

T. "JENCKS' ACT" **(PRODUCTION OF WITNESSES' STATEMENT AT HEARING)**

OVERVIEW:

For purposes of cross-examining the GC's witnesses, upon Respondent's request, the Trial Attorney turns over written statements obtained from that employee-witness.

OBJECTIVE:

To provide general information concerning the evolution of the Jencks' rule in criminal law and how it has been adapted in administrative law; what documents are governed by this rule and the corresponding practice and procedure; and application of the rule to Respondent's witness statements (reverse Jencks Rule).

1. BACKGROUND (CRIMINAL LAW):

a. *Jencks v. United States*, 353 U.S. 657 (1957) (*Jencks*):

A criminal trial in which two government witnesses testified about written reports they had made to the FBI concerning the defendant's illegal conduct. The witness's statements related to Jencks' alleged false swearing in an affidavit given to the NLRB concerning his affiliation with the Communist Party.

Jencks' defense counsel asked for the statements and was refused; on appeal the Supreme Court reversed the Jencks conviction saying that the defense had a right to such documents if the following two criteria were met:

- There was a demand by the defense for production of specific statements possessed by the Government in order to see them and determine what may be made of them, and
- The demand was for the statements of actual witnesses as opposed to non-witness informants.

- b. *The Jencks Act (18 U.S.C. § 3500) (1994):*
- i. Applies to all **criminal** proceedings ([Fed. R. Crim. P. 26.2](#)) and has been held to apply to administrative proceedings ([See](#) Section 2 below).
 - ii. States that no statements of witnesses in possession of the Government are available until after witness has testified on direct examination. The Trial Attorney need not provide statement if the witness is not going to testify.
 - iii. Allows the defendant to move for production of statements (after direct examination by the Government) which **relate to** the subject matter of the proceedings and for the presiding judge to determine what shall be released to the defendant.
 - iv. Allows for sanctions if statement not produced.
 - v. Defines the term "statement" to mean:
 - (1) A written statement made by the witness **and** signed or otherwise adopted or approved by him/her;
 - (2) A stenographic, mechanical, electrical, or other type of recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness, and recorded contemporaneously with the making of such oral statement; or
 - (3) A statement, however taken or recorded, or a transcription thereof, if any, made by said witness to a grand jury.

2. ADMINISTRATIVE PROCEEDINGS--CASE LAW:

- a. Harvey Aluminum v. NLRB, 335 F.2d 749 (9th Cir. 1964):

Applied "rule" of Jencks Act to NLRB proceedings because "the law under which these agencies operate prescribe[s] the fundamentals of fair play . . .," citing Jencks, above.

- b. NLRB v. Clement Bros., 407 F.2d 1027 (5th Cir. 1969):

Applied Jencks' Rule only to statements of witnesses not of every individual who gave statement to the NLRB.

- c. Stride Rite Corp., 228 NLRB 224 (1977):

Jencks' Rule does not apply to GC's notes and memos of conversations with witnesses absent a showing that the witnesses adopted or approved the notes.

- d. Caterpillar Inc., 313 NLRB 626 (1994):

ALJ must excise portions of the affidavit that do not relate to the matters to which the witness testified on or to matters raised by the pleadings.

- e. NLRB v. Champion Labs. Inc., 99 F.3d 223 (7th Cir. 1996):

Under the Jencks' Rule, a Charged Party has access to pre-trial statements of a government witness only after witness has testified. If employer obtained affidavit before trial, it could effectively discourage employees from testifying and thereby frustrate the NLRA.

- f. North American Rockwell Corp. v. NLRB, 389 F.2d 866 (10th Cir. 1968):

Jencks' Rule does not require the prosecutor to turn over any exculpatory evidence uncovered during the investigation. It is limited to the disclosure of pre-trial statements, after witness has testified, for cross-examination.

3. FLRA CASE LAW:

In Department of the Treasury, Internal Revenue Service, Memphis Service Center, 16 FLRA No. 100, 16 FLRA 687, 687 n.1 (1984) (Treasury), the Authority stated:

The Charging Party excepted to the Judge's ruling permitting disclosure by the General Counsel to the Respondent, for purposes of cross-examination, of written statements previously obtained from employees to support issuance of the complaint, after such witnesses had testified at the hearing. The Judge relied on the "Jencks Rule" as set forth by the U.S. Supreme Court in Jencks v. United States, 353 U.S. 657 (1957). The Authority specifically adopts the Judge's ruling, for the reasons she stated, noting that the "Jencks Rule" has been held applicable to administrative hearings. See Communist Party of the United States v. Subversive Activities Control Board, 254 F.2d 314 (D.C. Cir. 1958); NLRB v. Adhesive Prods. Corp., 258 F.2d 403 (2d Cir. 1958).

SBA, 54 FLRA No. 83, 54 FLRA 837, 848-49 (1998) (citation omitted) (ALJ properly denied post-hearing motion for documents under Jencks because documents could only be under during cross-examination and ALJ denied request to reopen record).

See also [62 Fed. Reg. 40911](#), 40913 (July 31, 1997) (maintenance of Jencks rule endorsed in Treasury).

4. PRACTICE AND PROCEDURE:

a. *Respondent's rights and responsibilities:*

- GC has no obligation to advise Respondent of its Jencks rights;
- Respondent does not have an automatic right to have GC witness affidavits or statements produced;

- Respondent must request the statement **after** each witness testifies for the GC and before Respondent begins cross-examination of the witness. Respondent waives right to GC statements if it makes request after the witness has been cross-examined and excused, Army Aviation Center, 216 NLRB 435 (1975), or after Respondent is well into its cross-examination of the witness. I-O Services, 218 NLRB 566 (1975); and
 - Only provide that which was requested. For example, usually the Respondent asks only for affidavits--provide only the affidavits, if any. Do not provide other documents, such as confirming letters unless specifically asked for.
- b. *In addition to GC affidavits the Jencks' Rule applies to:*
- Any statement provided the GC by a witness provided the witness signed or adopted or approved the statement; and
 - A document that has been incorporated into a witness statement (e.g., instead of going into background facts in the statement the witness directs the FLRA to review his statement in a prior case or, instead of detailing the remarks made in a letter, the witness specifically incorporates the letter into the statement).
-  *If one statement is taken for multiple cases, but only one of the cases is the subject of the complaint, the Trial Attorney prepares a sanitized version for Respondent's counsel (i.e., obliterating the facts or contentions in the other cases, if possible) and maintains a "clean" copy for the ALJ's review, **in camera**, in case the Respondent challenges the sanitization.*
- c. *When turning over that which is requested, state on the record that GC is giving a copy of statement to Respondent's counsel.*
- d. *Request that statement be returned after Respondent's counsel has finished cross-examination and indicate on the record that*

you have received it back. Respondent does not keep GC statements or make a copy of them.

 *However, the Jencks' Act contains no provision regarding the return of a witness's statements must be returned to the Government. United States v. Harloff, 826 F. Supp. 675, 676 (W.D.N.Y. 1993). Compare United States v. Badalamenti, 626 F. Supp. 655 (S.D.N.Y. 1985) (denial of return of Jencks materials directly following cross-examination of witness to whom materials related) with United States v. Fried, 1989 WL 88495 (6th Cir. 1989) (court granted similar request for the return of Jencks materials following their use at trial). Thus, it is within the ALJ's discretion to determine when Jencks materials must be returned to the Trial Attorney.*

5. "REVERSE" JENCKS--APPLICATION TO RESPONDENT'S WITNESS STATEMENTS:

If you are aware that Respondent, during its "investigation" of the ULP charge, obtained pre-trial statements from its witnesses, ask for this statement(s) before you cross-examine Respondent's witness. If Respondent's counsel confirms that its witness gave a statement, ask that it be produced for your use in cross-examining the witness. In response to Respondent's objection, point out that [Fed. R. Crim. P. 26.2](#), which implemented the Jencks' requirements, requires that statements of defense witnesses be turned over to the Government. Moreover, Jencks itself covers statements in the hands of the "Government" and Respondent is the "Government."