# The NLRB Alters Its Longstanding Policy of Sequestering Discriminatees

In *Unga Painting Corp.*,[1] the National Labor Relations Board altered its longstanding policy with respect to sequestration[2] of discriminatees in an unfair labor practice hearing and held that alleged discriminatees will now be excluded "during that portion of the hearing when [witnesses on the same side are] testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal, unless, in the judgment of the Administrative Law Judge, there are special circumstances warranting the unrestricted presence . . . or total exclusion [of the discriminatees] when not testifying."[3] This change was precipitated by an attack on the sequestration policy by several of the circuit courts following the enactment of Federal Rule of Evidence 615.[4]

Respondent, Unga Painting Corp., had been charged with violating §§ 8(a) (1) and (3) of the National Labor Relations Act by interrogating and discharging employees who engaged in union activities.[5] There were six alleged discriminatees, five of whom filed individual charges, with the union filing the charge on behalf of the sixth.[6] At the outset of the hearing, the administrative law judge denied respondent's request to sequester the discriminatees and respondent excepted. The National Labor Relations Board affirmed the ruling, basing its decision upon "long-established precedent."[7] On May 11, 1977, the National Labor Relations Board found that respondent had engaged in unfair labor practices in violation of the Act. The Board issued an order requiring respondent to cease interrogating and discharging employees who engaged in union activities, and to reinstate and make whole certain discriminatees. On February 15, 1978, the Board decided, sua sponte, to reconsider its decision.[8]

1. 237 N.L.R.B. No. 212, 99 L.R.R.M. 1141 (1978).

2. 99 L.R.R.M. at 1141 n.2. The Board interprets sequestration to mean the exclusion of witnesses from the hearing except when testifying.

3. *Id.* at 1143.

4. FED. R. EVID. 615 provides: "At the request of a party the court shall order witnesses excluded so that they cannot hear the testimony of other witnesses, and it may make the order of its own motion. This rule does not authorize exclusion of (1) a party who is a natural person, or (2) an officer or employee of a party which is not a natural person designated as its representative by its attorney, or (3) a person whose presence is shown by a party to be essential to the presentation of his cause."

5. 99 L.R.R.M. at 1141; Labor Management Relations Act § 8(a)(1),(3), 29 U.S.C.A. § 158(a)(1),(3) (1973).

6. *Id.* at 1142. Whether a discriminatee files his own charge is potentially significant, as will be subsequently shown.

7. *Id.* at 1141-42.

8. *Id.* at 1141.

Sequestration, or the expedient of separating a party's witnesses in order to detect falsehood by exposing inconsistencies, is a principle whose lineage can be traced back to Daniel's effective cross-examination of the elders who traduced Susanna.[9] Wigmore describes sequestration as "one of the greatest engines that the skill of man has ever invented for the detection of liars in a court of justice."[10] The high standing of sequestration in the law of evidence is attested by the practice of referring to it simply as "the rule".[11]

Sequestration renders a probative service when applied to witnesses presented by the opposing parties, or to witnesses presented by one party. The separation of witnesses is preventative in that later witnesses are deprived of the opportunity of shaping their testimony to correspond with that of an earlier one. It is additionally detective in its effect in that it exposes differences in witnesses' statements on points which, had they spoken truthfully, would have been consistent. This detection of inconsistency in statements is the significant achievement of sequestration. This inconsistency is especially significant when observed from witnesses testifying for the same side. "Where two witnesses, claiming to have been present on the same occasion with equal opportunities of observation, . . . both speak for the same party, contradicting each other, it is manifest . . . that the error is upon that particular side . . . ."[12] On the other hand, when two witnesses testify on opposite sides and contradict each other, the contradiction may indicate that one witness is falsifying but it does not indicate which one. Either side may claim that its witness is the truthful one and neither side is clearly fixed with the error or falsity.[13]

Wigmore's position on the availability of sequestration is that it should be demandable as of right, as is cross-examination. This position is based on the ever present danger of perjury and the belief that there should be no rule which could deprive an opponent of the opportunity to expose perjury. Prior to the enactment of the Federal Rules of Evidence, there was a difference of judicial opinion as to whether sequestration was demandable as of right or was grantable only in the trial court's discretion.[14] Con-

9. 6 J. WIGMORE, EVIDENCE, § 1837, at 455-56 (Chadbourn rev. 1976), hereinafter cited as WIGMORE. Two elders coveted Susanna, a very fair and pure woman. She resisted their temptations and they in turn plotted revenge by charging her with adultery. Susanna was brought before the assembly and the elders testified to seeing her commit adultry in a garden. Their testimony was believed and Susanna was condemned. Daniel then stepped forward and demanded that the two elders be separated and questioned individually. When asked under what tree the act took place, one replied "a mastick" and the other "a holm." Thus, the Aprocryphal Scriptures reveal how sequestration was used to save a daughter of Israel.

10. 6 WIGMORE, § 1838, at 463.

11. NLRB v. Stark, 525 F.2d 422, 426 (2d Cir. 1975), *cert. denied* 424 U.S. 967 (1976).

12. 6 WIGMORE, § 1838, at 462.

13. *Id.*

14. *Id.*, § 1839, at 467.

gress, by enacting Rule 615 of the Federal Rules of Evidence, adopted Wigmore's principle of mandatory exclusion of witnesses with some significant exceptions. At the request of a party, the court must exclude the witness from hearing testimony of other witnesses unless the witness under consideration is, *inter alia,* a party to the action or a person whose presence is essential to the presentation of a party's cause. The situation in which the witness is also a discriminatee is the core of controversy in the application of Rule 615 in an unfair labor practice hearing.

The longstanding Board policy with respect to sequestration of witnesses who are also discriminatees originated in *Jacques Power Saw Co.*[15] The Board determined that "the rule" was not to be applied to alleged discriminatees because they "were not mere witnesses at the hearing . . . . [but] were entitled to be present during the taking of the entire testimony because, in effect, they occupy the status of complainants.[16] In a long line of cases,[17] the Board has refused to apply "the rule" to discriminatees regardless of whether they had personally filed the charge of discrimination and were therefore parties within the Board's definition of the term.[18]

In light of the enactment of Rule 615, this longstanding policy of refusal to apply "the rule" to discriminatees has been challenged by some of the circuit courts of appeals.[19] In *NLRB v. Stark,*[20] the Second Circuit determined that the Board's uniform practice of not applying "the rule" to discriminatees could not stand subsequent to the passage of Rule 615. The court held that the administrative law judge should have the authority to sequester discriminatees in the typical unfair labor practice proceeding brought to remedy an employer's coercive interrogation and discriminatory discharge of employees because of union activities. The court further said that a failure to exercise that discretion would be an abuse of discretion.[21]

In *Stark,* the Board argued that the administrative law judge had not erred in failing to sequester the discriminatees because the judge was exercising discretion and did not abuse it. The court found no merit in

15. 85 N.L.R.B. 440 (1949).

16. *Id.* at 443.

17. Sopps, Inc. 189 N.L.R.B. 822, 822 (1971); T.I.L. Sportswear Corp., 131 N.L.R.B. 176 at 176-77 n.1 (1961), *enforced,* 302 F.2d 186 (D.C. Cir. 1962); Donald L. Trettenero, 129 N.L.R.B. 610, 610 n.1 (1960); Walsh-Lumpkin Wholesale Drug Co., 129 N.L.R.B. 294, 295 (1960), *enforced,* 291 F.2d 751 (8th Cir. 1961); Lewis Karlton, 91 N.L.R.B. 1295, 1295 n.3 (1950).

18. 29 C.F.R. § 102.8 (1978). For a discriminatee to be a party within the meaning of the term as defined by this regulation, the discriminatee must individually file a charge or petition under the Act.

19. NLRB v. Hale Mfg. Co., 570 F.2d 705 (8th Cir. 1978); Sturgis Newport Business Forms, Inc. v. NLRB, 563 F.2d 1252 (5th Cir. 1977); L.S. Ayres & Co. v. NLRB, 551 F.2d 586 (4th Cir. 1977); NLRB v. Stark, 525 F.2d 422 (2d Cir. 1975), *cert. denied,* 424 U.S. 967 (1976).

20. 525 F.2d 422 (2d Cir. 1975), *cert. denied,* 424 U.S. 967 (1976).

21. *Id.* at 430.

this proposition. The court reasoned that based on the Board's long-standing policy prohibiting sequestration of alleged discriminatees, the administrative law judge in reality did not have discretion with respect to sequestration of discriminatees. The court felt that the Board's precedent was so well-established that its effect was a flat rule against sequestering discriminatees.[22]

Although Rule 615 does mandate the sequestration of witnesses as a matter of right, it also states that there is a mandatory exception when the witness is a party.[23] The court in *Stark* noted that although discriminatees are not usually "parties" within the NLRB Rules and Regulations,[24] there is nothing to prevent their joining in the charge and therefore obtaining the status of parties.[25] It appears that the effect of this would be to prevent their sequestration. The court addressed this situation by observing that amended § 10(b) of the Act requires that an unfair labor practice proceeding shall "so far as practicable," be conducted in accordance with the rules of evidence applicable in the district courts of the United States.[26] This caveat circumvents the requirement that an unfair labor practice proceeding conform precisely with the provision of Rule 615 which prohibits exclusion of a witness who is also a party. The court limited this deviation from the strict application of Rule 615 only to situations where there is a substantial reason to do so.[27] The court in *Stark* found the danger of perjury resulting from the discriminatee's financial interest in the cause to be such a substantial reason. The court felt that the value of sequestering discriminatees who are witnesses to the same incident is so great that a presumption is created in favor of sequestration. This presumption could be rebutted "if at all, only by a particularized showing of need for the discriminatees to hear each other's evidence—a showing we find extremely hard to visualize."[28]

The Fifth Circuit has also challenged the Board's policy of refusal to apply "the rule" to discriminatees, but in an indirect manner. In *Sturgis Newport Business Forms, Inc. v. NLRB,*[29] the court did note the cogency of *Stark* with respect to the sequestration of discriminatees, but because there was no prejudice to the petitioner even if the Rule was misapplied, found it unnecessary to take a firm stand in the proper application of Rule 615.[30] In two more recent cases, *NLRB v. Pope Maintenance Corp.*[31] and

22. *Id.* at 428.
23. *See* note 4 *supra.*
24. *See* note 18 *supra.*
25. 525 F.2d at 429.
26. 29 U.S.C.A. § 160(b) (1970).
27. 525 F.2d at 430.
28. *Id.*
29. 563 F.2d 1252 (5th Cir. 1977).
30. *Id.* at 1258.
31. 573 F.2d 898 (5th Cir. 1978).

*NLRB v. National Fixtures, Inc.*,[32] the Fifth Circuit again did not determine how Rule 615 should be applied because, again no prejudice resulted from the failure to exclude the discriminatees. Therefore, the proper application of Rule 615 in a Board proceeding remains an open question within the Fifth Circuit.

Due to the circuit courts' increasing assaults on the Board's longstanding policy against sequestering discriminatees, the Board felt that *Unga Painting Corp.* provided an appropriate opportunity to revise its exclusion policy in light of Rule 615.[33] The Board observed that Rule 615, which makes exclusion demandable as of right except for the listed exceptions, is in striking contrast to the previous practice in federal courts which gave the trial judge discretion to exclude witnesses. The Board found that the Rule 615 elimination of the court's discretion emphasizes the degree of importance placed upon the utility of sequestration by Congress. The Board determined that the value of sequestration in depriving the witness of hearing suggestions in order to shape false testimony, in aiding cross examination, and in detecting inconsistent testimony was sufficient to justify "the rule's" pre-eminence as a vehicle for the ascertainment of truth. Thus, the Board reaffirmed its policy of excluding from the hearing room, upon request, all witnesses who are not alleged discriminatees.[34]

The Board next addressed the extent to which Rule 615 would apply to witnesses who are also discriminatees. The Board felt that whether a discriminatee is classified as a party under the Board's rules and regulations—and hence comes under the Rule 615 "party" exemption from sequestration—should not be controlling on the ultimate decision of whether to sequester the discriminatee. The Board noted that the same regulation which classifies a discriminatee as a party also provides that the Board may limit, to the extent of his interest, any party's participation in the proceedings. Thus, a discriminatee might be excluded from part of the hearing even if a "party".[35]

The Board observed that a discriminatee who has not filed his own charge and is therefore technically not a party within the Board's definition has nevertheless traditionally been regarded as a party by the Board. A discriminatee who has had the charge "filed on his behalf by a union [clearly has an interest] greater than that of a nondiscriminatee witness, but scarcely less than that of an individual charging party who is also a discriminatee."[36] In emphasizing that the identity of the person filing the charge should not be determinative, the Board looked to the practical effects of the hearing on all discriminatees, both those filing charges indi-

32. 574 F.2d 1305 (5th Cir. 1978).
33. 99 L.R.R.M. at 1142.
34. *Id.*
35. *Id.*
36. *Id.* at 1142-43.

vidually (parties) and those for whom the union files the charges (nonparties within the Board's definition). In both situations, the discriminatee's rights are determined equally at the hearing. If the discriminatee prevails at the hearing and a reinstatement order is issued, it runs in his favor, and any backpay is awarded to him personally. Regardlesss of whether the discriminatee is classified as a party, under § 10(f) of the Act he is considered an "aggrieved person" who can seek review of the Board's order in a United States court of appeals. In verifying that all discriminatees are parties in a real sense, the Board conceded that an argument could be made that a discriminatee has a right to remain in the hearing at all times to protect his interest, which is the position the Board had traditionally followed.[37]

In considering the discriminatee's right to remain in the hearing, the Board noted that remedial relief affecting the interests of a discriminatee is "but one facet of a comprehensive scheme to encourage collective bargaining and promote stable labor-management relations."[38] Factors which counterbalance the exclusive interest of the discriminatee are that "[t]he complaint in a Board proceeding is filed on behalf of the Government to vindicate the public interest, not just that of the discriminatee, . . . the General Counsel controls the proceeding, sometimes without the discriminatee's assistance . . . . [and] it is the General Counsel, and not the discriminatee, who may file a contempt action to enforce a Board order in favor of the discriminatee."[39]

The Board weighed the importance of a discriminatee's unrestricted presence during the Board hearing against the objectives of sequestration and the overall purposes of the Act and decided to alter the longstanding practice and to exclude discriminatees to a limited extent. The Board held that "discriminatees [may now] be excluded only during that portion of the hearing when another of the General Counsel's or charging party's witnesses is testifying about events to which the discriminatees have testified, or will or may testify, either in the case-in-chief or on rebuttal, unless, in the judgment of the Administrative Law Judge, there are special circumstances warranting the unrestricted presence of discriminatees, or their total exclusion when not testifying."[40] The Board noted that it was following the suggestion in *Stark* to exclude discriminatees when there will be several of them testifying concerning the same event.[41]

The Board foresaw a loss of public confidence in the Board's processes if discriminatees were excluded from hearings in their entirety. Separating a discriminatee from the process which determines his right to reinstate-

37. *Id.* at 1143.
38. *Id.*
39. *Id.*
40. *Id.*
41. *Id.*

ment to his former job and reimbursement of lost wages due to a discriminatory discharge could "add insult to injury."[42] The board felt that allowing a discriminatee to be present at least for part of the hearing was valuable because the discriminatee personally experiences the remedial process and gains an appreciation for conflicting policy considerations and for the decision making process, all of which contribute to the stability of labor-management relations.[43]

In the Board's view, sequestering discriminatees only during testimony by fellow discriminatees concerning the same event would comport with the spirit of Rule 615 and enhance the credibility of Board proceedings. The Board observed that in the usual unfair labor practice hearing, the discriminatee would only be excluded during the initial part of the hearing because the general counsel normally presents his witnesses before the respondent. Therefore, the discriminatees normally will have testified and undergone cross-examination before hearing the testimony of the opposition's witnesses. This limited exclusion, in the Board's opinion, will have the desired effect of affording respondent an "opportunity to pursue and develop inconsistencies and inaccuracies without fostering perjury, and equally as important, the discriminatees are afforded some opportunity to participate in the proceeding and appreciate the Government's advocacy on their behalf and, hence, on behalf of labor-management relations generally."[44] Permitting discriminatees to be present during at least a portion of the hearing was believed to be required in view of the Board's existing procedures which permit respondent to be present during the entire proceeding.

The dissent agreed that the policy of the Board with respect to sequestration of alleged discriminatees required modification, but argued that Rule 615 should be applied without limitation. Under the dissent's rule, sequestration would turn on whether the discriminatee was technically a party within the meaning of the Board's regulations. If the discriminatee personally filed the charge, he would be immune from sequestration; if the union filed the charge for the discriminatee, he would, upon request, be excluded from the hearing except while testifying, unless his presence throughout the hearing was shown to be essential to the presentation of the case. Noncharging discriminatees would be excluded completely because they are not parties according to the Board's rules, they rarely take an active role in the proceedings, and their presence throughout the hearing makes the administrative law judge's task of making credibility resolutions substantially more onerous. Also, discriminatees who are not charging parties would be excluded unless a showing could be made that their presence was essential to the presentation of the case.[45]

42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 1144-45.

The dissent predicted that the majority's rule would result in a revolving door procedure which would turn the hearing into "a gigantic circus—the more discriminatees and the more charging parties, the bigger the spectacle."[46] The dissent saw the majority rule as creating more problems than it solved because both general counsel and each charging party will be required to screen the prospective testimony of their witnesses in order to ascertain which testimony will require exclusion of the respective discriminatees; because the discriminatees will be constantly exiting and entering the hearing room and creating disruption; and because the motion for sequestration will be constantly raised and frequent rulings will be required. The dissent's criticism of the majority's rule concluded with the belief that any "educational benefits" which the discriminatee may derive therefrom are far outweighed by the potential delays anticipated from the procedural morass that will result from implementation of the new policy.[47]

With the intensity of the assault on the Board's longstanding sequestration policy increasing, the Board felt compelled to re-evaluate its policy in light of Rule 615. The dissent's rule of strict application of Rule 615 to an unfair labor practice hearing is cogent, at least on its face. Sequestering only those discriminatees who have not personally filed unfair labor practice charges is appealing because it is easily applied and avoids the administrative burdens associated with the majority's rule. Upon closer analysis, however, it appears that the rule of the dissent is also plagued with practical difficulties.

The dissent, written by Member Murphy, asserted that the principal evil which is avoided by sequestration—one witness hearing testimony of another—is often not present in the ordinary unfair labor practice hearing. This is so because the charging party or parties are called upon to testify first so that they will not hear the testimony of other witnesses in advance.[48] The evil is not present in these cases, however, only if there is *one* charging party. If there is more than *one* charging party, and the charging parties are not sequestered, all but the first to testify will benefit from hearing the others' testimony. The dissent addressed this situation with the suggestion that "perhaps one or more of them can be persuaded to leave during the testimony of the others—or, alternatively, their testimony can be evaluated by the administrative law judge in light of the fact that they had already heard related testimony."[49] This tactic of persuasion seems questionable at best, since the charging party will be asked to voluntarily relinquish a potential advantage against the very individuals he perceives as responsible for discriminating against him. The efficacy of having the administrative law judge evaluate the party's testimony in light

46. *Id.* at 1145.
47. *Id.*
48. *Id.* at 1146.
49. *Id.*

of previous testimony is also questionable because of the highly subjective nature of such an evaluation.

The dissent appears to be on firmer ground in criticizing the majority's emphasis on the "educational benefits" which all discriminatees will derive from their active participation in the hearing. Member Murphy focused on the majority's position which would allow nonparty discriminatees (discriminatees who do not file their own charges) to receive these educational benefits. After balancing these benefits against the potential for harm, the dissent concluded that the "interest in having a fair, orderly, and rapid resolution of the issues, based on accurate testimony, far exceeds any 'educational benefit' to be derived."[50] This concern for an expeditious resolution of the issue is well-taken because the alleged discriminatee has the most to lose in protracted litigation. The discriminatees are "the ones whose employment status remains unresolved, whose back pay is delayed, and who, in the extreme case, end up losers should the complaint fail because of procedural errors."[51] This position strikes at the major flaw of the majority's rule—the potential for delay and procedural error.

The cogency of the dissenting view is significantly blunted because of the undue emphasis placed on whether a discriminatee is a party within the Board's meaning of the term. If the discriminatee has filed an unfair labor practice charge himself, the dissenting view would exempt him from sequestration; if the union has filed the charge for the discriminatee, the dissent would subject him to sequestration.[52] The basis for this distinction is the dissent's proposition that noncharging discriminatees rarely take an active role in the proceeeding whereas charging parties often do conduct their own cases.[53] This position was expressly refuted in *Stark,* in which the court acknowledged that often "no lawyer appear[s] for the charging party and the proceeding [is] conducted solely by counsel for the General Counsel . . ." on behalf of the discriminatees.[54] Therefore, the discriminatees frequently rely on general counsel and do not conduct their own cases regardless of whether they filed the charge.

The dissent's position also failed to address the reasoning behind the Board's refusal to distinguish between a discriminatee who has filed his own charge and one who has not—the interests of the discriminatee are just as real whether the union files the charge or the individual files the charge.[55] It may be procedurally more convenient to make a sequestration determination based on the "party" technicality, but it certainly exalts form over substance.

50. *Id.* at 1145.
51. *Id.*
52. *Id.* at 1144.
53. *Id.* at 1144, 1146.
54. 525 F.2d at 429.
55. *See* notes 36 & 37 *supra,* and accompanying text.

The dissent also failed to deal adequately with the potential for abuse which exists with this technical distinction of whether a discriminatee is a party. A charge may be filed by "any person."[56] Therefore, there would be nothing to prevent all discriminatees from personally filing charges under union advisement and thereby avoiding sequestration completely under Rule 615. The dissenting opinion facilely dealt with this problem by indicating that if this "bandwagon" situation occurs, the administrative law judge may exclude parties in its discretion, under existing Board regulations.[57] This in essence returns the situation to the pre-Rule 615 era in which it is clear that this discretion was not exercised, and in never being exercised, in fact did not exist.[58]

The due process requirements afforded by the Board regulations[59] were of significant concern to the dissent in the exclusion of a discriminatee from the hearing. The dissenting view pressed this point, noting that unless the party has counsel, he will be unable to call and examine his own witnesses or to cross-examine witnesses called by the general counsel or another charging party while he is excluded from the hearing.[60] The efficacy of a discriminatee-party acting as his own counsel seems questionable at best. It would appear that the general counsel is more qualified to conduct effective direct and cross-examination of a witness than is a member of the labor force unskilled in law. In *Stark*, the court emphasized that an unfair labor practice proceeding is not the equivalent of a private suit in that the complaint is issued by the Board acting through a regional director and the course of the adjudication is controlled by the agency.[61] When a charging party appears without an attorney, as is often the case, the proceeding is conducted solely by the general counsel and one of the main reasons for proscribing sequestration dissipates. The need for the party's presence to guide his attorney is nonexistent when no counsel is retained by the charging party.[62]

Probably the most serious concern remaining with the majority rule of limited discriminatee exclusion lies with logistics and the potential for abuse as a dilatory device by management. The Board's position is that the procedure can be implemented "without much difficulty by determining at the outset of the hearing exactly who is to be excluded during what testimony."[63] However, the Board, in anticipating possible problems in the implementation of its rule, imposes an ominous caveat by stating that the Board is presently "embarking upon a course to determine to what extent

56. 29 C.F.R. § 102.9 (1978).
57. 99 L.R.R.M. at 1146 n.25 & 26.
58. *See* note 22 *supra*, and accompanying text.
59. 99 L.R.R.M. at 1146 n.26.
60. *Id.* at 1146.
61. 525 F.2d at 429.
62. *Id.*
63. 99 L.R.R.M. at 1143 n.15.

it is 'practicable' . . . to apply . . . ." Rule 615.[64] There is an implication that if the limited exclusion rule of the majority is not feasible, the Board will abandon it.

## CONCLUSION

Despite the lack of certitude which exists as to the future of the Board's rule of a limited exclusion of discriminatees, it is appropriate that sequestration will finally be applied (at least to a limited extent) to alleged discriminatees in a Board hearing. The value of sequestration in preventing and detecting perjury is well-established. The temptation for a discriminatee to commit perjury seems great when viewed in light of the financial interest at stake and the animus that naturally exists toward an employer who has allegedly discriminated against the witness. On the other hand, there is the danger that the majority's rule will result in even more protracted resolutions of disputes. This delay may result from the logistical problems encountered in implementing a new procedure or from intentional dilatory tactics by management. There is also the grave danger that employers otherwise guilty of discrimination could escape liability because of prejudice resulting from a discriminatee improperly hearing testimony due to a misapplication of the new policy. Although the concerns with the new policy are valid, they out outweighed, at this time at least, by the probative values of sequestration. Should the anticipated problems with the new policy materilize, the Board will be justified in determining that it is not "practicable" to apply Rule 615 to discriminatees and in falling back to the previous position of refusing to sequester all discriminatees.

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64. *Id.*