United States and Canada, Local Union No. 562*, 328 N.L.R.B. 1235 (1999) (affirming a hearing officer’s refusal to permit a union to engage in a fishing expedition through the use of the Board’s subpoena authority). Where the employer had other methods and means to obtain the information, the Board found that “the Employer’s subpoena for purposes of obtaining[a] marked Excelsior list was appropriately quashed.” *Avante At Boca Raton, Inc.*, 323 N.L.R.B. 555, 556 n. 6 (1997). The Board has also revoked subpoenas that were “unreasonably broad,” did not specify time limitations, put substantial privacy rights at stake, and raised the issue of attorney-client privilege. *See, e.g., Brink’s, Inc.*, 281 N.L.R.B. 74 (1986).

63. *North American Rockwell Corp. v. NLRB*, 389 F.2d 866 (10th Cir. 1986).

64. 340 U.S. 462 (1951).

65. *Id.* at 469-70.

66. In *Frank Invaldi*, 305 N.L.R.B. 493, 494 (1991), after weighing the General Counsel’s argument that in the absence of unusual circumstances Board agents should be precluded from taking apparent partisan positions and giving testimony that would help one party and harm the other, the Board granted a petition to quash both the employer’s and the union’s subpoenas. *See generally*, *Millsboro Nursing & Rehab. Ctr., Inc.* 327 N.L.R.B. 879 (1999); *Sunol Valley Golf Co.*, 305 N.L.R.B. 493 (1991), *amended by* 310 N.L.R.B. 357 (1993), *enforced*, 48 F.3d 444 (9th Cir. 1995); *Finally, Inc.*, 229 N.L.R.B. 1128, 1128 n.3 (1977), *enforced in part sub nom.* *NLRB v. Silver Spur Casino*, 623 F.2d 571 (9th Cir. 1980); *Stephens Produce Co. v. NLRB*, 515 F.2d 1373, 1376 (8th Cir. 1975); *Behring Int’l*,

Some courts clearly have been uneasy with federal agencies' apparently unrestrained discretion to avoid discovery requests for employee testimony, have found that agencies are subject to the Federal Rules of Civil Procedure, and have required agencies such as the NLRB to claim a privilege under its housekeeping regulations in order to withhold information.⁶⁷ On the basis of an agency's explicit or implicit claim of privilege, several federal courts have found authority to review agency head decisions when the agency head has directed a subordinate not to testify. For example, in *NLRB v. Capitol Fish Co.*,⁶⁸ the company subpoenaed an NLRB attorney to testify in an unfair labor practice hearing against it. Although the company did not directly subpoena the NLRB, the court held that a request for evidence or testimony "can be properly denied only if the evidence or testimony is privileged."⁶⁹ The court explained, "the question of privilege is as squarely raised by an unexplained refusal to comply as by an express claim of privilege,"⁷⁰ and concluded that the judiciary must test the validity of any privilege claim.⁷¹ Effectively rejecting the argument that any independent housekeeping privilege exists, the Ninth Circuit in *Exxon Shipping Co. v. United States Department of Interior*⁷² found that there was no statutory authority authorizing agency heads to withhold testimony and documents from federal courts.⁷³

But following review, courts may well decide that an agency is entitled to a protective order. This happened in *Leyh v. Modicon, Inc.*,⁷⁴ where a federal district court, following the Federal Rules of Civil Procedure, reviewed a subpoena of an EEOC employee.⁷⁵ The court held, "the Federal Rules of Civil Procedure give the federal courts ample power and flexibility to prevent or restrict discovery that is obtainable from some other source that is more convenient, less burdensome, or less expensive, or where the

Inc., 252 N.L.R.B. 354 (1980).

67. See, e.g., *Harvey Aluminum Inc. v. NLRB*, 335 F.2d 749, 755 (9th Cir. 1964).

68. 294 F.2d 868, 875 (5th Cir. 1961).

69. *Id.*

70. *Id.*

71. *Id.* Implying that the judiciary was less prone to bias than an agency, the court affirmed: "Responsibility for deciding the question of privilege properly lies in an impartial independent judiciary—not in the party claiming the privilege and not in a party litigant." *Id.* at 876.

72. 34 F.3d 774 (9th Cir. 1994).

73. *Id.* at 777-78. The court analyzed the Housekeeping Statute 5 U.S.C. §301 (1994) and found that it "did not provide 'substantive rules' regulating disclosure of government information." *Exxon Shipping Co.*, 34 F.3d at 777 (citing *Chrysler Corp. v. Brown*, 441 U.S. 281, 310 (1979).)

74. 881 F. Supp 420 (1995).

75. *Id.* at 424.

burden or expense of the proposed discovery outweighs its likely benefit.”⁷⁶ After analyzing the federal rules, the court concluded that a protective order should be granted to prevent injuries to the EEOC.⁷⁷

E. Pre-hearing Conferences

The ALJ may hold pre-hearing conferences to “further explore settlement, work out stipulations and joint exhibits and clarify pleadings and theories set forth in the complaint and answer.”⁷⁸ Short of settlement, the goal of these conferences is “simplification of the issues.”⁷⁹

F. Interrogation

An employer charged with an unfair labor practice under the National Labor Relations Act may prepare for a hearing by interviewing employees to discover facts within the limits of the issues raised by a complaint, despite the inherent danger of coercion, if the interviews are performed for the purpose of preparing its defense for trial. However, the employer must limit itself to what is required for its defense. The employer cannot seek information on union membership or activity, dissuade employees from engaging in union activity, or interfere with statutory rights of self organization.⁸⁰ In addition, this privilege is predicated on the employer providing the following safeguards:⁸¹

[T]he employer must [1] communicate to the employee the purpose of the questioning; [2] assure [the employee] that no reprisal will take place; and [3] obtain [the employee’s] participation on a voluntary basis; [4] the questioning must occur in a context free from employer hostility to union organization and must not be itself coercive in nature⁸²

G. Freedom of Information Act Requests

76. *Id.*

77. *Id.*

78. N.L.R.B. Casehandling Manual ¶ 10381.

79. 29 C.F.R. § 102.35(a)(7) (2005).

80. *Joy Silk Mills, Inc. v. NLRB*, 185 F.2d 732, 743 (D.C. Cir. 1950); National Labor Relations Act of 1935, § 8(a)(1), *amended by* Labor Management Relations Act of 1947, 29 U.S.C. § 141, 158(a)(1) (2005).

81. *Johnnie’s Poultry Co.*, 146 N.L.R.B. 770, 775 (1964), *enforcement denied* 344 F.2d 617 (8th Cir. 1965).

82. *Id.*

FOIA,⁸³ which was passed as a response to fears of governmental secrecy and abuse of power, provides the public with vast rights to procure copies of government documents and publications.⁸⁴ Notwithstanding the extent of these rights, the United States Supreme Court in *Robbins Tire & Rubber Co.*⁸⁵ held that pre-hearing witness statements were exempt from disclosure under the FOIA until the completion of the Board's unfair labor practice proceedings.⁸⁶ In *Robbins Tire & Rubber Co.*, following the Board's unfair labor practice complaint against the employer for alleged interference with the protected rights of employees, the employer requested copies of all witness statements that the Board obtained during its investigation.⁸⁷ The Court addressed the question raised by the Board that disclosure of potential witnesses' statements "would interfere with enforcement proceedings" by weighing:

the strong presumption in favor of disclosure under FOIA against the likelihood that disclosure at this time would disturb the existing balance of relations in unfair labor practice proceedings, a delicate balance that Congress has deliberately sought to preserve and that the Board maintains is essential to the effective enforcement of the NLRA.⁸⁸

The *Robbins Tire & Rubber Co.* Court refused to permit the FOIA to weaken the Board's authority to control its unfair labor practice proceedings.⁸⁹ Underlying the Court's decision was an acute awareness of the necessity of employee cooperation to ensure the effectiveness of the NLRA and a concern for the significant potential for employers or unions to use discovery as a means of coercing or intimidating employees and discouraging them from exercising their statutory rights.⁹⁰ The Court stated: "[B]oth employees and nonemployees may be reluctant to give statements to NLRB investigators at all, absent assurances that unless called to testify in a hearing, their statements will be exempt from disclosure until the unfair labor practice charge has been adjudicated."⁹¹

83. 5 U.S.C. § 552 (2005).

84. *See, e.g.*, *Chrysler Corp. v. Brown*, 441 U.S. 281, 285 (1979).

85. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

86. *Id.* at 236.

87. *Id.* at 216.

88. *Id.* at 236. *See also* *H.B. Zachry Co.*, 310 N.L.R.B. 1037, 1038 (1993) (explaining confidentiality interest and policy considerations that weigh in favor of non-discovery).

89. *Robbins Tire & Rubber Co.*, 437 U.S. at 249-51.

90. *Id.* at 238-40.

91. *Id.* at 240.

Circuit courts have elaborated further on the foundation for the Board's limited discovery rules. For example, the Second Circuit has held that an employer has no constitutional right to pre-trial discovery and that despite the provision in section 10(b) of the National Labor Relations Act that NLRB proceedings should be conducted in accordance with the Federal Rules of Evidence, there is no specific authorization or requirement that the Board adopt discovery procedures in unfair labor practice hearings.⁹²

Unlike other circuit courts, the Fifth Circuit has required a more liberal standard for discovery. In *NLRB v. Rex Disposables, Division of DHJ Industries, Inc.*,⁹³ the Court took the position that the Board should permit discovery to protect the rights of all parties if an employer or a union can show "good cause."⁹⁴

III. JUSTIFICATION FOR THE BOARD'S DENIAL OF PRE-HEARING DISCOVERY

A recent NLRB decision encapsulates the main arguments for and against the Board's policy against pretrial discovery. In *Offshore Mariners United*⁹⁵ the Board denied a petition to revoke a subpoena *ad testificandum*, issued by the General Counsel to seek the testimony of a former field director of the company who refused to cooperate voluntarily. A majority of two members defended the Board's limited discovery practices against a strongly worded dissent.⁹⁶ The dissent argued that because the Board's rules currently do not provide discovery rights to all parties, the petition to revoke the subpoena should be granted.⁹⁷ Member Cowen perceived it as inherently unfair that the Board has expanded the authority of the Regional Directors to issue investigative subpoena, while denying the same discovery

92. See *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 856-59 (2d Cir. 1970). See also *Van Bourg, Allen, Weinberg & Roger v. NLRB*, 751 F.2d 982, 985-86 (9th Cir. 1985) (finding documents exempt from disclosure under 5 U.S.C. § 552(b)(7)(C) as law enforcement investigatory documents where their release "would constitute an unwarranted invasion of privacy"); *Alirez v. NLRB*, 676 F.2d 423, 427 (10th Cir. 1982) (holding that the 5 U.S.C. § 552(b)(7)(C) exemption applied as the documents compiled by the Board of its investigation contained information of a "highly intimate and personal nature"); *Nissen Foods (USA) Co. v. NLRB*, 540 F. Supp. 584, 585 (D. Pa. 1982) (holding that documents gathered for law enforcement purposes were protected from release under 5 U.S.C. § 52(b)(7)(A)); *LTV Steel Co. v. Indus. Com'n*, 748 N.E.2d 1176, 1182 (Ohio Ct. App. 2000).

93. 494 F.2d 588 (5th Cir. 1974).

94. *Id.* at 592.

95. 2002 WL 31753330.

96. *Id.* at *1-4.

97. *Id.* at *5 (Member Cowen, dissenting).

rights to charged employers or unions.⁹⁸ He quoted from cases that have described the Board's failure to provide discovery rights for all parties as "trial by ambush" for parties accused of violating the Act.⁹⁹ Mentioning the problem that "[c]ounsel for parties charged with unfair labor practices must, of necessity, engage in considerable guesswork,"¹⁰⁰ Member Cowen ardently argued for full pretrial discovery as follows:

Discovery for all parties in Board proceedings is preferable because it allows the parties to assess their positions more thoroughly and determine whether to seek a resolution or proceed forward through the administrative hearing process. With full pretrial discovery available to all parties, parties would be better able to narrow and resolve issues and thereby expedite hearings or even avoid hearing altogether.¹⁰¹

Declining their "dissenting colleague's invitation to profoundly alter Board policy in this area,"¹⁰² the majority accepted the holding of the Second Circuit in *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*: "[p]retrial discovery in Board proceedings is neither constitutionally nor statutorily required."¹⁰³

The two-member majority pointed to the Board's historical prohibition of "disclosure of documents in the possession of the General Counsel, whether in response to a subpoena or otherwise, without the General Counsel's written consent."¹⁰⁴ They were swayed by the fact that Congress, recognizing the Board's policy, has never made any attempt to change it.¹⁰⁵

98. *Id.* at *5-6 (Member Cowen, dissenting).

99. *Id.* at *5 (Member Cowen, dissenting) (citing *New England Med. Ctr. Hosp. v. NLRB*, 548 F.2d 377, 387 (1st Cir. 1977); *Capital Cities Communications, Inc. v. NLRB*, 409 F. Supp. 971, 977 (N.D. Cal. 1976)).

100. *Id.* (Member Cowen, dissenting) (quoting *Pepsi-Cola Bottling Co. v. NLRB*, No. 76-106-C5., 1976 U.S. Dist. LEXIS 14552 (Kan. June 10, 1976)).

101. *Id.* at *6 (Member Cowen, dissenting).

102. *Id.* at *3.

103. *Id.* at *3 (quoting *NLRB v. Washington Heights-West Harlem-Inwood Mental Health Council, Inc.*, 897 F.2d 1238, 1245 (2d Cir. 1990)).

104. *Id.* at *3 (citing 29 CFR § 102.118(a)).

105. The majority stated that in enacting the investigatory records exemption to the Freedom of Information Act in 1966, Congress

was particularly concerned that premature production of witnesses' statements in NLRB proceedings would adversely affect that agency's ability to prosecute violations of the NLRA, and . . . the legislative history of the 1974 amendments afford no basis for concluding that Congress at that time intended to create any radical departure from prior, court-approved Board practice.

Id. at *3 n. 11 (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 238-39 (1978)).

The majority went on to justify the Board's restrictive discovery rules on mainly two grounds. First, full pre-trial discovery would impose substantial "cost and inconvenience . . . on administrative proceedings."¹⁰⁶ A second and more fundamental justification for the Board's policy "is grounded in 'the peculiar character of labor litigation,' where 'witnesses are especially likely to be inhibited by fear of the employer's or—in some cases—the union's capacity for reprisal and harassment.'"¹⁰⁷

Taking to heart the Supreme Court's cautionary admonition that a "change in the Board's prehearing discovery rules will have a chilling effect on the Board's sources," the majority adhered to the Board's longstanding policy and reaffirmed it.¹⁰⁸ Member Bartlett, although in the majority, recognized "the potential for abuse of the subpoena power during the pretrial investigation" and suggested that the Board "scrutinize the General Counsel's investigative subpoena" in each case.¹⁰⁹

Most commentators criticizing the Board's denial of pre-hearing discovery have argued that full discovery could eliminate surprises and speed up the trial process.¹¹⁰ Swift resolution of disputes is especially needed in the labor context. The Supreme Court has identified the "relatively rapid disposition of labor disputes" as "one of the leading federal policies" in labor law.¹¹¹ Yet, it is not at all clear that more discovery could abet this policy. To the contrary, cumbersome discovery procedures almost certainly would make it impossible to achieve swift justice.

At present, the institutional structure of the NLRA allows for significant delays if an employer or a union decides to take advantage of all the statute's procedural mechanisms. The internal procedure leading to an order requires an investigation by the agency's regional office, a hearing before an administrative law judge, and a decision by the NLRB's Board.¹¹² The

106. *Id.* at *3 (quoting *P.S.C. Res., Inc. v. NLRB*, 576 F.2d 380, 386 (1st Cir. 1978); *Emhart Indus. v. NLRB*, 907 F.2d 372, 378 (2d Cir. 1990) ("Pretrial discovery, perhaps the primary source of delay in civil actions, is almost never allowed by the Board."); David R. Webb Co., 311 N.L.R.B. 1135, 1136 (1993) ("Even granting that some advantages may be gained from prehearing discovery, the fact remains that it can be productive of delay, offering, as it does, abundant opportunities for collateral disputes.")).

107. *Id.* at *3 (quoting *Robbins Tire*, 437 U.S. at 240).

108. *Id.* at *3 (quoting *Robbins Tire*, 437 U.S. at 241).

109. *Id.* at *4 n.16.

110. See, e.g., Bernard J. Gallagher, *Use of Pre-Trial as a Means of Overcoming Undue and Unnecessary Delay in Administrative Proceedings*, 12 ADMIN. L. BULL. 44, 47 (1959); Raoul Berger, *Discovery in Administrative Proceedings*, 12 ADMIN. L. BULL. 28, 32 (1959).

111. See *United Parcel Serv. v. Mitchell*, 451 U.S. 56, 63 (1981) (citing *UAW v. Hoosier Cardinal Corp.*, 383 U.S. 696, 707 (1966)).

112. N.L.R.B. Casehandling Manual ¶¶ 10050-10070 (Investigation); ¶¶ 10250-10452 (Formal Proceedings).

Board does not have the power to make its orders legally binding; but according to the NLRA, it has to petition a federal appeals court for enforcement of orders in unfair labor practice proceedings.¹¹³ It potentially could take several years until the NLRB obtained enforcement from a federal court of appeals. There is also reason to be concerned about delays that perhaps could follow from the Regional Directors' expanded authority to issue investigative subpoenas if the Board were to provide interlocutory scrutiny every time a subpoena is issued.

Numerous hearings have addressed the issue of delay in NLRB decision making.¹¹⁴ According to NLRB data, the Board takes a median of 90 days from the filing of a charge to the issuance of a complaint, and 113 days from the issuance of a complaint to the close of a hearing. There is an additional 82 median days from the close of a hearing to the ALJ's decision. From the filing of a charge to the issuance of the Board's decision, 647 days pass.¹¹⁵ Notwithstanding concern about the delay in decision making at the NLRB, median time figures of the processing of cases make a less-than-ideal situation seem worse by concealing cases that take years to resolve. Although the NLRB should continuously strive to become more efficient, considerations of tardiness alone could not justify more liberal discovery.

Instead of burdening labor cases with complicated procedures, there are compelling reasons for simplified procedures. First, avoiding procedural

113. 29 U.S.C. § 160(e) (2005).

114. See, e.g., *The National Labor Relations Board: Recent Trends and Their Implications Before the Subcommittee on Employer-Employee Relations of the Committee on Education and the Workforce*, 106th Cong. (2000); *1988 Oversight Hearing on The National Labor Relations Board: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 100th Cong., 2d Sess. (1988); *Oversight of The National Labor Relations Board (Part 2): Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 99th Cong., 2d Sess. (1986); *National Labor Relations Board Case Backlog: Hearing Before a Subcomm. of the House Comm. on Gov't Operations*, 98th Cong., 1st Sess. (1983).

115. 68 NLRB Ann. Rep. 199, Table 23 (2003). Although statistics are hard to compare since the data are not completely similar, the Board's pace for resolution of cases does not appear to compare unfavorably with the Equal Employment Opportunity Commission's average charge processing time of 216 days for resolving private sector charges. EEOC Fiscal Year 2000 Accomplishments Report Shows Important Progress on Multiple Fronts, U.S. Equal Employment Opportunity Commission, available at <http://www.eeoc.gov/press/1-18-01.html> (last visited Jan. 18, 2001). There also does not appear to be a marked difference between the disposition time for labor cases at the NLRB and the median time to dispose of civil cases. For example, in 2001 the median number of months to dispose of tort trials in large counties from filing to disposition for most cases was between twenty and thirty months. U.S. Department of Justice, Bureau of Justice Statistics, *Tort Trials and Verdicts in Large Counties, 2001*, at 6. Contract cases disposed by jury trial had a mean processing time of over 2.5 years. U.S. Department of Justice, Bureau of Justice Statistics, *Contract Cases in Large Counties, 1992*, at 7.

complexities is likely to reduce the cost of litigation. For the employee, relatively simple NLRB procedures could reduce the out-of-pocket expenses and the accrual of billable hours that add to the cost of litigation.¹¹⁶ The employer benefits because the Board's processes of investigation, less confrontational administrative proceedings and the possibility of adjournment of hearings in case of surprise replace the discovery, depositions, and other pre-trial procedures associated with court proceedings.¹¹⁷

Second, the nature of labor cases makes it unlikely that they would generate substantial discovery. Studies have shown that the extent of discovery correlates positively with cases that involve large numbers of parties with counterclaims and crossclaims.¹¹⁸ By contrast, labor cases almost always involve only two parties—the employer and the union. Because these parties have a long-standing relationship and a substantial amount of shared experience, much of their information is common knowledge. Unlike many parties to litigation, workers and employers are not strangers to one another.

Third, employers and unions have normally learned from each other during a long process of negotiation. The NLRB, with the approval of the Supreme Court, has found that the duty to bargain in good faith requires an employer “to provide relevant information needed by a labor union for the proper performance of its duties as the employees’ bargaining representative.”¹¹⁹ Moreover, the Supreme Court has held that the employer’s duty to provide information “extends beyond the period of contract negotiations and applies to labor-management relations during the term of [a collective bargaining] agreement.”¹²⁰ Board cases have

116. It has been estimated that since “the average cost to plaintiffs of litigating an employment case is approximately \$60,000 . . . only about 10% of the people who get a ‘right to sue’ letter from the EEOC can actually find a lawyer willing to file suit on their behalf.” Paul C. Weiler, *A Principled Reshaping of Labor Law for the Twenty-First Century*, 3 U. PA. J. LAB. & EMP. L. 177, 194-95 (2001).

117. *See* NLRB v. Valley Mold Co., 530 F.2d 693, 695 (6th Cir. 1976) (rejecting a party’s claim that extensive prehearing discovery should be permitted in the context of an NLRB ‘backpay’ proceeding and holding that the company was not prejudiced by the denial of discovery because employees were available at the hearing for cross-examination and subpoenas were available to compel the attendance of witnesses); *Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1167 (8th Cir. 2000) (enforcing a Board order that found that the employer’s state-court discovery request for the identities of employees who had signed authorization cards had an illegal objective and no overriding business justification).

118. *See* P. CONNOLLY, E. HOLLEMAN & M. KUHLMAN, *JUDICIAL CONTROLS AND THE CIVIL LITIGATIVE PROCESS: DISCOVERY 40* (District Court Study Series, 1978).

119. *Detroit Edison Co. v. NLRB*, 440 U.S. 301, 303 (1979) (citations omitted).

120. *NLRB v. Acme Indus. Co.*, 385 U.S. 432, 435-36 (1967).

formulated standards to determine the sort of information that is to be considered presumptively relevant, the timing and form of information disclosure, and the availability of defenses to disclosure such as burdensomeness, trade secrets, and privacy.¹²¹ The standard of relevance utilized by the courts is a “discovery-type” standard of potential relevance.¹²² In determining whether information is relevant, courts have distinguished between certain kinds of information and have held that information which is so intrinsic to the core of the employer-employee relationship is considered presumptively relevant.¹²³

Some information can be gained without disclosure. For instance, labor contracts often provide union representatives with access to the workplace to investigate grievances. Moreover, the steps in the grievance procedure that precede arbitration are essentially a series of compulsory settlement conferences. Given the duty to disclose information during bargaining and grievance settlement, the opportunities for settlement during the arbitration process, and the access that union representatives have to the workplace, it is not likely that the parties to collective bargaining agreements regularly would make use of the broad range of discovery devices available under the Federal Rules of Civil Procedure.

Fourth, the Board has the authority to strike difficult balances in labor policy. In *NLRB v. Truck Drivers Local 449*,¹²⁴ the Supreme Court stated that “[t]he function of striking [the] balance to effectuate national labor policy is often a difficult and delicate responsibility, which the Congress has committed primarily to the National Labor Relations Board, subject to limited judicial review.”¹²⁵ Congress created the NLRB, like other

121. *See. e.g.*, *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967) (holding that a company has to furnish information needed by the employees’ bargaining representative to perform its duties); *Detroit Edison Co. v. NLRB*, 440 U.S. 301 (1979) (holding that a company did not violate its statutory obligation to bargain in good faith when it refused to deliver confidential test scores to the union); *WCCO Radio, Inc., Div. of Midwest Communications, Inc. v. NLRB*, 844 F.2d 511, 515-16 (8th Cir. 1988) (enforcing a Board order directing the company to supply information regarding the number of regular and overtime hours worked by each bargaining unit member, despite the company’s argument that the information constituted trade secrets); *Safeway Stores, Inc. v. NLRB*, 691 F.2d 953, 957-58 (10th Cir. 1982) (holding that a company had a duty to disclose requested information on the ethnic background, race, sex, and employment status of the bargaining unit employees, and rejecting the company’s argument that the time and expense of compiling the requested information was unduly burdensome).

122. 48 AM. JUR. 2D § 1046 (2004).

123. *NLRB v. George Koch Sons, Inc.*, 950 F.2d 1324, 1331 (7th Cir. 1991) (citations omitted).

124. 353 U.S. 87 (1957).

125. *Id.* at 96.

administrative tribunals, to offer wide-ranging expertise in the complex area of labor.¹²⁶ Similar to other agencies, the NLRB “should be free to fashion [its] own rules of procedure and to pursue methods of inquiry capable of permitting [it] to discharge [its] multitudinous duties.”¹²⁷ The Board has reasoned persuasively that its restrictive discovery rules and regulations are necessary to prevent employers and unions from intimidating employees and inhibiting employees from exercising statutory rights under the NLRA.¹²⁸ The Board’s system for investigating and deciding labor cases, imperfect as it may be, has evolved into a system that appears to be reasonably inexpensive, informal, and efficient. The Board’s rules strike an equitable balance between the need to safeguard employees in the pursuit of their statutory rights and the need for employers and unions to obtain adequate information to prepare their defenses.¹²⁹

IV. CONCLUSION

The introduction of discovery into that system is likely to result in a destructive modification of an equitable system. Additional discovery would bog the procedure down by adding technicalities and transforming labor cases into the exclusive province of lawyers while barring working people from using the system. Most devastating to employees would be orders for discovery procedures, such as depositions or interrogatories, that would be costly, make it necessary to obtain counsel, and effectively exclude the layperson in favor of the professional. Making it impossible for employees to exert their rights would be in direct contradiction to the NLRA’s guarantees that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection.”¹³⁰

As a result of the Board’s limited discovery some facts may not be

126. *Sears, Roebuck & Co. v. San Diego County Dist. Council of Carpenters*, 436 U.S. 180, 191 (1978); *Garner v. Teamsters, Chauffeurs and Helpers Local Union No. 776*, 346 U.S. 485, 490 (1953).

127. *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940).

128. For cases supporting the Board’s rulemaking in the area of discovery, see *NLRB v. Valley Mold Co.*, 530 F.2d 693, 695 (6th Cir. 1976); *D’Youville Manor, Lowell, Mass., Inc. v. NLRB*, 526 F.2d 3, 7 (1st Cir. 1975); *NLRB v. Interboro Contractors, Inc.*, 432 F.2d 854, 858 (2d Cir. 1970); and *Electromec Design & Dev. Co. v. NLRB*, 409 F.2d 631, 635 (9th Cir. 1969).

129. *E. Omni Constructors, Inc. v. NLRB*, 170 F.3d 418, 423 (4th Cir. 1999).

130. 29 U.S.C. § 157 (2005) (emphasis added).

revealed or fully investigated, some legal theories might not be as fully argued, and some opinions might be less sophisticated. At the same time, the Board's relatively uncomplicated and informal procedures do strike a desirable balance between ideal results and affordable costs. As Professor Clyde Summers has stated eloquently, "Where the employment rights of individual workers with limited resources are involved, . . . [m]ore perfect decision-making ought not to be bought by depriving most employees of any decision at all."¹³¹

131. Clyde Summers, *Effective Remedies for Employment Rights: Preliminary Guidelines and Proposals*, 141 U. PA. L. REV. 457, 534 (1992).