PRELIMINARY MEMO

April 12, 1974 Conf
List 3, Sheet 3
No. 73-1233-CFX  
N.L.R.B.  
Cert to CADC (Miller, Wright, Robb, order)

v.

SEARS, ROEBUCK AND CO.

1. This is a Freedom of Information Act [FOIA] case in which the D.D.C. (Corcoran) ordered the petr, the N.L.R.B. General Counsel, to make public various internal legal memoranda. CADC affirmed without opinion relying on the D.Ct opinion and citing Grumman Aircraft Engineering Corp v. Renegotiation Board, 482 F.2d 710 (CADC, 1973), cert to come. The Bd here contends that the memoranda fit within various exemptions from production in the FOIA and that forced production will hamper the Bd's investigatory and prosecutorial operations.
2. Facts  Bd Procedures- The administrative machinery of the Bd is initially triggered when a private party files charges claiming that an unfair labor practice is taking place. Under the provisions of the N.L.R.A., the General Counsel has the final authority in determining whether a complaint shall issue. The General Counsel has in turn delegated the initial power to determine whether a complaint should issue to the 32 Regional Directors. To promote uniformity, whenever a Regional Director is faced with charges that raise novel problems, he is required to submit a description of the case to the General Counsel's office for "Advice." Upon receipt of this request, the Division of Advice considers the issues presented and sends a memorandum to the Regional Director (the "advice memorandum"). The memorandum may advise the Regional Director to dismiss the charge, to issue a complaint, to proceed at his discretion, to seek a settlement or to conduct a further investigation. The memorandum sets forth the reasons for the recommended action and, if it recommends issuance of a complaint, it may discuss possible factual and legal defenses, trial tactics and the basis for settlement. In seeking to develop a coherent body of law, the General Counsel relies on prior Advice Memoranda in formulating the position and policy that will be taken in subsequent determinations of whether to recommend issuance of a complaint. The evidence indicates that no Regional Director has ever disregarded the recommendation in an Advice Memoranda. The position taken by the General Counsel in the Advice Memoranda are formulated after considerable deliberation within the General Counsel's office.

If the Advice Memorandum recommends no action, the Regional Director so informs the charging party; however, the parties are
not permitted to see the Advice Memorandum and are not informed of the basis of the General Counsel's refusal to issue a complaint.

The charging party can then appeal the decision not to issue a complaint to the General Counsel's Office of Appeals where one in twenty succeed in overturning the initial determination. The Office of Appeals reviews the entire file, permits the parties to file written briefs, and occasionally grants oral argument. If the Office of Appeals affirms the initial decision not to issue a complaint the parties will be sent a letter informing them of the decision and stating briefly the grounds of the affirmance. A more detailed "Appeals Memorandum" is prepared by the Office of Appeals at this time which is internally circulated and not disclosed to the public.

The Present Case - In April, 1971, Resp, Sears, Roebuck, filed charges with the Bd alleging that the refusal of the union to bargain with Sears individually, instead of in a multiemployer unit, violated §8(b)(3) of the NLRA. Because of the difficult legal questions presented, the Regional Director submitted the case to General Counsel for "Advice". By letters in June and July of 1971, the Regional Director informed resp that a complaint would not be issued for the reason that Sears had already commenced negotiating within the multiemployer unit and therefore Sears' attempt to withdraw from the multi-employer unit was untimely. Sears appealed the Regional Director's refusal to issue a complaint and in August, 1971 the General Counsel reversed the initial determination. In Sept, 1971 an unfair labor practice complaint issued that is still pending before the Bd.
Prior to appealing from the Regional Director's refusal to issue a complaint, Sears, relying on the FOIA, requested the General Counsel to make available to it: (1) the memorandum prepared by the Division of Advice advising the Regional Director with respect to Sears' unfair labor practice case; (2) all advice and appeals memoranda for the past five years which involve issues similar to those in the instant case; and (3) any index or digest of advice and appeals memoranda. That request, as later amended to include documents explaining the advice and appeals memoranda was denied by the General Counsel on the grounds, inter alia, that the materials were exempt from disclosure under Exemptions 5 and 7 of the FOIA. Sears then filed the instant suit in the D.D.C. seeking disclosure of the requested materials under the FOIA.

**FOIA Provisions** - The FOIA requires that the following agency material, inter alia, be made public:

"Substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;" 5 U.S.C. §552(a)(1)(D)

"(A) final opinions...as well as orders made in the adjudication of cases;

"(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

"(C) administrative staff manuals and instructions to staff that affect a member of the public;..." 5 U.S.C. §552(a)(2)

Section 552 (a)(3) vests jurisdiction in the D.Ct to enjoin agencies from withholding requested material that the Act requires to be made public. The Act exempts from disclosure the following types of material here pertinent:
"...[M]atters that are...

"(2) related solely to the internal personnel rules and practices of an agency;

"(3) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;

"(7) investigatory files compiled for law enforcement purposes except to the extent available by law to a party other than an agency." 5 U.S.C. §552(b).

D.Ct Decision.- Judge Corcoran found that the advice memoranda were subject to production under §552(a)(2)(C), supra, in that they were mandatory instructions to a member of the staff that affect a member of the public. The appeals memoranda were held producible under §552(a)(2)(A) as final agency opinions. As for the Bd’s argument that the material was exempt under §5, supra, as “interagency memorandums,” the D.Ct ruled that they were binding dispositions, not expressions of a point of view.

Taking an admittedly narrow view of §5 exemption, the D.Ct held that the FOIA required production. No reference was made to the §2 and §7 exemptions and apparently the Bd did not rely on them before the D.Ct. As for documents not part of, but referred to in, the advice and appeals memoranda, the D.Ct found that they too must be produced where they are expressly incorporated by reference into the memoranda. In addition, wherever a memorandum referred to the “circumstances of the case” the General Counsel must produce explanatory material so that the memorandum would be meaningful. Finally, the Ct enjoined the Bd from deleting any part of advice or appeals memoranda (such as names of parties or attorneys) unless the General Counsel provides a written explanation justifying such deletion. Settlement suggestions and names of affiants could be deleted at the discretion of the General Counsel without need for explanation.
CADC affirmed "on the basis of the opinion of D. Judge Corcoran" it also cited to the opinion of the CADC in *Grumman Aircraft* (Bazelon, Wright, Van Pelt). In that case the CADC ordered the Renegotiation Board to produce, pursuant to the FOIA, numerous types of documents functionally similar to the documents sought here. The CA rejected many of the FOIA arguments raised by the General Counsel in the instant case. The S.G. has filed for cert in the *Grumman* case and the petition raises issues identical to this case. The respondent in *Grumman* has received an extension of time in which to file a response until April 17. *Grumman* is No. 73-1316.

3. Contentions: a. The S.G. argues first that the D.Ct read the section 5 exemption too narrowly and that these memorandum clearly qualify as interagency memorandum. In *Environmental Protection Agency v. Mink*, 410 U.S. 73 the Ct had occasion to deal with the §5 exemption and distinguished between "Materials reflecting deliberative or policy making processes on the one hand," which are exempt under §5 and "purely factual, investigative matters on the other," which are not so exempt. The S.G. argues that under *Mink* these memorandum were entitled to §5 exemptions.

b. The S.G. also argues that the material was entitled to exemptions under §2 and §7. Section 2 exempts internal personnel rules and practices of an agency. The Senate Rpt to the FOIA gave as examples "rules as to personnel's use of parking facilities or regulation of lunch hours." The House Rpt took a broader view of §2 and appears to consider it as covering "operating rules,
guidelines and manuals of procedure for Government investigators or examiners." The two reports were never reconciled, however, the S.G. argues for the broader House version of §2 since the House considered the Bill after the Senate, which according to the S.G., must mean that the House felt §2 required the broader exemption. The S.G. admits that §2 was not pressed below. As for §7, which exempts agency investigatory files compiled for law enforcement purposes (including enforcement of labor and security laws), the S.G. argues that advice and appeals memorandum fit within the letter and spirit of §7 in that the memoranda often contain discussions of trial strategy, possible defenses, and evaluations of the testimony of prospective witnesses. According to the S.G., such disclosure while the case is still pending could well impede effective prosecution.

c. Aside from the question of exemptions, the S.G. argues that the D.Ct erred in concluding that these memoranda fit within the class of documents producible under the FOIA. Citing from the legislative history, the S.G. argues that the advice memorandum could not be within the §552(a)(2)(C) definition of "staff manual and instructions." According to the Senate Report, that provision referred only to purely administrative type documents and not law enforcement matters. As for the appeals memoranda, the S.G. argues that they are not final decisions pursuant to §552(a)(2)(A) because the General Counsel has no power to adjudicate cases, only to decide whether to initiate them.

Response: In a short response, Sears argues that there is no important question presented since all the D.Ct did was apply the law as found in EPA v. Mink. It argues that this is simply
a factual variant of Mink limited to the facts of this specific case. Secondly, the resp argues that the decision correctly gave a narrow interpretation to the FOIA exemption and there is no evidence that there were any sensitive material in any of the memoranda whose production was ordered. Finally, resp argues that the decision was correct on policy grounds citing Reports of the ABA Labor section which has been fighting for disclosure of these memoranda for years.

4. Discussion: On pure policy grounds the Bd has not presented a very compelling case for the need to withhold these memoranda beyond their own conclusion that it will hamper prosecutions. Regardless, it is clear that the D.Ct and CADC in Grumman have engaged in an extremely broad reading of the FOIA, and it is hard to square this approach with the Ct's opinion in Mink. The amount of judicial gloss on the pitifully vague provisions of the FOIA is still limited and this case, along with Grumman provide excellent vehicles for the Ct to bring some order to the chaos that appears to surround the administrative discovery process. I would recommend holding this case for Grumman, No. 73-1316 and then granting both and consolidating.

There is a response

4/1/74 Richter CA and D.Ct op in petn's app
This case involves same issue—a broad reading of Freedom of Inf. Act which S.G. wants us to review—an.
Sears Roebuck 73-1233 in which I've recused myself. If this case alone were granted I'd sit. But if Sears is held un-

granted, I'm out.

PRELIMINARY MENO

May 17, 1974 Conf
List 1, Sheet 2
No. 73-1316-CFX
RENEGOTIATION BD.
v.
GRUMMAN AIRCRAFT ENGINEERING CORP.

Cert to CADC (Bazelon, Wright, Van Pelt, DJ)
Federal/civil Timely (with ext)

1. The D.D.C. (Corcoran) ordered the Renegotiation Bd to produce various types of internal legal memos &ndash pursuant to the Freedom of Information Act [FOIA]. CADC affirmed. The S.G. seeks cert arguing that the CA has read the FOIA too broadly. The issue here is almost identical to the one raised in N.L.R.B. v. Sears Roebuck, No. 73-1233 (originally listed 4/12/74 conf) which has been held for Grumman and is straight-lined with Grumman on this conference list.

2. Facts: Bd procedures— The Renegotiation Bd is an independent executive branch composed of 5 members appointed by the President.
It is charged with the responsibility of ferreting out and eliminating excess profits from defense contracts made by the Gov't. In brief, the Bd functions by first investigating the terms and performance of a contract, and then deciding whether any action should be taken. If it is determined that there are no excess profits the contractor is given a "clearance." If excess profits are discovered, the Bd engages in a renegotiation process with the contractor to the end of reaching a settlement. See generally, Renegotiation Bd v. Banner craft Co., No. 72-822, dec 2/19/74 (Blackmun, J).

The National Renegotiation Bd. has delegated to Regional Renegotiation Bds. the task of initially reviewing each case and recommending to the National Bd whether a "clearance" should be granted. Sole decisional authority is retained by the National Bd in Class A cases (over $400,000 in profits) whereas the Regional Bd can give final clearances in Class B cases (under $400,000 in profits). The Regional Bd's recommendation to the National Bd is accompanied by a report explaining the reasons for recommending a "clearance." As a general matter the National Bd. accepts the Regional recommendation and no further independent review is undertaken at a national level. On occasion the National Bd will assign the case to a "Division" of the National Bd made up of three of the five members who will give further study, and present a report explaining their recommendation to the full Bd. As a general matter, the 5 man Bd accepts the recommendation of a Division.

The Present Case- In conjunction with then pending renegotiation proceedings, Grumman instituted this suit pursuant to §552 of the FOIA seeking to compel the Bd to disclose final orders and opinions
relating to its own case and to the cases of 14 other contractors.

After initial proceedings in the D.D.C. and CADC, the Bd produced all the material from Grumman's own files and the final orders in the 14 other cases requested. Having received this material, Grumman, on remand to the D.D.C., sought the reports prepared by the Regional Bds and the Divisions of the Bd that were used by the National Bd in determining to give clearances in the 14 cases. All of the requested Reports involved Class A cases in which final authority rested with the National Bd. The D.Ct ordered the Bd to produce the requested reports finding that they were "final orders" under the FOIA. CADC affirmed (Decision discussed below)

No information is provided relating to the current status of Grumman's renegotiation proceedings and nobody discusses whether it is relevant.

FOIA Provisions-

§552(a)(2) Each agency, in accordance with published rules, shall make available for public inspection and copying---

(A) final opinions, including concurring and dissenting opinions as well as orders made in the adjudication of cases;

...(b) This section does not apply to matters that are---

...(5) inter-agency or intra-agency memorandums or letters which would not be available by law to a party other than an agency in litigation with the agency;"

CADC Opinion- Although the National Bd retains the authority to review Regional Bd decisions, the CA found that for all practical purposes the Regional Bd's recommendation is the final decision. It noted the prefunctory nature of the National Bd's review, the failure of the National Bd to assign the case to its own docket for
independent consideration by a Division [the CA did not address the status of a Division, as opposed to a Regional, report], and the fact that in the notice sent by the National Bd to the contractor informing of the clearance, the decision is attributed to "the Regional Board pursuant to due delegation of authority." Having decided that the Regional Bd's report is a final decision for all practical purposes, the CA proceeded to find that the Regional Bd is an "agency" within the meaning of the FOIA. Defining "agency" broadly to include any government authority that has been granted "substantial independent authority," the CA observed that the National Bd had delegated substantial power to the Regional Bd. The Regional Bd conducts their own investigating and negotiating and are empowered to make formal recommendations to the contractor without any assumption of jurisdiction by the National Bd. The Renegotiation Statute itself recognizes that the National Bd can establish "agencies" to which to delegate functions. The CA noted that Congress was aware of the legal meaning of the term "agency" under the APA and therefore must have used the term intending the Regional Bds to have independent "agency" status. The CA thus concluded Part I of its opinion by stating that since the Regional Reports were "final decisions" of an "agency" they could not be "inter-agency or intra-agency memorandum" exempted by the Act.

Wholly independent of the Regional Reports' status as final agency decisions, the CA stated as an alternative ground that the Reports were producible under §552(a)(3) of the FOIA which calls for production of "identifiable records." The Bd apparently admits that the Reports are "identifiable records" (in that they can be
precisely identified; however, noted the CA, there is still the question of whether they are entitled to an intra-or inter-agency memorandum exemption. The CA then discussed the inapplicability of this exemption by noting that it is designed to protect the consultive and deliberative process, not to protect actual final determinations and recommendations. The CA felt a distinction had to be drawn between "documents composed exclusively for the purposes of assisting policy formulation and those which serve to reflect policy already made and announced." The CA thus distinguished its earlier decision in Sterling Drug v. FTC, 450 F.2d 698 (1971) where it was held that certain FTC staff memoranda written by staff who had no decisional authority whatsoever were exempted under §(5). The CA admitted that the line "is not always a bright one" in that sometimes a document can serve both functions. The CA stated that the ultimate principle is "a simple one":

"a document which a decision-maker treats as a justification for a decision communicated outside the bureaucracy to regulated parties should not be shielded from public disclosure on the ground that it was originally prepared for purposes of pre-decisional consultation, because the agency has customarily not disclosed the document, or because the agency labels the document something other than what it really is. Therefore, since the Regional Bd reports clearly reflect and are used to justify decisions of the Regional Board communicated to contractors under scrutiny, they must fall outside the scope of Exemption 5 and should be disclosed as "identifiable records."

3. Contention: Although the only addressed the Regional Reports issue, the S.G. argues that neither Regional or Divisional Reports should be producible. It refutes the CA’s conclusion that these are final opinions of the agency and they are written by the Regional Bd’s solely for the National Bd, not for the public. Particularly with a Divisional Report, the S.G. argues that they do not purport
to speak for the whole Bd and the fact that the Bd adopts the conclusion reached does not mean it agrees with the reasoning in the Report. The same argument is made for the Regional Reports which might be followed by the National Bd for reasons wholly different than those in the Report. The Bd does not adopt the Regional Report, they are purely consultive and pre-decisional. The S.G. does not contest the holding that the Regional Bds are "agencies"; it does contest the characterization of the Reports as "final decisions."

The S.G. also takes issue with the CA's alternate holding that the reports are producible as 'identifiable records' relied on in reaching a final decision. The S.G. argues that these documents are prepared not as an explanation to the public, "Thus they were not intended to 'support' the decision eventually reached, but to suggest to the decisionmakers why such a decision would be appropriate." Even if the Report has the ultimate effect of supporting the decision eventually reached, the S.G. points out that this is shared by all advisory memoranda and this "is not sufficient by itself to remove the memoranda from the scope of exemption 5." Finally, the S.G. notes that the Renegotiation Bd negotiates, it does not adjudicate. The process is informal and expeditious. See Bannercraft. By forcing the Bd to prepare formal statements of reasons in order to avoid having the public misled by the advisory internal reports, the informal procedures of the Bd will be undermined in contravention of Congressional intent.

The Response is short. It properly points out that there are no real conflicts yet on these issues. The fact that the Renegotiation Bd has unique procedures makes the case less, rather,
than more certworthy. The Resp also points out that the significance of this case has diminished by the fact that under its new regulations, the Renegotiation Bd is required to issue final opinions in each case and these opinions will be made public. At the time of the CA decision there were no final agency decisions issued by the Bd and this made it more compelling to require production of the Reports. Finally, the Resp argues that the CA simply applied the principles enunciated in *EPA v. Mink* and there is no further need for this Ct to review these issues.

4. Discussion: It would be helpful to know what the S.G.'s reaction is to Resp's assertion that the Bd is now required to issue its own final opinions. Since it appears that the unstated rationale for the CA opinion is that without these Reports the public sees nothing at all, arguably the amendment of the regulations changes the posture of the case entirely. If the National Bd itself is issuing final decisions, it is difficult to argue that the Reports are "final opinions" rather than simply recommendations. It would appear that this change in procedure reduces the certworthiness of the case.

The CA's reading of the FOIA is obviously far-reaching and it would almost seem to include a staff law clerk's memorandum in a judicial decision that is affirmed without opinion. Certainly the FOIA itself gives little guidance. If the Court feels that CADC has gone too far, cert should probably be granted because almost all FOIA cases arise in CADC and it seems that the entire substance of FOIA law is found in CADC opinions.

As between this case and *Sears*, *Sears* seems like a more suitable vehicle for clearing up some of the FOIA issues. It has
the identical question raised in this case plus a few more. In addition the non-adjudicatory nature of the Renegotiation Bd makes it somewhat unique and arguably a decision involving it might not be applicable to other agencies. It would seem that the NLRB's procedures are somewhat more universal. There is probably some merit to granting both cases in that it gives the Ct varying contexts within which to develop general rules. Certainly it would be possible to grant either one and hold the other. As a final alternative, the Ct could simply leave the issue to be further resolved in the CADC and wait until either become the results intolerably broad or until a conflict comes up from another CA. I do think that the change in Bd procedure described by resp changes the posture of this case drastically.

There is a response

5/7/74 Richter CA and D. Ct op in petn's ap:
NATIONAL LABOR RELATIONS BOARD, ET AL., Petitioners

vs.

SEARS, ROEBUCK AND CO.

2/11/74 Cert. filed.

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March 20, 1975

No. 73-1316 Renegotiation Board v. Grumman

Dear Byron:

Please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference
March 20, 1975

No. 73-1233  NLRB v. Sears, Roebuck

Dear Byron:

Please note at the end of your opinion that I took no part in the consideration or decision of this case.

Sincerely,

Mr. Justice White

lfp/ss

cc: The Conference
March 24, 1975

No. 73-1316 - Renegotiation Bd. v. Grumman Aircraft

Dear Byron,

I am glad to join your opinion in this case.

Sincerely yours,

Mr. Justice White

Copies to the Conference
RE: No. 73-1316 The Renegotiation Board v. Grumman Aircraft Engineering Corporation

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White
cc: The Conference
March 24, 1975

RE: No. 73-1233 N.L.R.B. v. Sears, Roebuck & Co.

Dear Byron:

I was inclined the other way but I'm fully persuaded. Please join me.

Sincerely,

Mr. Justice White

cc: The Conference
March 25, 1975

Re: No. 73-1233 - NLRB v. Sears, Roebuck and Co.

Dear Byron:

I am preparing an opinion in this case, concurring in part and dissenting in part.

Sincerely,

[Signature]

Mr. Justice White

Copies to the Conference
March 25, 1975

Re: No. 73-1316 - Renegotiation Board v. Grumman

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White
Copies to the Conference
March 26, 1975

Re: No. 73-1233 -- National Labor Relations Board v. Sears, Roebuck & Co.

Dear Byron:

Please join me.

Sincerely,

T.M.

Mr. Justice White

cc: The Conference
March 26, 1975

Re: No. 73-1316 - Renegotiation Board v. Grumman Aircraft Engineering Corp.

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

cc: The Conference
Re: No. 73-1316 -- The Renegotiation Board v. Grumman Aircraft Engineering Corporation

Dear Byron:

Please join me.

Sincerely,

T. M.

Mr. Justice White

cc: The Conference
March 26, 1975

Re: No. 73-1233 - NLRB v. Sears, Roebuck and Co.

Dear Byron:

Please join me.

Sincerely,

Mr. Justice White

cc: The Conference
April 8, 1975

Re: No. 73-1233 - NLRB v. Sears, Roebuck and Co.

Dear Byron:

On second thought, please join me.

Sincerely,

Mr. Justice White

Copies to the Conference
Re: 73-1233 - NLRB v. Sears

Dear Byron:

Please show me as concurring in the judgment in the above.

Regards,

Mr. Justice White

Copies to the Conference
Re: 73-1316 - Renegotiation Board v. Grumman

Dear Byron:

Please join me in your opinion.

Regards,

Mr. Justice White

Copies to the Conference
Dear Byron:

Please join me in your opinion in 73-1233, NLRB v. SEARS, ROEBUCK & CO.

William O. Douglas

Mr. Justice White

cc: The Conference
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73-1233 NLRB v. Sears
73-1316 Renegotiation Bd. v. Grumman
### THE RENEGOTIATION BOARD, Petitioner

vs.

GRUMMAN AIRCRAFT ENGINEERING CORPORATION

2/25/74 Cert. filed.

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