ORIGINAL

In the

Supreme Court of the United States

NATIONAL LABOR RELATIONS BOARD

Petitioner,

V.

ROBBINS TIRE AND RUBBER COMPANY

Respondent,

Case No. 77-911

Washington, D.C.
April 26, 1978

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Respondent.

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Friday, April 26, 1978

The above-entitled matter came on for argument at 1:17 o'Clock p.m.

BEFORE:

WARREN BURGER, Chief Justice of the United States
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHENQUIST, Associate Justice
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

CARL L. TAYLOR, Associate General Counsel, National Labor Relations Board, Washington,D.C. ; on behalf of the Petitioner

WILLIAM M. EARNEST; 800 Peachtree-Cain Tower, Atlanta,Georgia on behalf of the respondent.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 77-911, National Labor Relations Board against Robbins Tire and Rubber Company.

Mr. Taylor, I think you may proceed whenever you are ready. You have the honor of arguing what we hope is the last case to be argued in the course of this year; more important to us than it is to you.

ORAL ARGUMENT OF CARL L. TAYLOR, ESQ.,

ON BEHALF OF THE PETITIONER

MR. TAYLOR: Thank you, sir.

Mr. Chief Justice, and may it please the Court:

The heart of this case is that The Freedom of Information Act was never intended to be a new and superior set of discovery rules, to supersede and override the balance struck within existing discovery rules, and to provide a vehicle for enjoining trials and hearings, pending FOIA litigation.

The Fifth Circuit itself, from whence this case comes, has emphasized this principle with respect to criminal litigation. In a case called United States v. Murdock, which is cited in the Robbins case itself in footnote 19, the court notes that when it was previously faced, earlier last year, with a FOIA demand in a criminal context, it held, and I quote, "We find that FOIA was not intended as a device to delay

ongoing litigation, or to enlarge the scope of discovery beyond that already provided by the Federal rules of criminal procedure."

The Fifth Circuit has attempted to distinguish Murdock on the ground that the special dangers inherent in upsetting the discovery balance in a criminal prosecution are so compelling that Congress could not have possibly intended such a result.

But in the case at bar, by contrast, enlarging the scope of discovery in labor proceedings will have a salutary effect upon the Board's procedures.

QUESTION: Mr. Taylor, I spent three years in the Executive Branch, and resolutely adhered to just the position that you're taking now. And I thought I was right then in doing it.

I had a good deal of difficulty after the 1974 amendments, though, where it seems to me that Congress just kind of plowed ahead and said that that is what they meant.

MR. TAYLOR: Mr. Justice Rehnquist, the statute speaks of enforcement proceedings without distinguishing between particular types of enforcement proceedings. And I suggest to the Court that what applies to any enforcement proceeding applies to all equally. And I think the legislative history bears me out on that.

If we go back to the 1966 bill, the original

Act, and look at the legislative history of what was intended initially by section 7, by exemption 7, and then trace it through the 1974 amendments --

QUESTION: Have you compared the House history of the bill, of the '66 Act, with the Senate history? They look like they're talking about two entirely different bills.

MR. TAYLOR: The bill, of course, came up in the Senate first. And what is key in the Senate, as far as we're concerned, is the participation of Senator Humphrey, who specifically protested, during the debates in the Senate, that the Act might be used to obtain statements of witnesses, prior to hearing, in Labor Board proceedings; he specifically addressed the Labor Board.

He expressed the fear, and I quote, "that witnesses would be loathe to give statements if they knew that their statements were going to be made known to the parties before the hearings."

In response to that, Senator Long proposed the language which became exemption 7, which he said would meet that problem.

Now, in the House, the relevant consideration is the focus on the concept of no earlier or greater access. That's essentially what Senator Long was trying to get to with the language he proposed, and the House report does pick that up, which is what I'm getting to.

The concept is solid in the '66 Act. The Congress did not intend to provide discovery to the parties by providing for earlier or greater access to materials in an ongoing enforcement proceeding than one could obtain by discovery with respect to whatever set of discovery rules applied to that enforcement proceeding.

In sum, I suggest, as the Fifth Circuit held in Hardemann Garment decided last year, "the legislative history of the original version of exemption 7 clearly indicates that Congress intended to include investigatory files of the NLRB within the exemption."

The question before us, I submit, is whether the 1974 amendments to exemption 7 were intended to repudiate the concept of noninterference with discovery in general, or with the protection of Board witness statements in particular.

QUESTION: Well, certainly there's nothing in the Act, either in '66 or '74, that suggests the Labor Board is different from OSHA or different from the FTC, or different from any other agency, is there?

MR. TAYLOR: There is nothing to distinguish between various types of enforcement proceedings; that's exactly right. And to that extent, we suggest that there cannot be a difference between criminal enforcement proceedings, and any other type of enforcement proceedings.

The Act speaks of enforcement proceedings generically,

and that it makes no sense for the Fifth Circuit to say, we can't believe that Congress would have intended to interfere with discovery rules in criminal proceedings, but we believe it when it comes to labor Board proceedings, which are also enforcement proceedings, especially in light of Senator Humphrey's particular concern, particularly focused concern.

I'm not suggesting that he was singling out the Labor Board for special treatment. What I think the legislative history shows is that he was particularly concerned about the Board, and therefore, interested in getting the Act worded so that it would protect against discovery in all enforcement proceedings. And that is, indeed, what happened.

QUESTION: Mr. Taylor, what do you do with Senator Hart's comment, at the bottom of page 30 of your brief, your footnote, that it's only relevant to make that determination in the context of the particular enforcement proceeding. Does that support a notion that there's a general prohibition against discovery?

MR. TAYLOR: Mr. Justice Stevens, if I am right that the concept of no earlier or greater access still finds its way into the '74 amendments, then of necessity you must look to this particular enforcement proceeding, to determine what discovery rules are applicable, and what access is allowed.

QUESTION: You mean by "particular" you meant particular kinds of enforcement, like Labor Board --

MR. TAYLOR: Yes, sir, exactly.

QUESTION: Is that interpretation consistent with your notion that the same rules apply to criminal enforcement, Labor Board notion?

MR. TAYLOR: The notion, sir, is of no earlier or greater access, than whatever the discovery rules in the particular type of proceeding described. Congress did not intend that to say that all enforcement proceedings must have the same set of discovery rules.

QUESTION: What do you think Congress did intend to do by the 1974 amendment?

MR. TAYLOR: Congress was focusing particularly on a set of cases which Congress felt constituted a judicial distortion of the original intent. Congress was not writing on a clean slate in 1974.

It identified, in particular, four cases from the District of Columbia Circuit, none of which had anything to do with litigation that was then ongoing. And indeed, in some of them, it was pretty farfetched that litigation could ever be ongoing, and in one of them, the one dealing with the papers on the desk of President Kennedy, the court said there was no possibility there could be any further litigation.

Congress was particularly upset about those decisions. But Congress mentioned no decision with which it was upset that dealt with an ongoing enforcement proceeding.

QUESTION: Its primary concern was to undo the decisions of the Court that had read the exemption broadly as including anything that had ever been prepared, generically, in connection with any enforcement proceeding; isn't that right?

MR. TAYLOR: That's right. And I think it's also significant to note that in the catalog of judicial distortions the Congress identified, it did not include any of the substantial number of appellate court decisions -- not only district court, but appellate court decisions -- which had protected Board witness statements prior to hearing under the 1966 Act. There had been quite a number of such decisions, because the matter had been litigated heavily. And there was not a single reference in the legislative history to any of those decisions as being a judicial distortion.

We suggest that that matches perfectly with Senator Hart's comments when he specifically disclaimed any intentions to radically depart from the intention of the 1966 Act, and then referred to the original intent as not to allow any earlier or greater access.

And that the focus of the '74 amendments was exactly what's been suggested, was this refusal to provide access without regard to the enforcement proceeding, or the relationship of the information to the enforcement proceeding, or the enforcement proceeding interest, in keeping that information from being disclosed.

QUESTION: Now that is -- even if we were to adopt that position, that's not a complete answer to Judge Godbold's decision in this case, is it? Because he concluded that the disclosure would not really interfere with the enforcement.

MR. TAYLOR: I suggest, Mr. Justice Rehnquist, that it is a complete answer; that Congress had determined, as a matter of law, that there shall be no earlier or greater access; that Congress has determined that that is an inherent harm, that it is not going to impose through the FOIA; and that it is not permissible, consistent with the statute and the Congressional intent, for the court to come behind and say, we don't think that five days earlier or greater access --

QUESTION: It's not subject to case-by-case determination, then. It's just a generic type of rule laid down by Congress.

MR. TAYLOR: Exactly. Whatever the discovery rules in the particular proceeding provide, the FOIA matches that. But particular courts can't come along and say, well, one court thinks five days is sufficient, another court thinks ten, another court perhaps --

QUESTION: Well, then, what good does FOIA do in these cases? I mean, if it simply matches the discovery rules that already exist.

MR. TAYLOR: FOIA allows -- well, as this Court has said, on a number of occasions, the basic purpose of FOIA is

to protect the public interest in access to what agencies are doing, and not to benefit private litigants.

Now that rule allows the public in general the same access to information in ongoing litigation as the litigants have. In other words, there can be no -- if the information is to be provided to the litigants, under normal routine discovery rules, then it must, at the same time, be provided to the public.

QUESTION: Well, it just excludes it from the Act.

MR. TAYLOR: Sir?

QUESTION: It excludes you from the Act until you to go your regular discovery route?

MR. TAYLOR: Yes, sir. That's exactly what we suggest that Congress intended.

QUESTION: Well, I think Congress could have said that very easily.

MR. TAYLOR: Well, I suggest --

QUESTION: Just that way. And they didn't.

MR. TAYLOR: I suggest, Mr. Justice Marshall --

QUESTION: That's my problem.

MR. TAYLOR: -- that Congress did say that, but the legislative history is clear, in terms of the 1966 Act --

QUESTION: I don't think Congress says any place that this doesn't apply to NLRB investigations.

MR. TAYLOR: Congress said that it was not intended

to provide earlier or greater access than would be applicable --

QUESTION: My question was, that Congress could have said the FOIA does not apply to NLRB. And they didn't say that.

MR. TAYLOR: They said it doesn't apply to enforcement proceedings in general, to the extent of providing earlier or greater access.

QUESTION: I give up.

QUESTION: Well, is there anything in the legislative history that suggests that it was intended to be a substitute for, or an addition to, the discovery rules provided?

MR. TAYLOR: No, sir. Indeed, all the legislative history is --

QUESTION: To the contrary, is it not?

MR. TAYLOR: -- to the contrary. The very concept of no earlier or greater access is to the contrary.

QUESTION: But now take your language out of exemption 7, investigatory records compiled for law enforcement purposes, and then you have, I believe your '74 amendment, but only to the extent that the production of such records would interfere with enforcement proceedings.

Doesn't that suggest some sort of a case-by-case or some sort of a balancing approach?

MR. TAYLOR: We suggest that you've got to look, again -- that the '74 Act was not written on a clean slate,

and you can't look at those words by looking them up in the dictionary; that you've got to look at the original Act, and trace the history of this legislation. Look at the evils that Congress was trying to cure, and look at what Senator Hart said he was not proposing to do.

And one of the things he was not proposing to do was to interfere with the concept of no earlier or greater access. So that that sets the framework for what those words mean.

Now, the Fifth Circuit suggests -- and just to get back to the point that was raised -- the Fifth Circuit suggests that there is no presumptive damage done to the balance struck by the Board between discovery and protection by an order that the statements be disclosed five days in advance. Because the statements will become public at the hearing in any event, and because little intimidation is likely to occur in such a short period.

Now we contend that the earlier or greater access concept is sufficient to answer that question. But it also ought to be pointed out that the harm from any premature release of the identity of expected testimony of witnesses in an enforcement proceeding is precisely the danger that they can be persuaded to alter their testimony, and that it's no answer to suggest, as the Fifth Circuit did, that the intimidator may be prosecuted after the facts. Because if testimony is altered, there's no amount of after-the-fact prosecution

that's going to get that case back; if that testimony is altered, that case may be lost.

Moreover, as the Sixth Circuit noted in Hardemann Garment, intimidation may be subtle and not susceptible to proof.

We submit that these dangers, rejected by the Fifth Circuit, are indeed precisely the harms that Congress aimed at when it developed the concept of no earlier or greater public access under FOIA.

QUESTION: Mr. Taylor, do you contend that if the Board should change its rules to allow no discovery of witnesses' statement, even after they testified, the statute still would not allow disclosure?

MR. TAYLOR: Your Honor, the Court -- the Board has accepted this Court's decision in the Jencks case as applicable to the Board.

QUESTION: But as a matter of rulemaking, you're not --

MR. TAYLOR: As a matter of constitutional and due process law; not as a matter of FOIA law.

QUESTION: Well, suppose you changed -- say a different general counsel thought the Constitution was different. The Jencks case didn't apply to the Labor Board.

QUESTION: -- constitutional decision.

MR. TAYLOR: The Second Circuit, shortly after the

the Jencks case was issued, the Second Circuit did rule that the Jencks case applied to Board proceedings; that they were sufficiently like criminal proceedings that it ought to apply. And the Board did accept that concept. And in response to that Second Circuit decision, did enact its own Jencks rule. It's not a part of the rule.

QUESTION: So you say my hypothesis cannot occur, is what you're saying?

MR. TAYLOR: Sir?

QUESTION: So my hypothesis cannot occur, is what you'r saying?

MR. TAYLOR: That's right, sir.

QUESTION: Well, what if the Second Circuit changes its mind? Supposing the Second Circuit hadn't said that the Jencks rule should apply in NLRB cases. Would the Board be free by rule, so far as FOIA is concerned, to say, no Jencks Act disclosure either?

MR. TAYLOR: The Board would certainly be free to try. The case law suggests that the Board would be told to go back.

But in any event, that would be a constitutional due process question.

QUESTION: Well, Jencks wasn't based on constitutional law.

QUESTION: No, Jencks was not a constitutional decision.

MR. TAYLOR: It was based on the concept of inherent unfairness in not allowing --

QUESTION: Supervisory power over the Federal district courts.

MR. TAYLOR: There is an inherent unfairness. I stand corrected if I've spoken too loosely. Whatever the -- without discussing what the particularly -- precisely what the particular framework of Jencks is.

QUESTION: Would the Board be free, under FOIA, to go back on its Jencks Act rule? That's the question.

MR. TAYLOR: Yes, sir. The answer is yes. That the FOIA simply says, no earlier or greater access than your own discovery rules provide. And the FOIA does not purport to tell you what your discovery rules are, in a Board case, in a criminal case, or in any other enforcement proceeding. That's measured -- it may be measured by constitutional due process, supervisory standards; whatever elementary fairness requires. But not by FOIA.

Now --

QUESTION: The question, however, was: Is it your contention that whatever discovery the Board permissibly allows, that is, permissible outside of FOIA, cannot be -- FOIA does not require disclosure of?

MR. TAYLOR: That's correct, sir.

QUESTION: That's your -- so the Board, if it wanted

to change its rules, and assuming it permissibly could, to provide even less discovery than it now does, that would be it, and FOIA would have to respect it; exemption 7.

MR. TAYLOR: That's correct, sir. Just as if this Court itself changed the Federal rules of criminal procedure, then the FOIA would have to respect that.

QUESTION: But you base that on the legislative history, the statement out of the legislative history? That isn't what the Act says.

MR. TAYLOR: The legislative history in the House of the 1966 -- the House report specifically uses those words, no earlier or greater access. And Senator Hart picks them up. He describes that as having been the purpose of the 1966 Act, in the language of exemption 7. And he says, we don't intend to change that.

QUESTION: So if the agency wants, really, to frustrate what the statute seems to say on its face, it's free to do so?

MR. TAYLOR: Well, we suggest sir, that the statute doesn't say on its face any different than Congress clearly intended.

In any event, in this case, the Board certainly is not intending to frustrate the Act. The Board is simply saying that the Act ought not to provide earlier or greater access, that it's not intended as a discovery rule. And it's impossible, in the context of ongoing litigation, to frustrate the FOIA.

by changing your discovery rules.

If this Court should change the Federal rules of criminal procedure to tighten up, in some respect, because it felt that the present rules are unworkable, that would not, in any sense, be frustrating the FOIA.

QUESTION: Mr. Taylor --

MR. TAYLOR: The point is, again -- yes, sir.

QUESTION: I didn't mean to interrupt you if you hadn't finished your thought. But are you relying, when you keep referring to Senator Hart, on the passage you quoted at pages 29 and 30 of your brief? Is that what you say adopts the no greater or no earlier access concept?

Because I surely don't read that passage that way.

MR. TAYLOR: If you start on page 27, Mr. Justice Stevens, he says, "My reading of the legislative history suggests that Congress intended that this 7th exemption was to prevent harm to the government's case in court by not allowing an opposing litigant to get earlier or greater access than he would otherwise have."

He then goes on to say what the evils are. And then he says, that, he suggests, is not consistent with the intent of Congress when it passed this basic Act in 1966. "Then, as now, we recognize the need for law enforcement agencies to be able to keep their records and files confidential."

QUESTION: "Where a disclosure would interfere with

any one of a number of specific interests." And then later on he says, where the production of a record would interfere with enforcement procedures -- this would apply whenever the government's case in court, a concrete prospective law enforcement proceeding would be harmed by the release of information. And then in a footnote he says, it's only relevant to make such a determination in the context of the particular enforcement proceeding.

Now, you say he's announcing a general rule that there's never to be access.

MR. TAYLOR: Your Honor, he's saying that the intention of Congress in 1974 to return to the original intention, when the Act was passed in 1966. And when he says, then as now we recognize the need, he's saying that the Congress is recognizing the same need now as it recognized in 1966.

The whole thrust is that there was nothing wrong with the 1966 Act. The problem was with the way the courts had interpreted it. So now Congress had to go back and figure out some language which the courts could not ignore.

QUESTION: So he says that the amendment is not a radical departure from existing case law. So it's some departure from existing case law. But he says, the approach is in keeping with the intent of Congress, and by this amendment, we wish to reinstall it as a basis for access to information.

MR. TAYLOR: Exactly, sir. And that's why I suggested that it was significant that Congress did not point to any case which denied access, denied earlier or greater access, in an ongoing enforcement proceeding.

Congress focused on four cases specifically. It focused on an identified evil. And when you match that up with Senator Hart saying, we don't intend any radical departure from existing case law, and none of the cases they referred to -- and they were well aware of the cases. You know, that's what prompted this amendment; they had looked through the cases they didn't like.

QUESTION: Mr. Taylor, let me test you once more, if I may. At the bottom of page 28, again quoting Senator Hart, "this amendment explicitly places the burden of justifying the nondisclosure on the government, which would have to show that disclosure would interefe with enforcement proceedings, deprive a person of a right to a fair trial, constitute an unwarranted invasion of personal property, reveal the identity of informants, or disclose investigative techniques or procedures."

But under your view, all he would have to show is that we have rules that don't allow disclosure. He wouldn't have to show any of those things, if I understand you correctly.

MR. TAYLOR: Mr. Justice Stevens, I think what he's

referring to there is the other part of exemption 7. There are really two parts to exemption 7. There's a per se protection where it would result in earlier or greater access. If you look at the language, at the bottom of 29, and the top of page 30, Senator Hart explained that the amendment would continue to bar disclosure, first, where the production of a record would interfere with enforcement procedures. This would apply wherever the overnment's case in court, a concrete, prospective law enforcement proceeding, would be harmed by the premature release of evidence or information.

Now, I suggested to the Court, that has to be matched up with the original Congressional intent, and you have to look at what he intended there.

QUESTION: That is, they don't have to make that showing?

MR. TAYLOR: Yes, sir. But then he goes on to say, this would also apply where the agency could show -- and this is where the specific showing comes in, perhaps -- that the disclosure of the information would substantially harm such proceedings by impeding any necessary investigation.

That's got to mean something other than no earlier or greater access. Because he says, it would also apply. And we suggest that if there is a case-by-case determination to be made, in the context of an ongoing enforcement proceeding, that that's what he intended it to apply to.

But in any event, we don't have that case here. Now --

QUESTION: Well, you do have the case here, though, where your whole exemption claim is based upon the proposition that disclosure of the information would interfere with enforcement proceedings; don't you?

MR. TAYLOR: Yes, sir. But Congress has already defined --

QUESTION: And you say that your rules, your discovery rules, were promulgated upon the proposition that they are necessary to prevent interference with enforcement proceedings?

MR. TAYLOR: Yes, sir.

QUESTION: And that's enough. Just show what your rules are, and what the basis and justification for the rules are.

MR. TAYLOR: Yes, sir. We also rely on the proposition that it hardly needs argument that intimidation is a danger from the premature release of information in an enforcement proceeding.

QUESTION: And that these rules are based upon that general possibility of the disruption of the enforcement proceedings, and that those are the rules, so based and so justified, and that they -- the FOIA does not provide for an individualized determination whether in any particular enforcement proceeding, there would be a disruption.

MR. TAYLOR: Yes, sir.

I'd like to turn just very briefly to exemption 5. In the alternative, we ask the Court to rule that investigatory witness statements are protected by exemption 5 of the FOIA, as work products, except for the use, of course, of Jencks statements.

This Court has already held in Sears that exemption 5 includes the work product privilege, as well as the executive privilege. While the executive privilege protects only deliberative material, and that is, of course, what this Court rules in the Mink case, the work product privilege protects trial preparation material, which these statements clearly are, under Hickman v. Taylor.

In Sears, the Court referred to the work product rule of Hickman as applicable to government attorneys in litigation, and therefore within the scope of exemption 5.

We suggest that since the statements in question are protected by Hickman, it follows that they are protected by exemption 5.

Now, I might just finally point out that this Court itself, going back -- well, really going to both points for a minute -- this Court itself has emphasized that the purpose of the FOIA is not to serve the needs of a particular litigant; and therefore necessarily not to provide discovery, but to satisfy the public interest.

And the public interest of what the Board's investigation shows, in this proceeding, is going to come out in the trial. The record will be fully disclosed.

As this Court said in Sears, when it denied access to the general counsel's goal memorandum, making a decision to prosecute, this Court said, the public interest is not strong in seeing these, because they'll come out at the trial in any event.

QUESTION: Well -- but can't an agency respond to an FOIA claimant's request that the public interest, in your request, will be served when two years from now we announce our conclusions on this subject, so wait until then?

MR. TAYLOR: Mr. Justice Rehnquist, I respectfully suggest that that's not the situation we have here; that five days from the date that this order was issued this case would have gone to trial, but for the order. And that the public interest in whatever the general counsel had investigated would have come forward at that time.

QUESTION: What if the request had been six months before the case would have gone to trial?

MR. TAYLOR: Well, then, it would have been six months, unless the discovery rules provided for access earlier.

QUESTION: So really it doesn't make any difference whether it's two years, or six months, or five days?

MR. TAYLOR: No, sir, it doesn't. But I would also

point out that discovery in many criminal proceedings lasts for quite awhile. And that maybe 6 months or two years as well.

I'd like to make one final point, and that is a practical point. The First Circuit, in Goodfriend v. Western said, quote, we do not believe that Congress intended to transfer, from the Board to the courts, the case-by-case adjudication of discovery disputes in unfair labor practice proceedings, close quote.

Such case-by-case adjudication is precisely what the Fifth Circuit would require, with the requirement that the Board show specific harm in every case.

The recent experience of Federal courts with civil discovery suggests that those delays would be crippling. And they'll occur in every case. There will be a FOIA case within every Board case. And we suggest, in light of this Court's admonition, in Air Force v. Rose, that the FOIA is intended to be a practical, workable, statute; that the exemptions are intended to be practical and workable; that the First Circuit is right, that that is inherently impractical and unworkable, and would impose crippling delays on all enforcement procedures.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Very well, Mr. Taylor.

Mr. Earnest.

ORAL ARGUMENT OF WILLIAM M. EARNEST, ESQ.,

ON BEHALF OF THE RESPONDENT

MR. EARNEST: Mr. Chief Justice, and may it please the Court:

The primary issue here before the Court is whether a government agency is going to be allowed to deny a valid request, under the Freedom of Information Act, as amended, by giving a categorical, per se, response of denial, that any meeting whatsoever of a statutory burden of proof, under Section 552(a)(4)(B) of the amended Act, the burden of proof is squarely on the government in this case, in a de novo proceeding.

The '74 amendments also provided for in camera inspection. There were some substantial revisions in the '74 amendments.

Now, at the district court hearing in this case, the Board presented no evidence whatsoever to support its claimed exemptions. This was even after the court reminded the Board that it had the burden of proof. I think in the Appendix, on page 71, the Board admits that it presents no evidence in this case at all.

On page 91 of the Appendix, the court, after having reminded the Board that it had the burden of proof in this case, inquired as to the nature of these statements, whether the statements were unique in any way; whether there's anything

unusual in these particular statements that would cause an interference, or whether it was the Board's position, per se position here, that the giving of virtually any statement, regardless of who gave that statement, or what might be included in that statement, would be interference.

And the Board accepted the latter position, a per se approach. This is, of course, an approach that, in toto, would exclude documents. In runs contrary to the segregable amendment, the segregable portion added in the '74 amendments. The Board here is claiming a blanket immunity from any turning over of this information.

This was despite Senator Kennedy's remark, during the consideration by the Senate, that there were no blanket exceptions.

There is nothing in the statute specifically exempting investigatory statements. Now, I think in one of the amicus briefs, the Freedom of Information Clearinghouse, page 13 of that brief, exemption 3 is discussed there. Exemption 3, as I understand it, exempts from disclosure a document that would have a statutory exemption. There is no statutory exemption in this case. Although Congress is well aware that the Board and other government agencies all have investigatory statements.

Quite to the contrary, Congress in the '74 amendments did away with this stonewall, categorical approach that had been taken. These four cases, D.C. Circuit cases, were

illustrative of that particular approach, a blanket, rubber stamp-type approach.

And that was what they sought to turn around. It was a mechanical and wooden, as that phrase has been bandied about, test. And Congress was foscusing here, on the '74 amendments, with regard to exemption 7 in particular, on the effect of the disclosure with regard to the enforcement proceeding. Would there be interference?

QUESTION: As I understand it, Mr. Earnest, this proceeding has simply been stayed pending the outcome of this ruling under FOIA?

MR. EARNEST: It has not been stayed by any court.

QUESTION: But I mean, the NLRB has declined to proceed with it.

MR. EARNEST: At their own volition, yes.

QUESTION: Right. So there's no question of mootness here?

MR. EARNEST: Yes, in fact the District Judge -- Judge Hancock of the District Court specifically gave that option to the Board's counsel. He said, I can order you to turn them over right now, or I can order you to turn them over X number of days before the hearing.

And he says, I don't think you want -- he says, I have the authority to do either, and I'll basically give you a choice.

And so -- but there was no stay as such. And in fact, we would be through with this thing, had the Board complied with FOIA.

QUESTION: But FOIA hasn't got anything to do with whether there's a hearing or not does it?

MR. EARNEST: FOIA has -- that's correct. That's correct.

QUESTION: So even if it were dismissed, it would still be a live FOIA case.

MR. EARNEST: That's correct. That's correct.

QUESTION: I mean, even if the Board case was dismissed.

MR. EARNEST: Yes. There was an interesting comment made just -- and I think it may have been in regard to the exemption 5, that the Board's duty of disclosure or the public interest would have been met as the facts were brought out in the hearing.

Well, that's not quite the case. Because the documents sought in this case will never be brought out to the public in the hearing. They are produced to the person in litigation with the agency only upon request, and they are retrieved by the Board after that. There's no opportunity to make a copy --

QUESTION: Well, couldn't you go after review under FOIA?

MR. EARNEST: I think you can go after it any time with FOIA.

QUESTION: But wouldn't you be successful then? What exemption could they plead then?

MR. EARNEST: I suspect we would see the same exemptions we've got now, because the Board has, I think, taken --

QUESTION: That it's before?

MR. EARNEST: Even --

QUESTION: They couldn't say it was before.

MR. EARNEST: Well, they have taken --

QUESTION: -- say it's after.

MR. EARNEST: I think they have taken -- Mr. Justice Marshall -- they have taken the position that even a closed file could interfere with future enforcement proceedings, or could --

QUESTION: But they would have to show that specially for this particular --

MR. EARNEST: Yes.

QUESTION: They couldn't just take the blanket one you call wooden, they couldn't take the wooden approach then, could they?

MR. EARNEST: I think they would.

QUESTION: Would they be successful?

MR. EARNEST: I don't think they'll be successful

in this.

QUESTION: I'm sure of that.

QUESTION: Mr. Earnest, you didn't make your request under the Freedom of Information Act for the purpose of public dissemination?

MR. EARNEST: No, I did not. And I made it --

QUESTION: If you win, the public wouldn't necessarily benefit, except derivatively, if this is the public purpose of the Act.

You made your request for use to litigate this Labor Board proceeding, didn't you?

MR. EARNEST: I had a personal use of that. Another member of -- and we are a member of the public.

QUESTION: Yes.

MR. EARNEST: But another member of the public may have a different purpose. And I don't know that --

QUESTION: But your purpose was to get this information for your use as a lawyer representing the employer in that Labor Board proceeding?

MR. EARNEST: That's correct, sir.

QUESTION: And under the Board's rules, after a witness testified, as I understand it, you're entitled to any statements he's made.

MR. EARNEST: Upon proper request.

QUESTION: Upon propoer request, and you're entitled

to them as a lawyer, and in that proceeding.

MR. EARNEST: But not to keep. Just --

QUESTION: And not to disseminate to the public, either.

MR. EARNEST: That's correct; that's correct.

What Congress had in mind -- I think this has been clear from the decisions -- was that there be maximum possible disclosure together with a very narrow construction of the exemptions. Of course, the Board's position is that nothing has been changed by the '74 amendments.

The statute, I think, is clear that there must be proof of such a fact. If, in fact, there is such a fact, then there is such proof.

In each agency -- there was some discussion here earlier about how the Act would apply to different agencies. Well, I think the Act can apply to different agencies, and there can be consideration of withholding of documents by those various agencies to the extent that there is any interference with that particular agency's particular needs. NLRB has particular concerns, one of which is voiced is the employer-employee relationships. THe SEC also has particular concerns. Every other agency, OSHA, and to the extent that those concerns are valid concerns, they are capable of proof.

QUESTION: But every one of them, as your opponent

suggests, is going to end up in the Federal district court before you have the agency proceeding under a FOIA proceeding.

MR. EARNEST: I very much disagree with that, Justice Rehnquist. He has said -- I don't think he quite went so far as to say that it would end up in district court, but he said every case would be -- every Board case would be a FOIA case.

Quite frankly, a FOIA case should not even get to the district court. The agency ought to do -- the request first goes to the agency, and is appealed within the agency. So the district court should never have to fool with it.

QUESTION: If the agency complies with the request.

MR. EARNEST: If the agency complies.

QUESTION: But I gather from your opponent's position that the NLRB is not about to comply without being told to comply by the court.

MR. EARNEST: Well, a case in point might be the device and appeals memorandum that was considered by this Court in Sears.

QUESTION: Well, if one side knuckles under, there is never a judicial controversy, is there?

MR. EARNEST: That is correct. But if doing what you are supposed to do is knuckling under, I don't consider that to be the case.

QUESTION: Well, do you concede that in a given, particular case, there could be justification for the agency

to assert a claim under exemption number 7?

MR. EARNEST: Yes, I do.

QUESTION: And so that certainly would leave room for judicial controversy in any particular case, wouldn't it?

MR. EARNEST: It would. There is no assurance -- and I think Congress realized this at the time when it enacted the law. But I think it was Congress' intent to have the District Court consider that when there was a true controversy.

QUESTION: The NLRB says there should be a per se exemption under exemption No. 7 of the statements. You're not, on the other side, arguing that there should be a per se disclosure, are you?

MR. EARNEST: No, I'm not.

QUESTION: Does anything in the legislative history show that Congress intended that this should be used in lieu of discovery?

MR. EARNEST: No.

QUESTION: And that's what you want to do?

MR. EARNEST: It smells of discovery, okay? But I think the two actions are separate, and I think that the rules are equally applicable to all agencies --

QUESTION: But a -- the two actions are separate. You can get these after the hearing, and that you don't want them afterwards.

MR. EARNEST: I could get them after.

QUESTION: Well, you don't want them afterwards, do you?

MR. EARNEST: Probably not.

QUESTION: Well, the records show you didn't. You're litigating --

MR. EARNEST: -- to have them before.

QUESTION: Then why before instead of after?

MR. EARNEST: To resolve credibility issues in this case, which is --

QUESTION: So that's discovery?

MR. EARNEST: In that respect, yes.

QUESTION: Well, what other respect is there?

MR. EARNEST: Well --

QUESTION: Curiosity?

MR. EARNEST: No, it's not a case of curiosity.

QUESTION: Well, do you think that's what Congress was interested in, protecting your curiosity?

MR. EARNEST: Well, I think Congress was intending in having agencies operate with openness, and to the extent that their processes would be interfered with, that they were entitled to withhold that information. And I think that if there is such inference, then the best person in the world to show that is the agency. And I think there must be proof of that. I think the statutory language is clear.

With regard to your question about, would I want

these statements after the hearing, I cannot recall specific Senators or Congressmen involved, but there is very adequate legislative history backing for -- that information is really only worthwhile if it's received timely. And for my purpose, for my particular purpose, it may be only valuable to me if it's timely.

QUESTION: Well, that's when it's fulfilling the function of discovery before trial, discovery before hearing. You concede that this is -- you treat this as part of the discovery function in regulatory litigation?

MR. EARNEST: Well, I would wind up with the same document, whether you get it under a discovery, or whether you go under FOIA.

But all I'm saying is, that it makes no difference whether there's a discovery proceeding there or not. And I -- it's clearly contrary to the Board or any government agency that takes the position that its discovery procedures govern them; that's disclosable under FOIA.

Because if that be the case, then all an agency need do to get around FOIA is just adopt a policy of nondisclosure. And you have -- and FOIA is of no effect.

QUESTION: How about something that's clearly not disclosable under the Federal rules of criminal procedure? Do you think that a criminal defendant could go into the district court, where a criminal case is pending, or another

district court, and ask for it under FOIA?

MR. EARNEST: I think, under FOIA, again it would get back to a showing of interference.

QUESTION: You think in every single criminal case that a separate case could be brought, deciding whether or not discovery over and above that provided in the Federal rules of criminal procedure, would interfere with the prosecution's case?

MR. EARNEST: I'm not sure I understand your question, Justice Rehnquist.

QUESTION: Well, do you think that in every single criminal prosecution the defense lawyer could start separate litigation under FOIA, saying I know I'm not entitled to this information by way of discovery under the Federal rules of criminal procedure, but I think I am entitled to it under FOIA. And then a separate case would then go on as -- perhaps within the criminal department of the Justice Department, perhaps in a district court -- as to whether or not the prosecution's case would be prejudiced by disclosure of that information?

MR. EARNEST: I'm not really a criminal lawyer, so I'm not really speaking from a good basis on that. But I do -- I do feel that FOIA is a separate -- a separate statute, apart from other statutes, and it exists -- the availability of information under FOIA -- I think there are built in limitations within FOIA without having to rely on the other statutes, and that as a matter of proof, any interference or something per se

that is exempted. And I believe in exemption 7, under I guess it's the confidentiality, that there is a special provision in there concerning the FBI.

QUESTION: But the burden of proof is on the agency.

MR. EARNEST: That's correct; that's correct.

QUESTION: Mr. Earnest, following up on Justice Rehnquist's thought, it occured to me, the statute doesn't use the word "prejudice"; it uses the word "interfere." And why isn't any modifications of the rules that would otherwise obtain in the enforcement proceedings an intereference within the meaning of the statute.

Isn't it -- if it's a change in the proceeding, which it would be if you're getting discovery that you couldn't get under normal rules, why isn't that, per se, an interference?

MR. EARNEST: Well, aren't you getting into this comparative discovery test that the Fifth Circuit spoke of? And I don't think that the FOIA Act intended to amend an agency's discovery rules.

QUESTION: Well, I suppose -- you answered Mr. Justice Marshall by suggesting that the legislature simply didn't consider or talk about discovery. And yet you're seeking to use the statute for discovery, and doesn't the word "interfere," in effect, say any change in the procedure there is within the exemption?

MR. EARNEST: I don't see interference as that, no.

QUESTION: You're reading interference as though it meant prejudice, I think.

That they --

MR. EARNEST: I read interference as keeping the government agency from performing its statutory function.

QUESTION: Well, the statutory function, as implemented by its own rules governing the enforcement proceeding, would normally be no discovery other than that contemplated by those rules.

MR. EARNEST: Well, I may not agree, and do not agree, that the Board's discovery rules are necessary for the carrying out of its statutory function. In fact, I believe that a looser rule, from the Board's point of view, would aid them in carrying out that function.

QUESTION: Well, in any event, you're saying that FOIA intended to authorize a change in the nature of the Board's proceedings?

MR. EARNEST: Right.

QUESTION: And then you're saying that the change is not an interference unless it would harm the enforcement effort?

MR. EARNEST: That's correct.

QUESTION: That isn't necessary -- necessary reading of interference; it may be a correct one, but it's not a

necessary reading of that word. It would be if it said, "prejudice." But the word, "interfere," I'd just suggest, is a different word. Or it doesn't say harm or prejudice, it says --

MR. EARNEST: Well, the agency talks -- the legislative history talks in terms of interference, but also the word, harm. I don't recall the word prejudice being -- being bandied about.

QUESTION: Well, your basic claim is that the FOIA imposed certain duties upon the agencies, without regard or respect to their preexisting rules.

MR. EARNEST: That's precisely correct.

QUESTION: Maybe it would change them; maybe it wouldn't.

MR. EARNEST: That's correct.

QUESTION: But it imposed statutory duties on the agency.

MR. EARNEST: That's correct.

QUESTION: And that their preexisting rules of discovery are basically irrelevant to those duties?

MR. EARNEST: That's correct.

QUESTION: Including the United States as a civil litigant, or the United States as a criminal prosecutor?

MR. EARNEST: I think FOIA is independent.

QUESTION: So is your answer yes or no to my question?

MR. EARNEST: Yes, including them as either.

QUESTION: So by going into the district court, after

an agency declined to respond as requested, you acknowledge that you could hold up the unfolding of the case for a year, 18 months, two years, even more, by going to the district court, Court of Appeals, and petitioning for cert up here?

That's a possibility, isn't it?

MR. EARNEST: It is a possibility, yes, sir. But it's also a possibility, too, that I would do my client a great service by bringing out facts of credibility, and this is the --

QUESTION: Which you suggest you can't bring out by the ordinary discovery proceedings?

MR. EARNEST: Well, ordinary discovery proceedings under the Board, no.

QUESTION: Well, you would get the statements after the witness testified?

MR. EARNEST: If I requested them, yes. But I would have approximately five to ten minutes -- and I've worked for the Board, so I'm aware of this -- that I would have approximately five to ten minutes to review those statements, and in those statements could be listed the names of -- and you'd have credibility in this situation -- of corroborating witnesses, some of whom may or may not be employees. I would have no opportunity to have checked that out.

QUESTION: No one has mentioned -- perhaps it isn't relevant -- the potential for retaliation against an employee by an employer.

MR. EARNEST: Well, may I address myself to that, Mr. Chief Justice?

QUESTION: Is that a possibility?

MR. EARNEST: I think it is a possibility, yes, sir. The -- as I'm sure the court is well aware from the Scrivener decision, that 884 protects such a witness. In fact, it gives him greater protection than he would have if he had not -- if this disclosure had not been made. The company would be put on notice, knowledge of who such people were, and what was contained in those statements.

And if something were done, as in this case, which was a five-day period, something were done to that witness, some sort of intimidation, that certainly would be brought out at a trial --

QUESTION: They would not be likely to do their intimidating in the five-day period. They might wait a year.

MR. EARNEST: Well --

QUESTION: Then what are you going to do about it?

MR. EARNEST: I don't think you'd ever have any assurance that someone will not obey the law. But in this case, there's no evidence that there has been any disobeying of the law of this client, that the disclosure at the hearing, or prior to the hearing, would have no effect.

If the employer or union involved are going to discriminate against the employee or intimidate for that,

whether it's after the hearing or before, it would make no difference there.

QUESTION: Mr. Earnest, under the Board's rules, do you have a right to obtain a list of witnesses before trial?

MR. EARNEST: No, sir.

QUESTION: Are you -- excuse me.

QUESTION: Is that customary in an agency procedure? In the civil rules -- under the rules of civil procedure, you may obtain a list of witnesses. If you obtain that list, you can go interview the witnesses yourself.

MR. EARNEST: I do not-- I do not have that right under Board proceedings. In fact --

QUESTION: What discovery rights do you have under the Board's proceedings? Can you take a deposition of anyone in advance other than --

MR. EARNEST: I think any type of discovery would have to go through the general counsel of the Board, with the general counsel's approval. And that effectively is -- none.

QUESTION: Is there any differences, for purposes of this case, between witnesses who are employees of the employer, the company, who may be the object of the proceedings, and witnesses who may be employees of the union?

MR. EARNEST: Excuse me, of who? The second one.

QUESTION: Of the union. Usually there are three parties in a proceedings: the government agency, which may have

its own witnesses; the employer; and the union.

Now, is there any difference in the applicable principles with respect to FOIA or discovery rules as to what you can ascertain in advance of trial?

You're not going to intimidate union employees, are you? Or are you?

MR. EARNEST: As too -- I think the concern has been brought forth as to whether there would be intimidation. That intimidation could be brought about by a union as well as by an employer.

QUESTION: It wasn't just intimidation. There was intimidation, which is a possibility in the way of prior restraint. And the retaliation after the event, maybe six months, one year; a long time afterwards. Either of those things are possible, aren't they?

MR. EARNEST: Yes.

QUESTION: You would like to get -- not just the statements of witnesses, but the statements of anybody who bear on the case.

MR. EARNEST: No, my request was limited to just the statements of witnesses.

QUESTION: I know, but if you could get these, you ought to be able to get the statements that the Board has taken from people they don't intend to call as witnesses.

MR. EARNEST: That's a question we have not addressed.

QUESTION: Well, I know. But I can't imagine any difference in principle.

MR. EARNEST: Well, one of the -- the defense, I think, to the Board of that is -- is that it would be a breach of confidentiality, maybe or a breach of privacy.

QUESTION: You mean if a witness gives the Board a statement under the -- with the -- under the Board's agreement to keep it confidential, you couldn't get it?

MR. EARNEST: I don't agree that a Board -- bootstrap promise of confidentiality is sufficient to insulate that particular disclosure.

QUESTION: I wouldn't think it would.

QUESTION: But your request was for the previous statements of people who were going to testify at the hearing?

MR. EARNEST: Only those people.

QUESTION: Only those people.

MR. EARNEST: And only that they be disclosed after the investigation was complete. I had no desire to interfere with the investigation. We cooperated with the Board 100 percent. We produced our witnesses; let them take statements by our witnesses; we opened our files, our documents, and let them copy; they have seen our cards. One of the things that has been discussed either in briefs or in general cases that have been decided is whether or not there would be frustration of proceedings as far as construction of defenses. We have shown our hand

already on that.

QUESTION: Did you do that voluntarily, or were you --

MR. EARNEST: Yes, we did.

QUESTION: Why didn't you trade off?

MR. EARNEST: Mr. Justice Powell, as I've said a minute ago, I have worked for the Board, and I believe that the Board law is a good law. And my personal belief is that the Board law, the National Labor Relations Act, is best implemented when you have cooperation. I do not believe that holding cards close to your chest, going into a hearing for the sake of going to a hearing, really effectuates the law. I think it is --

QUESTION: Do you believe that it's in the public interest if it's a one-way street? That's the issue here, isn't it? In light of what you said.

MR. EARNEST: It might be an effect of the issue. I think --

QUESTION: Of course the issue is what the statute requires, but --

MR. EARNEST: That's correct.

QUESTION: You can best serve your client, being open and showing your cards; I take it you feel that?

MR. EARNEST: Yes, generally it does. I think it would be very -- probably, I would say within the last maybe five or six years, in maybe only two cases have I not presented evidence. Now, that is not a procedure that is necessarily

followed by all labor attorneys representing management.

QUESTION: The Board is authorized to enforce subpoenas, if you're unwilling, is it not?

MR. EARNEST: That's correct. The Board, of course, has the investigatory authority. And they can subpoena my witnesses and my records.

But I think the thing is best resolved in administrative give and take process, not where you're having any type of formal proceedings.

QUESTION: But the Board disagrees with you, I take it?

MR. EARNEST: Well, I don't know that they disagree with me on that. I think that's their effort -- that's their preferred method. And I think it's the best method. I think openness is the best method.

QUESTION: But they haven't been open here?

MR. EARNEST: No, they haven't been.

QUESTION: That's what I meant when I said they disagreed with you in this case.

MR. EARNEST: One thing I would particularly like to note is the Fourth Circuit's decision in the Charlotte Mecklenburg Hospital case, the Fourth Circuit was the circuit that submitted the Wellman Industries case, which is one of those that was pre-amendment. And the Fourth Circuit having looked at the '74 amendments I think has changed its mind about its

earlier decision and that is of the opinion that it should follow on a case by case basis.

With regard to exemption 5 raised by the Board, I do not think that one's statements are memoranda or letters. I think such a document is the type of a document that would be a statement of an agency employee, his own statement as opposed to someone outside the agency.

MR. CHIEF JUSTICE BURGER: Your time has expired. Thank you, gentlemen. The case is submitted.

(Whereupon, at 10:00 o'clock a.m., the case in the above-entitled matter was submitted.)

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