

**BEFORE THE SAFETY AND HEALTH REVIEW BOARD**

**OF NORTH CAROLINA**

COMMISSIONER OF LABOR OF  
THE STATE OF NORTH CAROLINA,

COMPLAINANT,

v.

DONOHUE CONSTRUCTION COMPANY

RESPONDENT.

DOCKET NO. OSHANC 93-2995  
OSHA INSPECTION NO. 18496463  
CSHO ID NO. H6194

**ORDER**

**DECISION OF THE REVIEW BOARD**

This appeal was heard at or about 11:00 A.M. on the 23th day of June, 1995 in the Conference Room in the office of the Safety and Health Review Board of North Carolina at 217 West Jones Street, Raleigh, North Carolina by Robin E. Hudson, Chair, Kenneth K. Kiser, and Hugh M. Wilson, Members of the North Carolina Safety and Health Review Board.

**APPEARANCES**

Linda Kimbell, Associate Attorney General and H. Allen Pell, Assistant Attorney General, North Carolina Department of Justice, Raleigh, North Carolina for the Complainant.

Michael C. Lord of Maupin, Taylor, Ellis & Adams, P.A. of Raleigh, North Carolina for Respondent.

**ISSUES PRESENTED**

1. To what extent does OSHANC protect the anonymity of those witnesses and complainants who provide information to the OSH Division on safety and health violations by their employers?
2. Does N.C.G.S. § 95-136(e)(1) prohibit the discovery by Respondent of witnesses' and complainants' names and statements in enforcement proceedings and hearings held pursuant to the NCOSH Act?

**SAFETY STANDARDS AND/OR STATUTES AT ISSUE**

1. N.C.G.S. § 95-136(e)(1) which provides:

The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, shall not be released to any employer or third party. A witness or complainant may, however, sign a written release permitting the Commissioner to provide information specified in the release to any persons or entities designated in the release. Nothing in this section shall be construed to prohibit the use of the name or statement of a witness or complainant in enforcement proceedings or hearings held pursuant to this Article. The Commissioner may permit the use of names and statements of witnesses and complainants and information obtained during the course of inspections or investigations conducted pursuant to this Article by public officials in the performance of their public duties.

- N.C.G.S. § 95-136(d)(1) which provides in pertinent part:

Any employees or an employee representative of the employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists may request an inspection by giving notice of such violation or danger to the Commissioner or Director. . . Upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy of any record published, released or made available pursuant to subsection (e) of this section.

N.C.G.S. § 95-136(a)(2) which provides in pertinent part:

(a) In order to carry out the purposes of this article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

.  
. .  
.

(2) To inspect and investigate during regular hours . . . any such place of employment . . . and to question privately any such employer, owner, operator , agent or employee.  
(emphasis added).

-----  
Having reviewed and considered the record and the briefs and the arguments of the parties, the Safety and Health Review board of North Carolina hereby makes the following Findings of Fact, Conclusions of Law, and Order:

#### **FINDINGS OF FACT**

1. This case was initiated by a notice of contest which followed citations issued to the Respondent to enforce the Occupational Safety and Health Act of North Carolina (OSHANC or Act), N.C. Gen. Stat. §§ 95-126 et seq.
2. The Commissioner of Labor (Complainant) is responsible for enforcing OSHANC (N.C. Gen. Stat § 95-133).
3. The Respondent is an employer within the meaning of N.C. Gen. Stat § 95-127(9).
4. The employer (Respondent) Donohoe Construction Company, is subject to the provisions of OSHANC (N.C. Gen. Stat § 95-128).
5. Donohoe is a general construction contractor engaged in building a detention center in Winston-Salem, North Carolina. Forsyth County is the project owner and contracted with Rosser-Fabrap International ("Rosser") to manage the project in addition to providing architectural and engineering services. Donohoe is one of four prime contractors at the project. There are numerous subcontractors, including Master Steel Erectors, Inc. ("Master Steel") and Pompano Masonry Corporation ("Pompano").
6. An inspection was made of Respondent's work site located in Winston-Salem, North Carolina from May 4, 1993, through June 8, 1993, by the Occupational Safety & Health Division of the North Carolina Department of Labor. The inspection was initiated as a result of an unprogrammed inspection arising out of fatalities occurring at the site, and pursuant to a complaint.
7. On April 29, 1993, two employees of Master Steel, one of the subcontractors at the site, died in a fire at the project.
8. As a result of the inspection numerous violations were alleged in one serious citation and numerous violations were alleged in one nonserious citation against Respondent which were issued on October 28, 1993.

9. In addition, citations were issued against numerous other employers at the worksite, including Forsyth County, Rosser, Master Steel and Pompano.

10. Complainant cited Master Steel, inter alia, for allegedly violating numerous sections of the fire protection standard for welding and cutting [29 CFR 1926.352].

11. Complainant cited Pompano, inter alia, for allegedly violating the standard governing crane-suspended personnel platforms [29 CFR 1926.550].

12. Complainant also cited Donohoe, inter alia, for the alleged violations of 29 CFR 1926.352 and 29 CFR 1926.550 that he cited against Master Steel and Pompano, respectively based on the theory that the Respondent was the creating, controlling and correcting employer.

13. The Respondent's Notice of Contest was filed with the Review Board on November 23, 1993.

14. On December 17, 1993, the Respondent filed its Statement of Position with the Review Board denying all violations, penalties and abatement dates and requesting formal pleadings.

15. Donohoe sought the investigative files compiled by the Complainant on Donohoe, Forsyth County, Rosser, Master Steel and Pompano. Complainant provided redacted copies of the files on Donohoe and Rosser with witness names and statements omitted but did not provide the information requested on Forsyth County, Master Steel and Pompano pursuant to its disclosure policy found at 13 NCAC 7A .0303 to not release information to the public for files that are still open.

16. Donohoe then filed a motion for discovery which the Complainant opposed on the grounds that the discovery sought was prohibited by N.C.G.S. § 95-136(e1) and 13 NCAC .0303.

17. A hearing was held on the Discovery motion before the Honorable Charles R. Brewer, Hearing Examiner on June 15, 1994.

18. On December 7, 1994 Hearing Examiner Brewer signed an order which was filed with the Review Board on December 27, 1995. The Order of Judge Brewer granted the Discovery motion by ordering the Complainant to produce the following documents:

a. The investigative file for Respondent (Donohoe) including witness names, witness statements and affidavits;

b. The investigative file for Master Steel including witness names and statements relating to Citation 1, Item 1a, 1b and 1c and the investigative file for Pompano including witness names and statements relating to Citation 2, Items 7 and 8. Other witness statements for these two files were not required to be produced unless they were relied upon by the Complainant to draft the complaint in this matter or expected to be relied upon by Complainant's witnesses at the hearing of this matter.

c. The investigative file for Forsyth County. Witness statements were not required to be produced unless they were relied upon by the Complainant to draft the complaint in this matter or expected to be relied upon by Complainant's witnesses at the hearing of this matter.

d. Witness names and statements from the investigative file on Rosser relied upon

by the Complainant to draft the complaint in this matter or expected to be relied upon by Complainant's witnesses at the hearing of this matter.

e. Any investigative file of other employers at the project including witness names and statements relied upon by the Complainant to draft the complaint in this matter or expected to be relied upon by Complainant's witnesses at the hearing of this matter.

19. Complainant filed a Petition for Review and Motion for Stay of the Discovery Order with the Review Board on January 18, 1995.

20. This case is a complex case which involves a multiemployer construction site, in which the violations that were alleged against the Respondent, the owner, general contractor and subcontractors involve factual and legal issues that are all intertwined.

21. Many of the employees on the construction site involved are journeymen working for numerous employers who move from one site to another to ply their trade.

22. The Respondent is unable to get the information in the witness statements elsewhere other than the Complainant's investigative files because more than two years has passed since the inspection and the mobility of the large number of journeymen employees who are potential witnesses working for numerous employers on the same large worksite makes it difficult, if not impossible to track them.

## **CONCLUSIONS OF LAW**

Based upon the foregoing Findings of Fact, the Board concludes as a matter of law as follows:

1. The foregoing findings of fact are incorporated as conclusions of Law to the extent necessary to give effect to the provisions of this Order.
2. The Board has jurisdiction of this cause and the parties are properly before this Board.
3. N.C.G.S. § 95-136(a)(2), N.C.G.S. § 95-136(d)(1) and N.C.G.S. § 95-136(e)(1) provide a policy of anonymity for witnesses and complainants who provide information to the OSH Division about alleged safety and health violations at worksites.
4. N.C.G.S. § 95-136(e)(1) does not prohibit the discovery by Respondent of witnesses' and complainants' names and statements in enforcement proceedings and hearings held pursuant to the NCOSH Act.
5. The NCOSH Act's policy of anonymity is based on the need to provide for the free flow of information about safety and health violations to the OSH Division in order to effect the public policy of the Act "to assure so far as possible every working man and woman in the State of North Carolina safe and healthful working conditions . . . by providing an effective enforcement program . . ." N.C.G.S. § 95-126(b)(2)g.
6. In order to reduce the risk of possible retaliation against employees, the anonymity of witnesses and complainants must be preserved whenever those identities are revealed pursuant to a discovery, by the use of a protective order with undertakings.
7. Respondent has met its burden of showing good cause for the discovery of the witness names and statements which the Board has ordered disclosed.

## **DISCUSSION**

This case is before the Review Board on an appeal of a discovery order of the Hearing Examiner requiring among other things the release by the Complainant of witness names and statements that were gathered as part of an investigation of two fatalities on a multiemployer construction site. The appeal of this discovery order is an interlocutory matter and "is subject to review only if the Board determines a review is appropriate". Brooks v. H. B. Zachry Company, 2 NCOSHD 341, 349 (RB 1982). Pursuant to N.C.G.S. § 95-135(c), the Chair of the Review Board has the discretion to hear appeals of discovery orders without subsequent review by the Review Board. Id., at 343. This statute which allows the Chair to make orders with respect to discovery and other procedural matters of evidence without subsequent review is "representative of the overall purpose of the Act, which is to provide for expeditious hearing of OSHA cases in which conditions may affect the health, life and welfare of employees involved. Id., at 343. Because of the importance of this matter the Chair, in her discretion, has chosen to have this matter heard by the full Board.

The main issue in this case is whether N.C.G.S. § 95-136(e)(1) prohibits the discovery by Respondent of witness's and complainant's names and statements in enforcement proceedings and hearings held pursuant to the NCOSH Act. This is a question of the interpretation of a statute and necessarily involves a question of law. "De novo review is applied for errors of law." Commissioner v. Tuttle Enterprises dba Jim Fleming Tank Company, 5 NCOSHD 115, at 117 (RB 1993), citing, Brooks v. Maxton Hardwood Corporation, 2 NCOSHD 277 (RB 1981).

As a general matter, formal discovery is not allowed in contested cases heard before the Hearing Examiner or Review Board pursuant to the Occupational Safety and Health Act of North Carolina (OSHANC). Brooks v. United Parcel Service, Inc., 5 NCOSHD 169 (RB 1992). Formal discovery is generally denied to provide for an expedited resolution of the matter so that the alleged violations may be abated. See, Brooks v. Weeks Construction Company, 3 NCOSHD 976 (RB Chairman 1990), appeal held invalid, Brooks v. Weeks Construction Company, 3 NCOSHD 977 (RB Chairman 1990); Brooks v. Central Transport, Inc., 3 NCOSHD 230 (Review Board Chairman, dissenting opinion, 1988; majority opinion withdrawn on May 10, 1989). ". . . it is the policy of the Review Board to move expeditiously to hearing . . . . To do otherwise would be contrary to the policy of the North Carolina OSHA law that employees in our state be provided with safe and healthful workplaces." Brooks v. Yates Construction Co. Inc., 2 NCOSHD 983, 990 (RB 1986). An employer or his attorney must usually take advantage of the Department of Labor's "open file" policy as an informal discovery device. United Parcel Service, supra, at 170.

The disclosure of documents in investigative and other files prepared by the Occupational Safety and Health Division pursuant to its enforcement of the Occupational Safety and Health Act of North Carolina is governed by Chapter 132 of the North Carolina General Statutes. The implementing regulations are found in Title 13, Chapter 7A, Section .0300-.0303 of the North Carolina Administrative Code. The informal discovery device which an employer or his attorney must normally pursue is governed by Chapter 132 and the implementing regulations. Both Chapter 132 and the implementing regulations have provisions exempting confidential information from the requirements of public disclosure that is mandated by Chapter 132. N.C.G.S. § 132-1.2 provides in pertinent part:

Nothing in this Article shall be construed to require or authorize a public agency to disclose any information which:

..

(4) Is designated or indicated as "confidential" or as a "trade secret" at the time of its initial disclosure to the public agency.

13 N.C.A.C. 7A.0303(b)(5)(C) provides in pertinent part:

(5) The following information contained in a releasable case file shall not be released at any time:

..

(C) Complainant and witness names or statements unless permission is granted for release by the complainant or witness;

The OSHANC contains three provisions that provide for the confidentiality of complainants and witnesses. N.C.G.S. § 95-136(d)(1) provides in pertinent part:

Any employees or an employee representative of the employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists may request an inspection by giving notice of such violation or danger to the Commissioner or Director. . . Upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy of any record published, released or made available pursuant to subsection (e) of this section.

N.C.G.S. § 95-136(e)(1) which provides in pertinent part:

The names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations conducted pursuant to this Article that would name or otherwise identify the witnesses or complainants, shall not be released to any employer or third party. A witness or complainant may, however, sign a written release permitting the Commissioner to provide information specified in the release to any persons or entities designated in the release. Nothing in this section shall be construed to prohibit the use of the name or statement of a witness or complainant in enforcement proceedings or hearings held pursuant to this Article. The Commissioner may permit the use of names and statements of witnesses and complainants and information obtained during the course of inspections or investigations conducted pursuant to this Article by public officials in the performance of their public duties.

N.C.G.S. § 95-136(a)(2) which provides in pertinent part:

(a) In order to carry out the purposes of this article, the Commissioner or Director, or their duly authorized agents, upon presenting appropriate credentials to the owner, operator, or agent in charge, are authorized:

.  
. .  
.

(2) To inspect and investigate during regular hours . . . any such place of employment . . . and to question privately any such employer, owner, operator , agent or employee.  
(emphasis added).

The right to question privately must of necessity carry with it the right to keep the results of that communication confidential. When a compliance officer questions employees, those employees are assured that their answers will be confidential and meet the requirement of N.C.G.S. § 132-1.2 that information "designated or indicated as "confidential". . . at the time of its initial disclosure to the public agency" is exempt from the public disclosure requirements of Chapter 132.

In summary, the North Carolina OSH Act, Chapter 132 and the Department of Labor's disclosure policy found at 13 N.C.A.C. 7A.0303 all contain authority for exempting witness and complainant's names from disclosure. When an employer or his or her attorney pursuant to the Department of Labor's "open file" policy requests and is provided with a copy of the employer's file, the names and any identifying information is redacted from that copy of the file as is authorized by the above quoted statutes and regulations. In addition, the policy of keeping confidential the names of witnesses and complainants is necessary in order to prevent retaliation against those giving information to the OSH Division so as to provide for the free flow of information to the OSH Division about safety and health violations.

The Complainant's position is that N.C.G.S. § 95-136(e)(1) and 13 N.C.A.C. 7A.0303 control the release of witness names and statements and prevents the release of those identities even through formal discovery. The Complainant contends that N.C.G.S. § 95-136(e)(1) prohibits the release of "names of witnesses or complainants, and any information within statements taken from witnesses or complainants during the course of inspections or investigations . . . that would name or otherwise identify the witnesses or complainants." The third sentence in N.C.G.S. § 95-136(e)(1) exempts the application of N.C.G.S. § 95-136(e)(1) to enforcement proceedings or hearings held pursuant to the OSH Act. That third sentence states:

Nothing in this section shall be construed to prohibit the use of the name or statement of the witness or complainant in enforcement proceedings or hearings held pursuant to this Article.

"Nothing in this section shall be construed to prohibit the use" can be simplified to "this section does not prohibit". Logically the statement "this section does not prohibit" is not the same as the statement "this section does permit". As was stated in footnote 5 of Sumter Builders, supra, at 4, "N.C.G.S. § 95-136(e)(1) does not prohibit voluntary disclosure to a Respondent for use in an enforcement proceeding. Nor does the statute require voluntary disclosure to a Respondent for use in an enforcement proceeding." It also does not give the Respondent any explicit rights to use witness names and statements in enforcement proceedings.

Although formal discovery, except requests for admissions, requires leave of the court and is generally denied, the Rules of Procedure of the Review Board recognize that there are cases whose complexity may require discovery by both the employer and/or the Department of Labor that is more extensive than that provided by the Department of Labor's "open file" policy or more extensive than the information that the OSH Division gathers from employers pursuant to its normal inspection of an employer. Brooks v. United Parcel Service, Inc., 5 NCOSHD 169 (RB 1992); Brooks v. Scandura, Inc., 2 NCOSHD 296 (RB 1980). Rule .0404 governs formal discovery and provides as follows:

#### .0404 DISCOVERY DEPOSITIONS AND INTERROGATORIES

(a) Except by order of the Board or the hearing examiner, discovery depositions of parties, intervenors, or witnesses, discovery inspections by parties or intervenors, and interrogatories, and requests for documents and things, directed to parties or intervenors shall not be allowed.

(b) In the event the Board or the hearing examiner grants an application for the conduct of such discovery proceedings, the order granting the same shall set forth appropriate time limits governing the discovery.

(c) The hearing examiner or Board may limit the extent of discovery, taking into account such considerations as: Burdensome expense, prior opportunity of a party to acquire the information, the complexity of issues in the case, and other relevant factors.

Pursuant to Rule .0404, an employer or his attorney desiring discovery, in this case the production of documents over and above what the Department of Labor provides voluntarily, must apply to the Review Board or hearing examiner for an order compelling discovery upon making a showing of good cause for the production of the requested documents. Brooks v. H. B. Zachry Company, 2 NCOSHD 341 (RB 1982). "[A]s a general rule discovery will be granted in those rare instances where the party seeking discovery shows that such discovery is required in the interest of justice." United Parcel Service, supra, at 171.

If an employer desires the identities of witnesses and complainants and their statements as part of the documents which it requests, then the employer must make a showing of good cause necessity for those identities and statements sufficient to overcome the OSH Act's policy of anonymity for witnesses and complainants who provide information to the OSH Division. The Board has recognized the Act's policy of anonymity and has excluded the identities of employees of Respondents when granting discovery to Respondent/Employers. See, Brooks v. United Parcel Service, Inc., 5 NCOSHD 169, 171 (RB 1992) ("In no event shall the identity of employees of Respondent be provided to Respondent where the Act's policy of anonymity would be infringed."); Commissioner v. Ultra Systems, Western Constructors, Inc., 5 NCOSHD 278, 282 (RB 1993) (The Review Board ordered the Complainant "to comply fully with the request for documents except that: if under N.C. Gen. Stat. §95-136(d)(1), employees have requested anonymity, the complainant should state that fact; or otherwise comply with the discovery request"). The Act's policy of anonymity is found at N.C.G.S. § 95-136(a)(2), N.C.G.S. § 95-136(d)(1) and N.C.G.S. § 95-136(e)(1) and is set out and discussed above. To meet that burden of overcoming the Act's policy of anonymity, the employer must show (1) that the identities and statements are essential to the preparation of its case and (2) that the employer is unable to get the information elsewhere. Massman-Johnson (Luling), 1980 OSHD 24,436 (RC 1980), appeal dismissed, 645 F.2d 67 (5th Cir. 1981). The Board or hearing examiner may also take into account the other factors enumerated in Rule .0404(c).

If discovery is granted only rarely, then the identities of witnesses and complainants should be revealed even more rarely and only when the employer has met its burden of showing good cause. In those rare instances where

the employer meets its burden, the names of witnesses and complainants and their statements should be revealed , if at all, only, under a protective order with undertakings. Commissioner v. Sumter Builders, Inc., 5 NCOSHD\_\_\_, OSHANC 93-2820 (RB Chairman 1993). The protective order with undertakings is necessary so that the revealing of the identities is limited so far as possible to reduce the risk of retaliation against the witness or complainant. Id.

The Respondent, Donohoe in this case has met its burden of showing good cause for revealing the identities and statements of the witnesses. The Respondent has been charged as a controlling contractor on a multiemployer worksite. The inspection occurred over two years ago and many of the workers are journeymen in the construction industry who move around from job site to job site. In order to prepare its defense to the violations which were charged to Master Steel and Pompano and which have also been charged against Respondent as the creating, controlling and/or correcting employer, the Respondent has shown the need for access to the witnesses who provided relevant information in those two cases so that it may ascertain what defenses, if any, they might have against the same charges. Since the inspection occurred so long ago and the prospective witnesses have long since scattered to different construction sites and possibly to different states, the Respondent has shown the need to have access to the identity and statements of those witnesses whose testimony was used to draft the violations that are common to both the Respondent and Master Steel and Pompano or on which the compliance officer is expected to rely upon at trial for his or her testimony. This information is essential to the preparation of Respondent's case in the defense of those common violations and Respondent is unable to get the information elsewhere.

In addition, Respondent has shown that the violations alleged against the owner, general contractor, prime contractors, subcontractors and Respondent are all intertwined. Besides Donohoe there were three other prime contractors at the site and those three were not charged. Due to the complexity of this case, Respondent needs the relevant witness names and statements provided to the OSH Division in the Forsyth County (owner of site) and the Rosser (general contractor) cases. (See discussion below on the limitation that the witness names and statements be relevant to the citations issued against Respondent). Again this information is central to the preparation of Respondent's case and is not readily available elsewhere.

It would be an anomaly to provide Donohoe access to the relevant witness names and statements in the files of other entities present at the worksite but not to provide access to relevant witness names and statements in its own files. Again, because of the complexity of this case the relevant witness names and statements in Respondent's own files are central to the preparation of its case and the Respondent may be unable to get the information elsewhere. Subject to the relevancy requirement discussed below, the Respondent is also entitled to the witness names and statements in its own files.

Access to the witness names and statements in all of the files is governed by the overall relevancy requirements of Rule 26(b)(1) of the North Carolina Rules of Procedure. All of the witness names, statements and affidavits that are required to be released must be witnesses and statements relied upon by the Complainant to draft the complaints in Respondent's case or expected to be relied upon by Complainant's witnesses at the hearing of Respondent's case, otherwise they are not relevant. See, Brooks v. Scandura, Inc. 2 NCOSHD 296 (RB 1980). In addition, Rule 26(b)(1) excludes from discovery matter that is privileged. At least one federal Court of Appeals has held that the names of witnesses who provided information to the Secretary of Labor were privileged matter exempt from disclosure under the discovery provisions of the Federal Rules of Civil Procedure from which the North Carolina Rules of Civil Procedure were taken. Wirtz v. Continental Finance and Loan co. of West End, 326 F.2d 561, 563 (Ct. of Appeals 5th Cir. 1964)

The Respondent makes the argument that N.C.G.S. § 95-240 et seq. provides protection against retaliation but the purpose for the protection of witness's and complainant's names "is to make retaliation impossible, thus obviating the deterrent force of sanctions for retaliation." Wirtz v. Continental Finance & Loan Co. of West End, 326 F.2d 561, 564 (5th Cir. 1964). "The pressures which an employer may bring to bear on an employee are difficult to detect and even harder to correct. The economic relationship of employer-employee makes possible a wide range of discriminatory actions from the most flagrant to those so subtle that they may be scarcely noticed." Id., at 564. Those pressures include promotion or denial of promotion, assignment of jobs, equipment and office space, outright firing and blacklisting from the industry. "The average employee involved in this type of action is



keenly aware of his dependence upon his employer's good will, not only to hold his job but for the necessary job references essential to employment elsewhere" Wirtz v. B.A.C. Steel Products, Inc., 312 F.2d 14, 16 (4th Cir. 1962). It is very difficult for an employee to feed and clothe his or her family while prosecuting a retaliatory discrimination claim against an employer who has fired him or her. For these reasons the "shield of anonymity is preferable to the sword of punishment." Wirtz v. Continental Finance & Loan Co. of West End, supra, at 564.

The limitations put on the discovery of witness names were aptly stated by former Chairman Kelly in Sumter Builders, supra, at 6-8. His Order in that case is quoted below and adopted by the Board with the addition that the criteria required in the protective order and the undertakings are numbered:

When witness names and statements are permitted to be discovered, disclosure of such information should be limited in an effort to prevent any such retaliation or the appearance of the possibility of such retaliation.

Furthermore, discovered material can only be permitted to be used during NCOSHA enforcement proceedings. This is so because Respondent, or others, cannot disclose information which the Commissioner could not otherwise disclose pursuant to N.C.G.S. § 95-136(e)(1). In other words, merely because the Commissioner discloses witness names and statements to a Respondent pursuant to Board Rule .0401 for use in an enforcement proceeding, does not then allow the Respondent to use that information for any purpose whatsoever. The Respondent is then bound by the same terms the Commissioner is pursuant to N.C.G.S. § 95-136(e)(1). It cannot disclose or release the witness names and statements to any other party. It cannot use the witness names and statements for any purpose other than NCOSHA enforcement proceedings.

Therefore, any request for discovery in which the names of witnesses and witness statements is either sought or given, should be allowed, if at all, under a protective order. The protective order must state:

1. that such information is confidential;
2. that such information is subject to the provisions of N.C.G.S. § 95-136(e)(1);
3. that no copies will be made;
4. that at the close of all enforcement proceedings the material will be returned to the Commissioner or destroyed;
5. that it will only be used for enforcement proceedings under the OSH Act and
6. that it will not be disclosed to anyone unless they have read the protective order and signed an undertaking.

Chairman Kelly then listed the following six conditions required in an undertaking which the Board also requires:

1. The undertaking should recite the non-discrimination provisions of N.C.G.S. § 95-241(a). (Chairman Kelly recited N.C.G.S. § 95-130(8) which has been repealed and replaced by N.C.G.S. § 95-241(a)).
2. The person signing the undertaking must confirm that she has read the nondiscrimination provisions and the protective order, understands them and will abide by them;
3. Only two people other than Respondent's attorneys should normally be permitted to sign undertakings;
4. Only individuals signing the undertaking may be permitted to see the discovered material;

5. Individuals signing the undertaking may not disclose the discovered material or information found in the discovered material to any person who has not signed an undertaking and

6. Individuals signing the undertaking may not discuss the information in the discovered material with anyone who has not signed an undertaking.

Id., at 6-8. Any violations of the protective order and undertaking shall be contempt of court.

We affirm the opinion of the hearing examiner below with two modifications. The first modification is that the information that is to be provided must be relevant, that is, the witness names and statements that are ordered to be produced must have been relied upon by Complainant in the drafting of the complaint against the Respondent, Donohoe or must be expected to be relied upon by the Complainant's witnesses at the hearing of Donohoe's case. The second modification is that the release of any witness names and statements shall be accompanied by a protective order with undertakings that complies with the requirements of this decision.

**THEREFORE**, it is **ORDERED** that Respondent's Motion to Conduct Discovery is granted under the following terms:

1. The Commissioner must produce the files including the unredacted witness statements for any witness or statements the Commissioner has used in the drafting of the citation or the complaint against Donohoe or which is expected to be relied upon by the Complainant's witnesses at the hearing of Donohoe's case for the following files:

a. the investigative file for Respondent;

b. the investigative file for Master Steel including witness names and statements relating to Citation 1, Items 1a, 1b and 1c;

c. the investigative file for Pompano including the witness names and statements relating to Citation 2, Items 7 and 8;

d. investigative file for Forsyth County;

e. investigative file for Rosser;

f. any investigative files of other employers at the project.

Witness names and statements from all of these files that were not used in the drafting of the citation or the complaint are not subject to discovery unless the Commissioner intends to rely on those statements, in any form whatsoever to prove its affirmative case at the hearing of this matter.

2. Discovery will only be permitted under an approved protective order with undertakings which contain all the conditions and limitations set forth in this Order. Respondent has the responsibility of drafting a protective order and undertaking in cooperation with the Commissioner in an effort to reach a consensus on acceptable language. The proposed protective order and undertaking should be submitted to the Chair within 20 days of this Order. If the Commissioner objects to the proposed protective order and undertakings as filed he will have 10 days thereafter to submit his objections.

3. After approval of a protective order, the Commissioner must respond to the Discovery as set forth in paragraph one above, in accordance with the time periods set in the Rules of

Civil Procedure.

4. Any violations of the protective order and undertaking shall be treated as contempt of court.

This the 22nd day of March, 1996.

---

ROBIN E. HUDSON, CHAIR

---

KENNETH K. KISER, MEMBER

---

HENRY M. WHITESIDES, MEMBER  
DID NOT PARTICIPATE IN THE DECISION OF THIS CASE