

THE "JENCKS RULE" IN NLRB PROCEEDINGS

REGINALD H. ALLEYNE, JR.*

During an unfair-labor-practice hearing before a trial examiner of the National Labor Relations Board, the attorney for the General Counsel of the NLRB concludes the direct examination of a witness whose testimony is adverse to the respondent in the case.¹ At this point or at some time during cross-examination of the witness, respondent's attorney requests that the attorney for the General Counsel produce for respondent's inspection and for impeachment purposes all written statements of the witness. It is the cross-examiner's intention to test the witness' credibility by revealing inconsistencies which might exist between the witness' testimony on direct examination and the contents of statements the witness might have given to agents of the NLRB during the investigation of the charge leading to the complaint and hearing in the case. To the extent that such inconsistencies can be shown to exist, the witness' credibility is open to question.² Out of this hypothetically posed yet not untypical setting

* B.S., Tufts University, 1954; LL.B., Howard University, 1959; Attorney, National Labor Relations Board, Twenty-eighth Regional Office, Albuquerque, New Mexico.

The views expressed herein are those of the author and are not intended as expressions of view of the National Labor Relations Board or the General Counsel of the National Labor Relations Board.

¹ The investigation of an alleged violation of the National Labor Relations Act, 29 U.S.C. §§ 151-68 (1964), is initiated by filing an unfair-labor-practice charge with the NLRB regional director for the region in which the alleged violation occurred. The charge is investigated by the regional office. A charge found not to have merit is either voluntarily withdrawn or dismissed by the regional director, subject to the right of appeal to the General Counsel of the NLRB. If a charge is found to have merit, the regional office attempts to settle the case. If settlement efforts are unsuccessful, the regional director institutes formal action by issuance of a complaint and notice of hearing. Absent a prehearing settlement, a hearing on the unfair-labor-practice allegations is held before a trial examiner of the NLRB. See National Labor Relations Board Statements of Procedure, Series 8, 29 C.F.R. §§ 101.2-.10 (1968).

Ordinarily there are three parties to the hearing: the party filing the charge leading to the complaint and hearing, the party alleged to have committed an unfair labor practice, and the General Counsel of the NLRB who is represented by an attorney attached to the Board's regional office and who has the responsibility of presenting the evidence in support of the complaint. These parties are generally referred to as the charging party, the respondent, and the General Counsel or attorney for the General Counsel, respectively. They are sometimes so designated herein.

² On the subject of prior inconsistent statements, see generally 4 B. Jones, *The Law of Evidence* §§ 931-40 (5th ed. 1958); 3 J. Wigmore, *Evidence* §§ 1017-46 (3d ed. 1940). Wigmore describes the use of prior inconsistent statements, in part as follows:

[I]nstead of invoking the assertions of other witnesses to prove [the testifying witness'] specific error, we resort simply to the witness' *own prior statements*, in which he has given a contrary version. We place his contradictory statements side by side, and, as both cannot be correct we realize that in at least one of the two he must have spoken erroneously. Thus, we have detected him in one specific error, from which may be inferred a capacity to make other errors.

Id. § 1017, at 685.

evolves the questions: What prehearing statements of witnesses in NLRB proceedings must be produced for inspection and possible impeachment attempts? And, assuming a statement is producible, at what time and under what circumstances must the statement be produced?

I. BACKGROUND

Prior to 1958, respondents at NLRB hearings were not permitted to inspect a witness' signed pretrial statement for cross-examination purposes.³ This practice, together with the absence of discovery procedures in the NLRB rules, rendered NLRB files essentially closed to any kind of inspection.⁴ The denial of requests for pretrial statements was based on Section 102.87 of the NLRB's Rules and Regulations, which at that time prohibited the production of "files, documents, reports, memoranda, or records of the Board . . . whether in answer to subpoena, subpoena duces tecum or otherwise . . ." by agents of the Board without the consent of the General Counsel or Chairman of the NLRB.⁵ Although not expressly stated by the NLRB in any of its decisions refusing disclosure of statements taken by NLRB agents,

³ *NLRB v. Chambers Mfg. Corp.*, 278 F.2d 715, 46 L.R.R.M. 2316 (5th Cir. 1960), enforcing 124 N.L.R.B. 721, 44 L.R.R.M. 1477 (1959); *Raser Tanning Co. v. NLRB*, 276 F.2d 80, 45 L.R.R.M. 3039 (6th Cir.), cert. denied, 363 U.S. 830 (1960); *Jamestown Sterling Corp.*, 106 N.L.R.B. 466, 32 L.R.R.M. 1483 (1953), enforced, 211 F.2d 725, 33 L.R.R.M. 2837 (2d Cir. 1954).

⁴ Section 10(b) of the National Labor Relations Act provides in part:

[National Labor Relations 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 rules of civil procedure for the district courts of the United States adopted by the Supreme Court of the United States pursuant to section 2072 of Title 28.

29 U.S.C. § 160(b) (1964). The language "relating to the 'rules of evidence' does not require the Board to adopt the discovery procedure contemplated by the Federal Rules of Civil Procedure." See *North American Rockwell Corp. v. NLRB*, 389 F.2d 866, 871, 67 L.R.R.M. 2603, 2606 (10th Cir. 1968). See also *Raser Tanning Co. v. NLRB*, 276 F.2d 80, 45 L.R.R.M. 3039 (6th Cir.), cert. denied, 363 U.S. 830 (1960); *NLRB v. Quest-Shon Mark Brassiere Co.*, 185 F.2d 285, 27 L.R.R.M. 2036 (2d Cir. 1950), cert. denied, 342 U.S. 812 (1951). Cf. *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273, 66 L.R.R.M. 2136 (5th Cir. 1967), enforcing 153 N.L.R.B. 417, 59 L.R.R.M. 1486 (1965), cert. denied, 390 U.S. 955 (1968) (holding that NLRB trial examiners have discretion to grant or deny a motion for leave to take depositions). 29 C.F.R. § 102.30 (1968) provides for the taking of depositions "for good cause shown after the issuance of a complaint . . ." The NLRB has suggested that in a proper case, a request for pretrial discovery would be granted. See *Miami Coca-Cola Bottling Co.*, 163 N.L.R.B. No. 73 n.6 (1967). The absence of discovery provisions in the NLRB's rules and regulations has been held not to be a denial of due process of law. *NLRB v. Globe Wireless, Ltd.*, 193 F.2d 748, 751, 29 L.R.R.M. 2319, 2321 (9th Cir. 1951); *Red Bird Foods, Inc.*, 162 N.L.R.B. No. 89, 64 L.R.R.M. 1127 (1967); *Plumbers Local 100*, 128 N.L.R.B. 398, 46 L.R.R.M. 1316 (1960), 291 F.2d 927, 48 L.R.R.M. 2544 (5th Cir. 1961). Contra, *NLRB v. Southern Materials Co.*, 345 F.2d 240, 244, 59 L.R.R.M. 2220, 2223-24 (4th Cir. 1965) (dictum).

⁵ Section 102.87, NLRB Rules and Regulations, Series 6, originally promulgated as § 102.90, 16 Fed. Reg. 1934, 1947-48 (1951).

"JENCKS RULE"

those decisions and rule 102.87 were based apparently on the theory that witnesses interviewed by NLRB agents during the investigation of unfair-labor-practice charges would be more inclined to give statements and to speak freely in the knowledge that their written statements would not be revealed to an adverse party. No firm legal basis existed for challenging the NLRB's policy of not making prehearing statements available for cross-examination purposes until the United States Supreme Court's decision in *Jencks v. United States*.⁶ In the *Jencks* decision the Supreme Court dealt squarely with the issue of the Government's right to suppress information which might be vital to an accused's defense in a criminal case.

The case arose out of a criminal prosecution for filing a false non-Communist affidavit with the NLRB.⁷ At the trial, government witnesses who were paid informers for the Federal Bureau of Investigation testified that during their employment with the FBI they submitted written reports to the FBI concerning the defendant's attendance at Communist Party meetings. At the conclusion of their testimony on direct examination, defense counsel moved for an order directing an inspection of those reports by the defense. The motions were denied and the defendant was subsequently found guilty.⁸ The United States Court of Appeals for the Fifth Circuit affirmed, holding that at the trial the defendant had laid no preliminary foundation of inconsistency between the contents of the reports to the FBI and the testimony of the government witness informers who made the reports.⁹ The Supreme Court reversed, holding that "the petitioner was entitled to an order directing the Government to produce for inspection all reports of [the witnesses] in its possession, written and, when orally made, as recorded by the F.B.I. touching the events and activities as to which they testified at the trial."¹⁰ The rationale of the court of appeals, requiring a showing of inconsistency between the requested document and the witness' testimony, was specifically rejected on the ground that it was "clearly incompatible with our standards for the administration of criminal justice"¹¹ Resolving in favor of the

⁶ 353 U.S. 657 (1956).

⁷ The prosecution in *Jencks* was under 18 U.S.C. § 1001 (1964) providing criminal penalties for making false statements to a department or agency of the federal government. At that time, § 9(h) of the NLRA provided that the processes of the NLRB were to be unavailable to a labor organization "unless there is on file with the Board an affidavit executed . . . by each officer of such labor organization . . . that he is not a member of the Communist Party or affiliated with such party" 29 U.S.C. § 159(h) (1958). This section has since been repealed. 29 U.S.C. § 159 (1964).

⁸ 353 U.S. at 659.

⁹ 226 F.2d 540, 37 L.R.R.M. 2015 (5th Cir. 1955). This holding was consistent with then existing law. Cf. *Herzog v. United States*, 226 F.2d 561 (9th Cir. 1955), cert. denied, 352 U.S. 844 (1956).

¹⁰ 353 U.S. at 668.

¹¹ *Id.*

defendant the conflicting interests of the Government in suppressing the FBI report and the defendant in using the report for cross-examination purposes, the Court noted the overriding value to the defense of demonstrating prior inconsistent statements of an adverse witness.

Every experienced trial judge and trial lawyer knows the value for impeaching purposes of statements of the witness recording the events before time dulls treacherous memory. Flat contradiction between the witness' testimony and the version of the events given in his reports is not the only test of inconsistency. The omission from the reports of facts related at the trial, or a contrast in emphasis upon the same facts, even a different order of treatment, are also relevant to the cross-examining process of testing the credibility of a witness' trial testimony.¹²

Although not expressly stated in *Jencks*, the Supreme Court subsequently noted that the decision was an exercise of the Court's power to prescribe procedures for the administration of justice in the federal courts and was not grounded on the Constitution.¹³

II. THE NLRB AND THE JENCKS DECISION

In *Great Atl. & Pac. Tea Co.*,¹⁴ the NLRB held that the *Jencks* holding was limited to criminal cases, stating that its application to NLRB proceedings would seem "to amount to a *pro tanto* repeal of Section 102.87 without showing a need therefor."¹⁵ The NLRB reasoned that the Executive Department's "Housekeeping" Act¹⁶ authorized the promulgation of rule 102.87, and that Section 6 of the National Labor Relations Act,¹⁷ authorizing the Board to make rules and regu-

¹² *Id.* at 667.

¹³ *Scales v. United States*, 367 U.S. 203, 257-58 (1961); *Palermo v. United States*, 360 U.S. 343, 345 (1959). But see Keefe, Jinks and Jencks, 7 Cath. U.L. Rev. 91, 92 (1958); see also *Palermo v. United States*, *Supra* at 362-63 (Brennan, J. concurring).

¹⁴ 118 N.L.R.B. 1280, 40 L.R.R.M. 1338 (1957).

¹⁵ *Id.* at 1283, 40 L.R.R.M. at 1340. Accord, *E.V. Prentice Mach. Works, Inc.*, 120 N.L.R.B. 1691 n.1, 42 L.R.R.M. 1246 (1958); *Baltimore Steam Packet Co.*, 120 N.L.R.B. 1521, 42 L.R.R.M. 1215 (1958); *Local 450, Int'l Operating Eng'rs*, 120 N.L.R.B. 568, 42 L.R.R.M. 1005 (1958); *Building & Constr. Trades Council*, 119 N.L.R.B. 1816, 1817 n.1, 41 L.R.R.M. 1388 (1958).

¹⁶ 5 U.S.C. § 22 (1952). The Act provides: "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." This section has since been amended by the addition of the sentence: "This section does not authorize withholding information from the public or limiting the availability of records to the public." 5 U.S.C. § 22 (1964).

¹⁷ 29 U.S.C. § 156 (1964) provides: "The Board shall have authority from time to time to make, amend, and rescind, in the manner prescribed by the Administrative Procedure Act, such rules and regulations as may be necessary to carry out the provisions of this subchapter."

"JENCKS RULE"

lations, specifically conferred jurisdiction upon the NLRB to adopt that rule. The Board's reasoning was not persuasive. Its authority to adopt rule 102.87 was not in question. The issue was whether, in light of the *Jencks* decision, fundamental fairness required the adoption of a different rule. Certainly the broad language in the "Housekeeping" Act did not preclude the NLRB from exercising its discretion under Section 6 of the National Labor Relations Act to enact a rule consistent with *Jencks*.¹⁸ The real issue in *Great Atlantic*, and one which the NLRB did not discuss in the case, was whether, on balance, the interests of respondents in Board proceedings in obtaining statements for purposes of impeachment outweighed the interests of the NLRB in not revealing the contents of such statements.

In a later case, *Ra-Rich Mfg. Corp.*,¹⁹ the NLRB at first again declined to adopt *Jencks*, but subsequently reconsidered that decision and adopted *Jencks*²⁰ because of an intervening court decision in *NLRB v. Adhesive Prods. Corp.*²¹ There, the court held the *Jencks* principle applicable to an NLRB proceeding and refused to enforce an NLRB order because the trial examiner denied the respondent's request for production of a written prehearing statement by a witness for the General Counsel. The court's sole basis for holding *Jencks* applicable to NLRB proceedings was that "logic" compelled that result,²² citing *Communist Party of the United States v. Subversive Activities Control Bd.*²³ and *Walling v. Twyeffort, Inc.*²⁴

The *Communist Party* case was the first case in which a court extended the *Jencks* decision to an administrative proceeding. There, the statement denied production was an FBI agent's report of an interview with a government witness in a Subversive Activities Control Board proceeding to determine whether the Communist Party should register as a "Communist-action" or "Communist-front" organization within the meaning of the Subversive Activities Control Act.²⁵ Moving from the premises that SACB proceedings are neither criminal nor civil, but "administrative," that in both criminal and civil proceedings

¹⁸ See note 16 supra.

¹⁹ 120 N.L.R.B. 503, 42 L.R.R.M. 1001 (1958).

²⁰ *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. 700, 42 L.R.R.M. 1403 (1958).

²¹ 258 F.2d 403, 42 L.R.R.M. 242 (2d Cir. 1958); 57 Mich. L. Rev. 420, 421 (1959).

²² 258 F.2d at 408.

²³ 254 F.2d 314 (D.C. Cir. 1958).

²⁴ 158 F.2d 944 (2d Cir. 1947). This was an action in a federal district court to enjoin an employer from violating the overtime provisions of the Fair Labor Standards Act. At the trial, defendants asked that a signed statement of a witness for the complaining party be produced. The court refused to order production on the ground that the statement was confidential. The court of appeals held that the refusal to order production was harmless error.

²⁵ 50 U.S.C. §§ 782(3), (4), 786 (1964).

the report would have been producible,²⁶ and that "the laws under which [administrative] agencies operate prescribe the fundamentals of fair play,"²⁷ the court held that the denial of the motion to produce was error.

Although proceedings before the SACB are not criminal, there is a close connection between possible criminal prosecution and an adverse order of the SACB requiring an organization to register as a "Communist-action" or "Communist-front" organization. Several criminal proscriptions are imposed by the Subversive Activities Control Act upon members of an organization which registers or has been ordered to register pursuant to an SACB decision,²⁸ thus making SACB proceedings, though administrative, criminal in nature to the extent that the SACB operates as a link in the administration of a criminal statute. Rather than rely upon civil proceedings generally as an analogy, a better rationale in extending *Jencks* to the SACB in the *Communist*

²⁶ According to the reasoning of the court, the report would have been producible in criminal cases under the *Jencks* decision, and in civil cases under Fed. R. Civ. P. 34. This rule provides for the production of documents "not privileged, which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by Rule 26(b) and which are in [any party's] possession, custody, or control . . ." Id. The related portion of rule 26(b) allows examination of "any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the examining party . . ." Fed. R. Civ. P. 26(b).

The court's analogy to civil cases does not appear to be appropriate in light of *Hickman v. Taylor*, 329 U.S. 495 (1947), holding that absent "hardship," discovery may not be had of oral or written statements by witnesses taken by the attorney employed to prosecute or defend the case. See Cleary, *Hickman v. Jencks*, 14 Vand. L. Rev. 865 (1961), concluding that the *Hickman* and *Jencks* decisions are diametrically opposite. Nor can the analogy to civil cases be justified solely on the basis of a distinction between statements taken by attorneys and those taken by nonattorney government investigators, since the *Hickman* doctrine has been extended to include agents of a party, whether attorneys or not. *Alltmont v. United States*, 177 F.2d 971 (3d Cir. 1949), cert. denied, 339 U.S. 967 (1950).

²⁷ 254 F.2d at 327, quoting *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 143 (1940).

²⁸ E.g., 50 U.S.C. § 783 (1964), which makes it unlawful for members of a registered organization, or one designated as having to register, to seek, accept or hold employment under the United States or to fail to disclose their membership in such organizations when so seeking, accepting or holding employment under the United States. If the organization is designated a "Communist-action organization," that section makes it unlawful for such organization members to engage in any employment in a defense facility or to hold office or employment with any labor organization within the meaning of § 2(5) of the NLRA, 29 U.S.C. § 152(5) (1964), or to represent any employer in any matter or proceeding arising or pending under the NLRA. In addition, the failure to register when ordered to do so by the SACB carried heavy criminal penalties. Under § 15(a)(2) of the Act, 50 U.S.C. § 794(a)(2) (1964) for example, each day of failure to register constituted a separate offense punishable by a maximum fine of \$10,000 or five years imprisonment or both. The question on the merits in the case is now academic. In *Albertson v. Subversive Activities Control Bd.*, 382 U.S. 70 (1965), the Supreme Court held that the registration requirements of the Subversive Activities Control Act violated the fifth amendment privilege against self-incrimination.

"JENCKS RULE"

Party case would have been the close nexus between SACB orders and the potential criminal consequences arising out of the Subversive Activities Control Act.

Carrying the decision in the *Communist Party* case to its logical conclusion would result in the application of the *Jencks* principle to all administrative proceedings, irrespective of the degree to which the administrative proceeding is adversary in nature, and the degree to which penalties might be imposed upon a party, following an adverse finding by an agency. Viewing the *Adhesive Products* decision in light of the nature of the agency's proceedings, on the other hand, the decision to apply *Jencks* to the NLRB was an extension of the court's holding in the *Communist Party* case. In NLRB proceedings, unlike SACB proceedings, there is no direct connection between an order adverse to a respondent and possible criminal consequences arising out of the statute governing the proceedings. Examined in terms of the penal nature of an agency's order, the decision was sound, inasmuch as the NLRB has broad powers to remedy violations of the National Labor Relations Act, including back-pay awards in appropriate cases.²⁹ In addition, there are varying degrees of underlying economic consequences incident to remedial orders issued by the NLRB on a finding of an unfair labor practice as defined by the National Labor Relations Act.³⁰

Although, as a result of the NLRB's second *Ra-Rich* decision,³¹ it was settled that NLRB files were not sacrosanct, sharp questions continued to arise in NLRB proceedings concerning the types of pretrial statements subject to production, the timing of the request for production, and how such statements, once obtained, could be used by the cross-examiner. At one end of the spectrum are blanket requests for all statements taken during the NLRB's investigation of a case. These requests are denied. They are in effect requests for pretrial discovery and the NLRB's rules and regulations do not now contain provisions for discovery.³² At the other end of the spectrum are specific requests for statements made by a specific witness. Such requests may or may not be granted, depending upon the timing of the request and the type of statement sought. Following the second *Ra-Rich* decision, these matters were made the subject of Section 102.118 of the NLRB's Rules and Regulations when a proviso was added to the language prohibiting disclosure of the contents of NLRB files without the consent

²⁹ Section 10(c) of the NLRA, 29 U.S.C. § 160(c) (1964), authorizes the NLRB to fashion remedies for violations of the Act, including the award of back pay in appropriate cases. See generally Fuchs & Kellcher, *The Back-Pay Remedy of the National Labor Relations Board*, 9 B.C. Ind. & Com. L. Rev. 829 (1968).

³⁰ Unfair labor practices are defined in § 8 of the Act, 29 U.S.C. § 158 (1964).

³¹ *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. 700, 42 L.R.R.M. 1403 (1958).

³² See 29 C.F.R. § 102.118 (1968). See also authorities cited note 4 *supra*.

of the General Counsel or Chairman of the NLRB. The proviso reads as follows:

Provided, After a witness called by the general counsel has testified in a hearing upon a complaint under section 10(c) of the act, the respondent may move for the production of any statement of such witness in possession of the general counsel, if such statement has been reduced to writing and signed or otherwise approved or adopted by the witness. Such motion shall be granted by the trial examiner. If the general counsel declines to furnish the statement, the testimony of the witness shall be stricken: *Provided further*, That after any witness has testified in any postelection hearing pursuant to § 102.69(d), any party may move for the production of any statement of such witness in possession of any agent of the Board, if such statement has been reduced to writing and signed or otherwise approved by the witness. Such motion shall be granted by the hearing officer.³³

III. THE NLRB AND THE JENCKS ACT

The proviso to section 102.118 was patterned generally after the Jencks Act,³⁴ which was enacted by Congress in 1957 in order to

³³ 29 C.F.R. § 102.118 (1968).

³⁴ 18 U.S.C. § 3500 (1964). The act, in pertinent part, provides:

(a) In any criminal prosecution brought by the United States, no statement or report in the possession of the United States which was made by a Government witness or prospective Government witness (other than the defendant) to an agent of the Government shall be the subject of subpoena, discovery, or inspection until said witness has testified on direct examination in the trial of the case.

(b) After a witness called by the United States has testified on direct examination, the court shall, on motion of the defendant, order the United States to produce any statement (as hereinafter defined) of the witness in the possession of the United States which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the court shall order it to be delivered directly to the defendant for his examination and use.

(c) If the United States claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the court shall order the United States to deliver such statement for the inspection of the court in camera. Upon such delivery the court shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised, the court shall then direct delivery of such statement to the defendant for his use. . . .

(d) If the United States elects not to comply with an order of the court under paragraph (b) or (c) hereof to deliver to the defendant any such statement, or such portion thereof as the court may direct, the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared.

"JENCKS RULE"

"clarify" the *Jencks* decision. The Act provides that a criminal defendant's right to inspect government files is limited to situations where the witness whose statement is sought has testified for the Government on direct examination and where the statement relates to the subject matter of the witness' testimony.³⁵ The Act further provides that if the defendant's motion for production is resisted by the Government on the ground that the requested statement does not contain matters which relate to the subject matter of the testimony of the witness, "the court shall order the United States to deliver such statement for the inspection of the court in camera."³⁶ The statute commands the court to remove any portions of the statement which do not relate to the subject matter of the testimony of the witness. The revised statement is then delivered to the defendant for his use. If the Government elects not to comply with an order of the court to deliver the statement to the defendant, "the court shall strike from the record the testimony of the witness, and the trial shall proceed unless the court in its discretion shall determine that the interests of justice require that a mistrial be declared."³⁷ The Jencks Act defines a "statement" as:

- (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or

³⁵ In the main, the legislation was passed because some lower courts had erroneously interpreted the *Jencks* decision as giving criminal defendants a broad right of discovery in criminal cases. But the number and nature of such decisions was greatly exaggerated. See Note, *The Aftermath of the Jencks Case*, 11 *Stan. L. Rev.* 297, 308-09 (1959); Comment, *The Jencks Legislation: Problems in Prospect*, 67 *Yale L.J.* 674, 681-83 (1958). The Senate Committee reporting on the bill which became the Jencks Act said:

The proposed legislation, is not designed to nullify, or to curb, or to limit the decision of the Supreme Court insofar as due process is concerned. The committee believes that legislation would clearly be unconstitutional if it sought to restrict due process. On the other hand, the proposed legislation, as here presented, reaffirms the decision of the Supreme Court in its holding that a defendant on trial in a criminal prosecution is entitled to relevant and competent reports and statements in possession of the Government touching the events and activities as to which a Government witness has testified at the trial, but excluding such matter which is within any valid exclusionary rule.

... The committee is of the opinion, and the bill so provides, that statements of witnesses should not be subject to production until the Government witness, who is the putative source of such statements, has himself testified. In other words, it is the specific content of the bill to provide for the production of statements, reports, transcriptions or recordings, as described in the bill, after the Government witness has testified against the defendant on direct examination in open court, and to prevent disclosure before such witness has testified. The committee is also of the opinion that the decision as to relevance must be made by the trial judge and not by the defendant or his attorney.

S. Rep. No. 981, 85th Cong., 1st Sess. (1957), reported in 2 U.S. Code, Cong. & Ad. News 1861, 1862-63 (1957). See also *Palermo v. United States*, 360 U.S. 343, 356 (1959) (summarizing in part the legislative history of the Jencks Act).

³⁶ 18 U.S.C. § 3500(c) (1964).

³⁷ *Id.* § 3500(d).

- (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the Government and recorded contemporaneously with the making of such oral statement.³⁸

The NLRB indicated that it would look to the Jencks Act as well as the *Jencks* decision in considering the application of rule 102.118.³⁹ But neither the letter of that rule nor NLRB decisions interpreting it were entirely consistent with the tenor of the Jencks Act. The rule followed the Jencks Act requirement that a producible statement be written, signed, or otherwise adopted or approved by the witness whose statement was sought; the rule, at that time, did not adopt the "substantially verbatim-contemporaneously recorded" provision which the Jencks Act sets out as an alternative to the "signed-approved-or-adopted" test.⁴⁰ The Jencks Act requires that the requested statement relate to the subject matter of the witness' testimony; NLRB rule 102.118 contained no such requirement. Both the Jencks Act and the rule apply only to documents in the Government's possession, but the courts and the NLRB have in some instances differed on the question of the physical scope of the possession requirement.

Prompted in part by courts which disagreed with the NLRB's failure to adopt the Jencks Act's section (e)(2) "substantially verbatim-contemporaneously recorded" definition of a statement,⁴¹ the NLRB on July 9, 1968, amended the proviso to rule 102.118 to make it consistent with the tenor of the entire Jencks Act, including Section

³⁸ Id. §§ 3500(e) (1), (2).

³⁹ See, e.g., *United States Mfg. Co.*, 151 N.L.R.B. 709, 710 n.1, 58 L.R.R.M. 1557 (1965); *Canton Cotton Mills*, 148 N.L.R.B. 464, 465 n.1, 57 L.R.R.M. 1033 (1964). In *Palermo v. United States*, 360 U.S. 343 (1959), and *Rosenberg v. United States*, 360 U.S. 367 (1959), the Supreme Court held that since the enactment of the Jencks Act, the Act "and not the *Jencks* decision governs the production of statements of government witnesses for a defendant's inspection at trial." Id. at 369.

⁴⁰ E.g., *United States Mfg. Co.*, 151 N.L.R.B. 709, 58 L.R.R.M. 1557 (1965); *Louisiana Television Broadcasting Corp.*, 142 N.L.R.B. 55, 64 n.27, 52 L.R.R.M. 1545 (1963).

⁴¹ *NLRB v. Safway Steel Scaffolds Co.*, 383 F.2d 273, 278, 66 L.R.R.M. 2136, 2139-40 (5th Cir. 1967), enforcing 153 N.L.R.B. 417, 59 L.R.R.M. 1486 (1965), cert. denied, 390 U.S. 955 (1968); *NLRB v. Seine & Line Fishermen's Union*, 374 F.2d 974, 981, 64 L.R.R.M. 2210, 2215 (9th Cir. 1967); *Harvey Aluminum (Inc.) v. NLRB*, 335 F.2d 749, 753-54, 56 L.R.R.M. 2982, 2984-85 (9th Cir. 1964).

In *Harvey Aluminum*, the court noted that, although the trial examiner did not restrict NLRB rule 102.118 to the "signed, approved or adopted" standard, testimony by the attorney for the General Counsel on the question of the existence of producible statements may have been so restricted, and that "[a]ny doubt that exists on this score can be resolved readily on remand." Id. at 756, 56 L.R.R.M. at 2986.

"JENCKS RULE"

(e)(2) of the Act.⁴² Also, the amended proviso, like the Jencks Act, provides for an in camera inspection by the trial examiner when the question of a statement's relevancy to a witness' testimony on direct examination is raised by the Government.⁴³

The amended proviso is of course adapted to the administrative procedures used by the NLRB in conducting hearings. Unlike the Jencks Act, it provides that the General Counsel will preserve any statement or portion of a statement refused production by the trial examiner after the trial examiner's in camera inspection. The preserved statement is made available to the NLRB if exceptions are taken to

⁴² 33 Fed. Reg. 9819 (July 9, 1968).

(b)(1) Notwithstanding the prohibitions of paragraph (a) of this section, after a witness called by the general counsel or by the charging party has testified in a hearing upon a complaint under section 10(c) of the act, the trial examiner shall, upon motion of the respondent, order the production of any statement (as hereinafter defined) of such witness in the possession of the general counsel which relates to the subject matter as to which the witness has testified. If the entire contents of any such statement relate to the subject matter of the testimony of the witness, the trial examiner shall order it to be delivered directly to the respondent for his examination and use for the purpose of cross-examination.

(2) If the general counsel claims that any statement ordered to be produced under this section contains matter which does not relate to the subject matter of the testimony of the witness, the trial examiner shall order the general counsel to deliver such statement for the inspection of the trial examiner in camera. Upon such delivery the trial examiner shall excise the portions of such statement which do not relate to the subject matter of the testimony of the witness. With such material excised the trial examiner shall then direct delivery of such statement to the respondent for his use on cross-examination. If, pursuant to such procedure, any portion of such statement is withheld from the respondent and the respondent objects to such withholding, the entire text of such statement shall be preserved by the general counsel, and, in the event the respondent files exceptions with the Board based upon such withholding, shall be made available to the Board for the purpose of determining the correctness of the ruling of the trial examiner. If the general counsel elects not to comply with an order of the trial examiner directing delivery to the respondent of any such statement, or such portion thereof as the trial examiner may direct, the trial examiner shall strike from the record the testimony of the witness.

(c) The provisions of paragraph (b) of this section shall also apply after any witness has testified in any postelection hearing pursuant to § 102.69(d) and any party has moved for the production of any statement (as hereinafter defined) of such witness in possession of any agent of the Board which relates to the subject matter as to which the witness has testified. The authority exercised by the trial examiner under paragraph (b) of this section shall be exercised by the hearing officer presiding.

(d) The term "statement" as used in paragraphs (b) and (c) of this section means: (1) A written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

Id. at 9820.

⁴³ Id. (§ (b)).

the trial examiner's refusal to order production.⁴⁴ The amended proviso applies to statements of witnesses for the charging party, as well to statements of witnesses for the General Counsel.⁴⁵

The NLRB will unquestionably look to the courts for some guidance in interpreting those Jencks Act provisions which were added to the NLRB's rules by the amended proviso. This will necessarily create new areas of litigation in NLRB proceedings. Courts, including the Supreme Court, have not always ruled with consistency or unanimity on questions involving interpretation of the Jencks Act.

• A. *Timeliness of Production Requests*

The main thrust of the Jencks Act is to impose clear, statutory limits upon a criminal defendant's right to inspect government files. It is mandatory that the request, if otherwise appropriate, be invoked "[a]fter a witness called by the United States has testified on direct examination"⁴⁶ To this extent, NLRB rule 102.118 has been consistent with the Jencks Act since the second *Ra-Rich* decision. The rule is applicable where otherwise appropriate, "after a witness called by the general counsel has testified"⁴⁷ Like the Jencks Act, the purpose of the rule in this respect is to limit narrowly the right of production to impeachment attempts on cross-examination and not to confer a general right of discovery.⁴⁸ The NLRB strictly adheres to this provision, and approves trial examiners' denials of production requests which are made before a witness whose statement is sought has commenced or completed his direct examination,⁴⁹ and those made after a witness has been cross-examined and excused.⁵⁰ In the case of requests for production made after a witness has been cross-examined

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ 18 U.S.C. § 3500(b) (1964); *Johnston v. United States*, 260 F.2d 345, 347 (10th Cir. 1958), cert. denied, 360 U.S. 935 (1959).

⁴⁷ 33 Fed. Reg. 9820 (July 9, 1968).

⁴⁸ See *Nachman Corp.*, 144 N.L.R.B. 473, 474 n.1, 54 L.R.R.M. 1402 (1963); *Monsanto Chem. Co.*, 130 N.L.R.B. 1097, 1098 n.1, 47 L.R.R.M. 1451, 1453 (1961).

⁴⁹ *NLRB v. Vapor Blast Mfg. Co.*, 287 F.2d 402, 47 L.R.R.M. 2670 (7th Cir.), cert. denied, 368 U.S. 823 (1961); *NLRB v. Chambers Mfg. Corp.*, 278 F.2d 715, 46 L.R.R.M. 2316 (5th Cir. 1960); *Local 320, Int'l Operating Eng'rs*, 150 N.L.R.B. 455, 456 n.2, 58 L.R.R.M. 1113, 1114 (1964). See *Aero Corp.*, 149 N.L.R.B. 1283, 1288, 57 L.R.R.M. 1483, 1490-91 (1964) (denying a production request for pretrial statements made by persons who purportedly signed union authorization cards, the request having been made during the cross-examination of a handwriting expert who testified on direct examination as a witness for the General Counsel). Cf. *United States v. David*, 168 F. Supp. 269 (N.D. Ohio 1958), aff'd per curiam, 264 F.2d 248 (6th Cir.), cert. denied, 359 U.S. 967 (1959).

⁵⁰ *Walsh-Lumpkin Wholesale Drug Co.*, 129 N.L.R.B. 294, 46 L.R.R.M. 1535 (1960), enforced per curiam, 291 F.2d 751 (8th Cir. 1961). See *Selwyn Shoe Mfg. Corp.*, 172 N.L.R.B. No. 81, 68 L.R.R.M. 1417 (1968).

"JENCKS RULE"

and excused, the Board reasons that a contrary rule would disorganize the hearing.⁵¹ This somewhat restrictive application of the rule is to some extent mollified by the discretion vested in the trial examiner to permit the recall of a witness for additional cross-examination.⁵² Under that circumstance, a respondent would not be barred from making a production request solely for the reason that no request had been made before the conclusion of his initial cross-examination of the witness.⁵³

Since the rule, like the Jencks Act, is a procedural device which permits a respondent to establish prior inconsistent statements of adverse witnesses, its restriction to periods of time following the direct examination of the witness sought to be impeached is warranted; the restriction of the rule's operation to periods of time before the completion of cross-examination, though less justifiable, does not appear to be unreasonable. The cross-examiner has the burden of establishing the existence of statements given to government agents, and this is ordinarily done by eliciting from a witness during cross-examination the fact that such statements were made. Thus, the initial cross-examination of the witness is clearly the proper time to bring out these matters.

If the respondent recalls a previously cross-examined witness as his own witness, a production attempt may not be made, since the witness in that instance is not being cross-examined. If a respondent calls an adverse witness under Rule 43(b) of the Federal Rules of Civil Procedure,⁵⁴ respondent is entitled to interrogate the witness by "leading questions and [to] contradict and impeach him in all respects as if he had been called by the adverse party" Rule 43(b) would appear thus to warrant a production order on respondent's request when respondent's witness is testifying as an adverse rule 43(b) witness. But the NLRB holds to the contrary, and has denied a production request made under those circumstances.⁵⁵

⁵¹ Id. at 296, 46 L.R.R.M. at 1535.

⁵² Cf. id.

⁵³ Id.

⁵⁴ Fed. R. Civ. P. 43(b) provides:

A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, or managing agent of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross-examined by the adverse party only upon the subject matter of his examination in chief.

⁵⁵ Kenrich Petrochemicals, Inc., 149 N.L.R.B. 910, 911 n.2, 57 L.R.R.M. 1395, 1396 (1964).

*B. Statements Within the Scope of the
Jencks Act and the NLRB's Jencks Rule*

In addition to limiting narrowly the time within which a production request may be made, the Jencks Act also places limits upon the types of statements which are producible. These limitations are cast within the framework of the definition of a statement in Sections (e)(1) and (2) of the Act.⁵⁶ A written statement signed by the witness poses no problems, and is clearly within section (e)(1). There have been difficulties, however, in determining what constitutes a section (e)(1) "adopted or approved" statement and what constitutes a section (e)(2) "substantially verbatim recital of an oral statement. . . . recorded contemporaneously with the making of such oral statement."⁵⁷

1. *Adoption-Approval*.—Like its counterpart in the Jencks Act, the approval or adoption requirement of the NLRB's inspection rule forecloses a gap which would exist if the rule or the statute unqualifiedly required that every statement subject to production be signed by the witness whose statement is sought. The words "signed or otherwise adopted or approved," as used in subsection (d)(1) of the amended proviso and in the Jencks Act, contemplate that an unsigned statement may not be denied production solely on the ground of lack of a signature.⁵⁸ In the absence of a signature, an otherwise producible statement falls within Section (e)(1) of the Jencks Act and subsection (d)(1) of the amended proviso if the statement taken is read by or to the witness and its accuracy is acknowledged in some way by that witness.⁵⁹

In *Campbell v. United States*,⁶⁰ decided by a divided Supreme Court, section (e)(1) was given the broadest possible interpretation. In that case, a prosecution for bank robbery, an FBI agent took notes while interviewing a witness to the robbery. He referred to the notes and recited to the witness the substance of the witness' account, and received the witness' assurance that the statement was accurate. Seven hours after confronting the witness, the agent dictated the report into a dictating machine, using his notes of the interview and also relying upon his memory. The agent then destroyed his interview notes. The report was transcribed, but the transcription was never shown to the

⁵⁶ 18 U.S.C. §§ 3500(e) (1), (2) (1964).

⁵⁷ *Id.* § 3500(e) (2).

⁵⁸ *Campbell v. United States*, 365 U.S. 85, 96-98 (1961). Four justices, dissenting in part, thought that § (e)(1) applied only to statements in the witness' handwriting. *Id.* at 104-06. The legislative history of the Act supports the majority. See H.R. Rep. No. 700, 85th Cong., 1st Sess. (1957). NLRB rule 102.118 is clearer in this regard, and is not as susceptible of an interpretation that it applies only to statements in the handwriting of the witness.

⁵⁹ NLRB Rule 102.118.

⁶⁰ 373 U.S. 487 (1963).

"JENCKS RULE"

witness. The district judge, after the original remand,⁶¹ held that neither the notes nor the interview report was producible under the Jencks Act.⁶² The court of appeals held that the status of the notes could not be determined adequately without more testimony from the witness who had given the statement, and accordingly ordered a special hearing before another district judge.⁶³ That judge found that the witness adopted the narrative as recited by the FBI agent and that the transcribed interview report "was almost *in ipsissima verba* the narrative" which the agent had recited to the witness.⁶⁴ On the basis of those findings, the Supreme Court concluded that the transcribed statement of the FBI agent was producible as an "approved or adopted" statement within the meaning of the Jencks Act.⁶⁵

The *Campbell* case, which is an important one in terms of its relationship to day-to-day factual situations arising out of the investigation of criminal cases, appears to have been incorrectly decided. The statement which the witness "adopted or approved" was destroyed and the question of its producibility was not considered by the Supreme Court. The transcribed statement clearly did not qualify as a "signed" statement. Section (e)(1) of the Jencks Act contains nothing relating to the "transcription" of an "adopted or approved" statement, much less one transcribed partly from an agent's memory several hours after an interview. If Congress, in enacting the Jencks Act, had intended to include transcriptions of "adopted or approved" statements within the scope of section (e)(1), its intent would probably have been made as clear as it was in section (e)(2) where transcriptions of certain recordings are expressly made a part of the "substantially verbatim-contemporaneously recorded" definition of a statement. Further, it is unlikely that the interests of ascertaining truth in judicial proceedings will be advanced by permitting a party to demonstrate inconsistencies between a witness' testimony and statements like the one held producible in the second *Campbell* case. Assuming, as one must, the fallibility of the FBI agent's memory, if his transcribed statement did not accurately reflect the witness' narration to him—and the dissenting justices thought that it did not—the value of testing credibility by comparing a witness' testimony with such a statement is necessarily

⁶¹ *Campbell v. United States*, 365 U.S. 85 (1961).

⁶² *United States v. Campbell*, 206 F. Supp. 213 (D. Mass., 1961).

⁶³ *Campbell v. United States*, 296 F.2d 527 (1st Cir. 1961).

⁶⁴ *United States v. Campbell*, 199 F. Supp. 905, 907 (D. Mass. 1961).

⁶⁵ Three Justices—Clark, Harlan and Stewart—dissented on the ground that the record did not support the trial judge's finding that the agent's interview report and his earlier narrative to the witness were the same, and that even if they were, "the statute does not cover a written report . . . prepared from the agent's memory, as well as his notes, some nine hours subsequent to the interview and neither read by or to the witness nor shown to him prior to what the Court terms his 'adoption' of it." 373 U.S. at 499.

lost. In any event, if a transcription of an "adopted or approved" statement was not intended to be within section (e)(1), it was not material in *Campbell* whether the transcription and the earlier narration to the witness were the same.

In *Canton Cotton Mills*,⁶⁶ one of the few NLRB cases dealing with the reach of the "approval or adoption" aspect of NLRB rule 102.118, and where the facts differed substantially from those in *Campbell*, the attorney for the General Counsel of the NLRB had prepared a pretrial summary of a witness' affidavit in the form of questions and answers. The question and answer summary was not shown to or discussed with the witness before trial. The statements in the witness' affidavit and the answers written out in the question and answer summary were the same. On request of the respondent's counsel, a copy of the witness' affidavit was furnished the respondent for his inspection and use in cross-examination. The respondent then successfully moved for the production of the question and answer summary. The NLRB held that under the circumstances the question and answer summary was not a statement "approved or adopted" by the witness within the meaning of section 102.118 of the NLRB rules "or the principles enunciated in *Jencks v. United States* . . . or the 'Jencks Act,' " and that the trial examiner improperly ordered the summary's production.⁶⁷

The statement in the *Canton* case was clearly not within the scope of rule 102.118. Since the witness had no way of knowing the contents of the summary, it could hardly have been considered "approved or adopted" by the witness. Nor would the statement in *Canton* qualify as producible under Section (e)(2) of the Jencks Act, or its counterpart in subsection (d)(2) of the amended proviso, since it was not made contemporaneously with the witness' interview, as those sections require, but after the interview and on the basis of another statement.

In a related but distinguishable case decided before the NLRB's amendment of the proviso, an NLRB trial examiner denied production of a question and answer form which had been completed *during* the interview of a witness.⁶⁸ The denial was based on the fact that the form had not been signed by the witness. It is not clear from the decision whether the witness had occasion to "approve or adopt" the contents of the form. Under the Jencks Act and the amended proviso, the com-

⁶⁶ 148 N.L.R.B. 464, 57 L.R.R.M. 1033 (1964).

⁶⁷ *Id.* at 465 n.1, 57 L.R.R.M. at 1035. The Board held further that the trial examiner's error in ordering production of the question and answer summary was not prejudicial, inasmuch as several other witnesses corroborated the testimony of the witness involved. *Id.*

⁶⁸ *Louisiana Television Broadcasting Corp.*, 142 N.L.R.B. 55, 64 n.27, 52 L.R.R.M. 1545 (1963).

"JENCKS RULE"

pleted form might have been producible, since the statement was taken contemporaneously with the interview and the answers might have been substantially verbatim recordings of the witness' narration, thus bringing the form within the scope of Section (e)(2) of the Act and subsection (d)(2) of the amended proviso.

2. Substantially Verbatim-Contemporaneous Recordings.—In a criminal proceeding in a federal district court, a statement not "signed, approved or adopted" within the meaning of Section (e)(1) of the Jencks Act might nonetheless be subject to production under section (e)(2) as a "substantially verbatim-contemporaneously recorded" recital of a witness' oral statement. As a result of the amended proviso, this is now true in NLRB proceedings. To qualify as a statement under this definition a statement must meet both the substantially verbatim and the contemporaneous recording tests. More so than the "approval or adoption" test contained in both the Jencks Act and rule 102.118, the "substantially verbatim-contemporaneously recorded" standard is inherently susceptible of a wide range of construction problems. Similar problems will confront the NLRB now that the agency has followed the judicial trend to engraft that test upon the NLRB. Although no firm definition has evolved from Jencks Act court decisions to date, there are some rough interpretative guidelines. Under the Jencks Act, a statement which contains substantially all of a witness' pretrial narration is producible. A summary which omits major portions of a witness' narrative is not producible⁶⁹ but a "substantially verbatim" statement need not be a word-for-word account of the witness' narrative.⁷⁰ The test is satisfied if the statement gives the substance of a witness' statement in a fairly comprehensive reproduction of the witness' words, and does not constitute mere fragmentary notes of the agent.⁷¹

The issue, in deciding whether a statement is contemporaneously recorded, will usually narrow to one of measuring the time lapse between the investigation or pretrial interview and the preparation of notes based on the interview, and the time lapse between note-making and the preparation of any report based on the notes.⁷² As least one court has held that the word "contemporaneous" in Section (e)(2) of the Jencks Act does not mean "simultaneous."⁷³ Beyond this pronouncement, no guiding rule has evolved from the cases. Like the

⁶⁹ *Palermo v. United States*, 360 U.S. 343 (1959). In the view of four justices concurring separately in that case, not all summaries of witnesses' statements automatically fall outside of the Jencks Act, as the majority suggested. *Id.* at 362.

⁷⁰ *United States v. Waldman*, 159 F. Supp. 747 (D.N.J. 1958).

⁷¹ *United States v. Thomas*, 282 F.2d 191, 194 (2d Cir. 1960). See Annot., 5 L. Ed. 2d 1014, 1026-29 (1961).

⁷² E.g., *United States v. McKeever*, 271 F.2d 669, 674-75 (2d Cir. 1959).

⁷³ *Id.* at 675.

"substantially verbatim" aspect of the Act, each contemporaneous recording question is decided on its facts.⁷⁴

C. *Statements in General Counsel's Possession*

1. *Scope of Physical Possession.*—NLRB rule 102.118 limits producible statements in unfair-labor-practice cases to those "in possession of the general counsel."⁷⁵ Section (b) of the Jencks Act limits producible statements to those "in the possession of the United States." Within the meaning of both the Jencks Act and the NLRB rule, "possession" means something more than the immediate possession of the Government's attorney at a particular hearing or trial. Otherwise the intent of the rule and the statute would be defeated.⁷⁶ On its face, "possession of the United States," as used in the Jencks Act, extends to documents in the possession of any department or agency of the United States, so that pertinent documents not in the possession of the FBI or the Justice Department but held by other federal agencies are nonetheless subject to production if other Jencks Act requirements are met. The NLRB rule, on the other hand, is limited to documents in the possession of the agency's General Counsel. On its face it does not extend to otherwise producible documents in the possession of other agencies of the federal government. At least one reviewing court has disagreed with this limitation on the scope of the possession requirement in rule 102.118.⁷⁷

⁷⁴ See *United States v. Waldman*, 159 F. Supp. 747 (D.N.J. 1958). The court held that the "contemporaneous recording" test was satisfied where an FBI agent's original notes, subsequently transcribed, were made while the witness was talking to the agent, stating: "[T]he statute requires not that the transcription shall be contemporaneous, but that its recording shall be, as it was. The present statement is, therefore, 'a transcription thereof'—the very words of the statute." *Id.* at 749. In *Lohman v. United States*, 251 F.2d 951 (6th Cir. 1958), the court held producible an FBI informer's report on the defendant's attendance at Communist Party meetings, the report having been made one or two days after the meetings were held. See also *Borges v. United States*, 270 F.2d 332 (D.C. Cir. 1959) (*per curiam*) (ten day to one and one half month time lapse).

⁷⁵ 33 Fed. Reg. 9819, 9820 (July 9, 1968) (§ (b)). The second proviso relating to "postelection" hearings, limits producible documents to those "in possession of any agent of the Board . . ." *Id.* (§ (c)). Although this wording differs from its counterpart in the first proviso, relating to unfair-labor-practice hearings, the effect of the "possession" requirement in both provisos is the same, since all professional employees (field examiners and attorneys) in the NLRB's regional offices are agents of the General Counsel. Unlike unfair-labor-practice proceedings, there is no attorney for the General Counsel in postelection hearings. Generally, those participating in postelection hearings are a union and an employer, one of whom is contesting the outcome of a representation election, and a "counsel for the regional director," who is an attorney attached to the regional office in the region where the representation election was held. The counsel for the regional director does not act as an advocate for either the union or the employer, but assures that all of the facts required for a decision by the Board are placed on the record. See 29 C.F.R. § 102.69 (1968).

⁷⁶ Cf. *United States v. Lonardo*, 350 F.2d 523, 530 (6th Cir. 1965); *Augenblick v. United States*, 377 F.2d 586, 597-98 (Ct. Cl. 1967).

⁷⁷ *Harvey Aluminum (Inc.) v. NLRB*, 335 F.2d 749, 56 L.R.R.M. 2982 (9th Cir. 1964).

"JENCKS RULE"

In *Harvey Aluminum (Inc.)*⁷⁸ an NLRB trial examiner refused to order the attorney for the General Counsel to produce statements of witnesses for the General Counsel which had been taken by agents of the Department of Labor and the FBI during investigations by those agencies. The trial examiner also revoked subpoenas duces tecum directed to the Secretary of Labor and the Attorney General seeking production of those statements, and denied a request that the NLRB ask the Secretary of Labor and the Attorney General to make the statements available.⁷⁹ The NLRB held that the statements were not in the possession of the General Counsel within the meaning of the *Jencks* decision or the Jencks Act.⁸⁰ A reviewing court in *Harvey Aluminum Inc. v. NLRB*⁸¹ disagreed. After preliminarily noting that the *Jencks* doctrine applies to administrative proceedings, the court held that the requirements of "justice," "fair play" and "due process" were not met by limiting the availability of prior statements to those in the possession of the federal agency conducting the hearing.⁸² The court's rationale was significant in its diametric opposition to the rationale of the NLRB in the decision reviewed that neither the *Jencks* case nor the Jencks Act required the result ultimately reached by the court:

In a criminal prosecution the Department of Justice would scarcely be heard to say that it was not required to produce statements otherwise within the rule simply because the documents rested in the hands of another federal agency, and we perceive no valid distinction, for this purpose, between that case and this one.⁸³

Thus, in the view of the court, insofar as the scope of physical possession of NLRB documents is concerned, rule 102.118 should extend to all agencies and components of the federal government and not merely to documents in the "possession of the general counsel" of the NLRB, as the plain meaning of the NLRB rule clearly contemplates. The *Harvey Aluminum* court's decision was not based on an interpretation of the NLRB rule, but on a flat disagreement—on the basis of Jencks requirements—with the rule as written and as applied in that case. The phrase "possession of the United States," as used in Sections (a) and (b) of the Jencks Act, appears to assure, on the

⁷⁸ 139 N.L.R.B. 151, 51 L.R.R.M. 1288 (1962).

⁷⁹ The request was based on the provisions of § 11(6) of the NLRA which provides: "The several departments and agencies of the Government, when directed by the President, shall furnish the Board, upon its request, all records, papers, and information in their possession relating to any matter before the Board." 29 U.S.C. § 161(6) (1964).

⁸⁰ 139 N.L.R.B. at 152, 51 L.R.R.M. at 1290-91.

⁸¹ 335 F.2d 749, 56 L.R.R.M. 2982 (9th Cir. 1964).

⁸² Id. at 753-54, 56 L.R.R.M. at 2984-85.

⁸³ Id. at 754, 56 L.R.R.M. at 2985.

basis of fundamental principles, that a producible statement will not be withheld from a defendant simply because a document sought at the time of trial is in the possession of another federal agency, which derives its existence from the same legislative body and is subject to the ultimate will of the same Chief Executive as the prosecuting agency. *Harvey Aluminum* properly extends this requirement to the NLRB.

2. *Legal Possession*.—Section (a) of the Jencks Act makes it reasonably clear that the Act applies only to statements made "to an agent of the Government" The NLRB Jencks rule refers to "any statement," without limitation as to whom the statement was made. But the Board has narrowly interpreted this aspect of the rule.⁸⁴ A statement taken by the charging party's attorney⁸⁵ is outside the scope of the rule,⁸⁶ even though it is shown to the attorney for the General Counsel.⁸⁷ This construction of the rule's possession requirement might easily defeat the rule's purpose, since production could be resisted on the ground that possession of a statement once obtained was lost before trial to a third person who was not an agent of the Government. This is particularly true where the "third person" is the charging party. The interests of the charging party and the General Counsel in an unfair-labor-practice proceeding are essentially the same. The attorneys for both parties often work together during the preparation and trial of an unfair-labor-practice case. It is accordingly arguable that for the limited purposes of production, circumstances might warrant treating the attorney for the charging party as an agent of, or co-attorney for, the General Counsel. Recognizing this problem, one court expressly left open the question whether the rationale of *Harvey Aluminum* extends so far as to require the production of statements not in the possession of the Government but of a private party working in close harmony with the Government.⁸⁸

It is questionable whether the amendment of the proviso affects the Board's holding in *Campco Plastics*⁸⁹ and *Tidelands Marine Serv.*⁹⁰ that the statement of a witness for the General Counsel is not

⁸⁴ 18 U.S.C. § 3500(a) (1964). See *United States v. Baker*, 358 F.2d 18, 20 (7th Cir. 1966), cert. denied, 385 U.S. 869 (1966).

⁸⁵ The charging party may be represented by counsel. 29 C.F.R. § 102.38 (1968).

⁸⁶ *Tidelands Marine Serv., Inc.*, 140 N.L.R.B. 288, 289 n.4, 52 L.R.R.M. 1005, 1007 n.4 (1962), enforced, 338 F.2d 44, 57 L.R.R.M. 2456 (5th Cir. 1964).

⁸⁷ *Campco Plastics Co.*, 142 N.L.R.B. 1272, 1273, 1286, 53 L.R.R.M. 1262, 1264 (1963).

⁸⁸ *NLRB v. Seine & Line Fishermen's Union*, 374 F.2d 974, 979 n.4, 64 L.R.R.M. 2210, 2213 n.4 (9th Cir. 1967).

⁸⁹ *Campco Plastics Co.*, 142 N.L.R.B. 1272, 1273, 1286, 53 L.R.R.M. 1262, 1264 (1963).

⁹⁰ *Tidelands Marine Serv., Inc.*, 140 N.L.R.B. 288, 289 n.4, 52 L.R.R.M. 1005, 1007 n.4 (1962).

"JENCKS RULE"

produced if the witness' statement was taken by the charging party and is not in the General Counsel's possession at the time of the hearing. Before the proviso was amended, the rule applied only after a witness for the General Counsel had testified. Under subsection (b) of the amended proviso, the rule also applies after a witness for the charging party has testified. But the section of the rule relating to "possession of the general counsel" remains unchanged. It remains to be seen whether the Board will place a different interpretation on the possession requirement, and, if not, whether courts will approve the Board's application of the rule.

3. *Lost or Missing Statements.*—In *Campbell v. United States*,⁹¹ the defendants requested production of a statement which a government witness testified he had signed for an FBI agent. The government prosecutor told the court that the statement was not in his possession and that he did not know whether such a statement ever existed. Neither the defendants' attorney nor the trial judge called to the witness stand the agent alleged to have taken the statement. In the course of his own examination of the government witness who had allegedly signed the statement, the trial judge showed the witness what was purported to be an FBI report of the witness' interview. On appeal from the conviction, the Supreme Court held that the trial judge erred by not examining sua sponte the agent who allegedly took the statement the witness said he had signed. The case was remanded for a hearing on the limited questions of the existence of the statement, whether it was destroyed, and, if so, the circumstances of its destruction. The Court reasoned that if the interview report shown to the witness was not the original or a copy of the document the witness said he signed and the signed paper had been destroyed, the defendants "might have been denied a statement to which they were entitled under the [Jencks Act],"⁹² thus requiring that the testimony of the witness be stricken in accordance with subsection (d) of the statute. Contrary to what the majority of the Court implied, four concurring justices stated that "possession" within the meaning of the Jencks Act was limited to statements in the possession of the United States at the time of the trial—a view which, if adopted by the courts, would make it unnecessary for trial judges to inquire into the circumstances surrounding the unavailability of documents sought by defendants during trials. In the case of documents purposely made unavailable, such as the statement deliberately destroyed by an FBI agent on the eve of trial in *United States v. Lonardo*,⁹³ the failure to determine why a document was unavailable would result in a clear injustice.

⁹¹ 365 U.S. 85 (1961).

⁹² *Id.* at 98.

⁹³ 350 F.2d 523 (6th Cir. 1965).

As do the courts in criminal cases, the NLRB examines the circumstances surrounding the unavailability of documents sought for production and bases the decision whether to strike testimony because of noncompliance with *Jencks* principles on the motive of the party causing the unavailability. For example, in an NLRB case where original affidavits were lost before the hearing, a motion to strike the testimony of the witnesses involved was denied because the General Counsel in some instances provided originals of later affidavits concerning the subject matter of the lost affidavits. The NLRB affirmed on the ground of a lack of showing of prejudice, inasmuch as respondents had an opportunity during cross-examination to ascertain from the witnesses whether the copies supplied were copies of the originals and whether the new affidavits differed materially from the lost affidavits.⁹⁴ A reviewing court enforced the NLRB's order finding the respondent in violation of the National Labor Relations Act.⁹⁵ The court disposed of the lost-affidavit question on a broader ground than lack of prejudice, by including a "bad faith" test in its reasoning.

[W]here original statements have been lost or destroyed and no bad faith or prejudice has been shown, as is the case here, testimony of the witnesses concerned need not be stricken because original statements cannot be produced. This would be true even where purported copies could not be supplied.⁹⁶

D. The Statement's Relationship to the Witness' Testimony

Under Section (e) of the *Jencks* Act, statements which are entirely unrelated to a witness' testimony on direct examination are not producible, and statements partially related are producible only to the extent that they relate to the witness' testimony on direct examination.⁹⁷ The issue arises only if the Government resists production on that ground.⁹⁸ In that case, the trial judge is bound to resolve the question, even to the extent of conducting an ancillary hearing if one is required.⁹⁹ The proper test for the trial judge to apply is not whether

⁹⁴ *Dwight-Eubank Rambler, Inc.*, 152 N.L.R.B. 1433, 59 L.R.R.M. 1326 (1965).

⁹⁵ *NLRB v. Dwight-Eubank Rambler, Inc.*, 380 F.2d 141, 65 L.R.R.M. 2900 (9th Cir. 1967). Accord, *NLRB v. Seine & Line Fishermen's Union*, 374 F.2d 974, 64 L.R.R.M. 2210 (9th Cir. 1967). See *Killian v. United States*, 368 U.S. 231, 239-44 (1961); *Ogden v. United States*, 323 F.2d 818 (9th Cir. 1963); *United States v. Tomaiolo*, 317 F.2d 324, 327-28 (2d Cir. 1963), cert. denied, 375 U.S. 856 (1963). But cf. *United States v. Lonardo*, 350 F.2d 523 (6th Cir. 1965).

⁹⁶ *NLRB v. Dwight-Eubank Rambler, Inc.*, 380 F.2d 144, 145, 65 L.R.R.M. 2900, 2903 (9th Cir. 1967). See *Carlisle Paper Box Co. v. NLRB*, 398 F.2d 1, 5, 68 L.R.R.M. 2831, 2834 (3d Cir. 1968).

⁹⁷ 18 U.S.C. § 3500(c) (1964).

⁹⁸ *Id.*

⁹⁹ See *id.* Cf. *Williams v. United States*, 328 F.2d 178, 180 (D.C. Cir. 1963).

"JENCKS RULE"

the material sought is relevant to the substantive issues in the case, but whether the statement relates generally to the events and activities described by the witness on direct examination.¹⁰⁰

The Jencks Act contains no explicit language requiring an in camera inspection by the trial judge to determine whether a statement sought to be produced qualifies as a statement under section (e). But in *Palermo v. United States*,¹⁰¹ the Supreme Court interpreted the Act as requiring an in camera determination of that question.

Before the amendment to the proviso, the NLRB Jencks rule, unlike the Jencks Act, contained no requirement that a producible statement relate to the witness' testimony on direct examination. Notwithstanding this omission from the rule, statements not meeting that test were denied production in NLRB proceedings.¹⁰² Despite these decisions by the Board, a court reviewing an NLRB order interpreted the rule literally and held that an affidavit bearing no relationship to the testimony of the witness who gave the statement was improperly denied production by an NLRB trial examiner.¹⁰³ Because of the silence of the NLRB's Jencks rule on the subject of relevancy, the court refused to consider sua sponte the relevancy of the statement. Apparently, the court chose not to apply the principle of law that an administrative agency's interpretation of its own rules are generally accepted, unless contrary to a statute or the Constitution.¹⁰⁴ Further, the decision, if followed, would have resulted in the production of privileged statements having no relevancy to the testimony of the testifying witness, a situation clearly not intended by the *Jencks* decision or the Jencks Act. In this respect, subsection (b) of the amended proviso is clearly consistent with NLRB decisional law and with Section (e) of the Jencks Act. Unlike the situation which existed before the amendment to the proviso, it is now clear what a trial examiner should do if a statement sought to be produced contains matters both related and unrelated to a witness' testimony on direct

¹⁰⁰ *Ogden v. United States*, 303 F.2d 724, 740 (9th Cir. 1962).

¹⁰¹ 360 U.S. 343 (1959).

¹⁰² *Holbrook Knitwear, Inc.*, 169 N.L.R.B. No. 106, at 1 n.1, 67 L.R.R.M. 1406, 1407 (1968); *Follet Corp.*, 164 N.L.R.B. No. 47, at 2 n.3, 65 L.R.R.M. 1102 (1967); *Borden Co.*, 157 N.L.R.B. 1100, 1120, 61 L.R.R.M. 1467 (1966). In one case, the Board's order provided for a remand to the trial examiner for the purpose of permitting production of "any pretrial statements . . . directly related to their testimony in the proceedings." *Ra-Rich Mfg. Corp.*, 121 N.L.R.B. 700, 702, 42 L.R.R.M. 1403 (1958) (emphasis added).

¹⁰³ *NLRB v. Borden Co.*, 392 F.2d 412, 67 L.R.R.M. 2677 (5th Cir. 1968).

¹⁰⁴ E.g., *Udall v. Tallman*, 380 U.S. 1, 4 (1965); *Bowles v. Seminole Rock Co.*, 325 U.S. 410, 413, 414 (1945). An agency's interpretation of its own procedural rules would appear to be a fortiori binding upon a court, particularly where, as in the court's *Borden* decision, the interpretation of the rule is consistent with statutory and Constitutional law, as well as consistent with a statute (Jencks) imposed upon the agency by the courts on grounds of fundamental fairness.

examination. On General Counsel's motion, the trial examiner must excise from the statement any matter not related to the witness' testimony on direct examination.

E. Use of the Obtained Statement

The rules of evidence regarding the admissibility and use of produced statements are not affected or modified by either the Jencks Act¹⁰⁵ or the NLRB's Jencks rule.¹⁰⁶ The impeachment value of a produced statement depends generally upon the nature and degree of inconsistency or contradiction between a witness' testimony on direct examination and matters contained in the statement attributable to the witness.¹⁰⁷ Notwithstanding its earlier reluctance to apply the Jencks Act to its proceedings, the NLRB has subsequently held applicable to its own proceedings, the statement of the Supreme Court in the *Jencks* case acknowledging the value of a prior written statement for impeachment purposes.¹⁰⁸ To enable the cross-examiner to exploit the use of the statement, wide latitude is permitted in cross-examining a witness on possible inconsistencies, contradictions, omissions and other matters relating to the produced statement as it bears on the witness' credibility. Unduly limiting this type of impeachment cross-examination to the detriment of the cross-examining party may constitute reversible error.¹⁰⁹

Apart from using a produced statement for impeachment purposes, narrow limits are placed upon its use. Although the statement may be read and analyzed prior to and during cross-examination, the NLRB holds that it may not be copied or permanently retained by the cross-examining party, unless it is introduced into evidence.¹¹⁰

IV. CONCLUSION

Although the Act which the NLRB has now chosen to adopt in toto is a criminal statute, the underlying concepts used by the Supreme Court in deciding the *Jencks* case, "justice" and "fairness," are very easily applied to at least some administrative proceedings. They are particularly applicable to proceedings of an administrative agency

¹⁰⁵ *Palermo v. United States*, 360 U.S. 343 (1959); *United States v. Knox Coal Co.*, 347 F.2d 33 (3d Cir.), cert. denied sub nom. *Libbi v. United States*, 382 U.S. 904 (1965).

¹⁰⁶ Cf. *Manbeck Baking Co.*, 130 N.L.R.B. 1186, 1189-90, 47 L.R.R.M. 1462, 1464 (1961).

¹⁰⁷ See text accompanying note 2 supra.

¹⁰⁸ *Tidelands Marine Serv., Inc.*, 126 N.L.R.B. 261, 263, 45 L.R.R.M. 1299 (1960).

¹⁰⁹ *NLRB v. Seine & Line Fishermen's Union*, 374 F.2d 974, 64 L.R.R.M. 2210 (9th Cir. 1967). Cf. *NLRB v. Bear Brand Roofing, Inc.*, 312 F.2d 616, 52 L.R.R.M. 2275 (10th Cir. 1962).

¹¹⁰ *Manbeck Baking Co.*, 130 N.L.R.B. 1186, 1190 n.11, 47 L.R.R.M. 1462, 1464 (1961).

like the NLRB, which determines whether or not a law has been violated.¹¹¹ Facilitating the opportunity to impeach a witness, within proper bounds, is not merely a benefit to a party accused and opposed by the Government, but a benefit to those who must find facts and arrive at conclusions based on those facts. Clearly, if a witness lies or has an imperfect memory concerning events he describes on the witness stand, it is in the interests of the fact finder, as well as the respondent, and, indeed, a government interested in fair play in judicial or quasi-judicial proceedings, that the witness' failing be exposed.¹¹² An administrative agency should certainly be no less interested in ascertaining the truth than should a court in a criminal proceeding.

In the case of the NLRB, "life and liberty" in the criminal sense are not at stake in its proceedings, but NLRB proceedings are decidedly more adversary in nature than those administrative proceedings in which facts are essentially undisputed, where the fact finder's need to resolve issues of credibility is an infrequent occurrence, and where no decision is made concerning a violation of a law. The question whether an employer or union committed unfair labor practices in violation of the National Labor Relations Act frequently hinges on an NLRB trial examiner's determination concerning a witness' ability or willingness to recall certain words or events, whether the words were uttered or the events took place as described, and, if so, in what context. The binding nature of a trial examiner's credibility resolutions compounds the importance of permitting full use of a procedural device which facilitates testing a witness' credibility.¹¹³

¹¹¹ Although not so stated in the decisions, the courts apparently take this view. In addition to the NLRB and SACB proceedings a court has held the Jencks principle applicable to deportation proceedings conducted by the Immigration and Naturalization Service, *Carlisle v. Rogers*, 262 F.2d 19 (D.C. Cir. 1958). In 1959, the Federal Trade Commission, without court compulsion, applied the Jencks principle to its proceedings. *Ernest Mark High*, 56 F.T.C. 625 (1959). See Gellhorn, *The Treatment Of Confidential Information By The Federal Trade Commission: The Hearing*, 116 U. Pa. L. Rev. 401, 428, 433 (1968).

¹¹² Studies have shown that exposure of willful falsehood is very rarely demonstrated by cross-examination, and that the most important service of cross-examination is in exposing faults in perception and memory. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 Harv. L. Rev. 177, 186-88 (1948).

¹¹³ The NLRB consistently holds that a trial examiner's credibility resolutions may not be successfully challenged on appeal unless "a clear preponderance of all the relevant evidence" shows that such findings were incorrect. *Standard Dry Wall Prods., Inc.*, 91 N.L.R.B. 544, 26 L.R.R.M. 1531 (1950), enforced, 188 F.2d 362, 27 L.R.R.M. 2631 (3d Cir. 1951). There are exceptions to the rule, but rarely are they successfully invoked. Some of these are: Credibility resolutions may be overtuned when they are improperly based on an inconsistency in testimony rather than the demeanor of a witness, *R. & R. Screen Engraving, Inc.*, 151 N.L.R.B. 1579, 1582 (1965); *Poinsett Lumber & Mfg. Co.*, 147 N.L.R.B. 1197, 1198, 56 L.R.R.M. 1381, 1382 (1964); *Phoenix Newspapers, Inc.*, 142 N.L.R.B. 827, 829 (1963); when the credited witness' testimony is inherently incredible, *A.F. Publicover Co.*, 168 N.L.R.B. No. 152, 67 L.R.R.M. 1088 (1968); *Braswell Motor Freight Lines*, 107 N.L.R.B. 761, 763-64, 33 L.R.R.M. 1243 (1954); when credibility

With narrow limits placed upon the circumstances under which production of pretrial statements may be ordered in criminal cases and in those administrative proceedings in which the *Jencks* principle is applicable, government files are clearly not in danger of being subjected to unreasonable disclosure to the public. The value of *Jencks* procedures as an aid in ascertaining truth more than offsets any such danger.

resolutions have no other basis than the trial examiner's statement that "[Witness 'A''] testimony was more convincing than [Witness 'B'']'s]," *Hotpoint Co.*, 120 N.L.R.B. 1768, 1771 (1958); *Erie Dry Goods Co.*, 117 N.L.R.B. 815, 39 L.R.R.M. 1336 (1957); when a credited witness is inferentially discredited, *Teamsters Local 279*, 140 N.L.R.B. 164, 165-166, 51 L.R.R.M. 1598 (1962); and when the credited witness' testimony is substantially contradicted on cross-examination, *Midstate Hauling Co.*, 129 N.L.R.B. 1150, 1153, 47 L.R.R.M. 1150, 1151 (1961).