

## O. PURLOINED DOCUMENTS AND OTHER “IMPROPERLY” OBTAINED EVIDENCE

### OVERVIEW:

[Part 3, Chapter M of the ULPCHM](#) provides guidance to investigating Agents on whether to accept and use evidence that may have been improperly obtained or purloined by a party. Such matters could include documents obtained by a party or individual under “questionable circumstances” and provided to the Region during the investigation or other evidence such as a tape recording or videotape that may have been surreptitiously recorded without the consent of one or both parties. This Chapter reiterates the principles contained in the ULPCHM.

### OBJECTIVE:

To provide information about the use of evidence supplied by a party which may have been obtained improperly by that party.

#### 1. CRITERIA FOR DETERMINING WHETHER TO USE SUCH EVIDENCE:

Consider the following in determining whether to introduce documents that have been obtained under “questionable circumstances”:

- An agent of the FLRA never engages in complicity in improperly obtaining evidence. If there is evidence of such complicity, the RA is immediately notified (or as appropriate the RD). If the Region has participated in the process of obtaining such information, the Region does **not** use this material at hearing;
- Consider whether liability (criminal or civil) will attach to the individual who provided the evidence to the Region should the evidence be introduced (or an attempt made) at hearing. The Region attempts not to embroil itself in a situation in which its agents may be called upon to testify in an arbitration,

administrative, civil or criminal proceedings related to evidence it introduced, or attempted to introduce, at hearing; and

- Whether the cost of introducing (or attempting to introduce) the evidence, i.e., negative impact upon the ULP proceeding, is outweighed by any benefit to the ultimate aim of the hearing process--to determine whether a violation has occurred.

**2. AUTHORITY PRECEDENT: THE AUTHORITY HAS NOT ADDRESSED THIS MATTER IN ANY DECISIONS BUT THE FOLLOWING 2 ALJ DECISIONS ARE INSTRUCTIVE:**

National Labor Relations Board, Region 24, 2-CO-50, ALJD Rpt. No. 5 (1981) (In a ULP proceeding against the union for surreptitiously taping a bargaining session, the ALJ in dicta found that, in deciding that the union had violated the Statute, “the National Labor Relations Board has refused to admit the tape as evidence in a refusal to bargain proceeding, on the ground that such a recording would inhibit severely the willingness of parties to express themselves freely, and seriously impair the collective bargaining process”).

U.S. Department of Justice, Immigration and Naturalization Service, Border Patrol, Case No. 6-CA-90255, ALJD Rpt. No. 94 (1991) (ALJ stated in response to the GC’s argument that Respondent’s evidence should be given no weight since it was not provided to the Region during the investigation: “An Administrative Law Judge is not charged with the responsibility of policing investigations and overseeing the collection of evidence necessary to prove or disprove the allegations of a charge. Absent a showing that evidence was somehow obtained illegally, the Administrative Law Judge’s sole function with respect to documentary evidence proffered at a hearing is to determine its relevance and legal sufficiency”).

**3. NLRB/COURT PRECEDENT:**

- a. *Initial strict exclusionary rule:*

Hoosier Cardinal Corp., 67 NLRB 49 (1946) (Board agent obtained records from an officer of a cited union organization who was secretly a

member of a rival union and Board indicated it would not consider evidence in order “to refrain from any appearance of surreptitious dealing with one of the parties”).

- b. *Loosening of strict rule: Evidence allowed as long as Board Agent not involved in improper activity:*

Air Line Pilots Association, 97 NLRB 929 (1951) and General Engineering, 123 NLRB 586 (1959) (Board held that it would allow the introduction of allegedly illegally obtained evidence as long as government agents were not involved in the taking of the documents).

Cory Coffee Services, Div. of Cory Food Services, Inc., 242 NLRB 601 (1979) (where Board attorney asserted that the purloined document came to Board agents during its investigation and that no Board agent “obtained it from Respondent’s office”, the ALJ stated that he could not find that the Board’s attorney or its agents knew these documents had been stolen or that the Board had any involvement in the taking of the documents, and therefore was “unable to conclude that the proceedings should be dismissed outright on the basis that Respondent has been denied due process of law or that its rights have been seriously prejudiced by the Region’s clandestine use of this ‘purloined evidence’”).

NLRB v. South Bay Daily Breeze, 415 F.2d 360, 365 (9th Cir.1969) (in upholding Board’s decision court stated that “where the Board merely accepts and makes use of evidence illegally obtained by private individuals, exclusion of such evidence is not required by the Act”).

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**ULPCHM, Part 3, Chapter M concerning Improperly Obtained or Purloined Information/Evidence**

**Trial Evidentiary Matters**  
**Purloined Documents and Other “Improperly” Obtained Evidence**

RESERVED