

The Burger Court Opinion Writing Database

NLRB v. Sears, Roebuck & Co.
421 U.S. 132 (1975)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

April 21, 1975

Re: 73-1233 - NLRB v. Sears

Dear Byron:

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

Regards,

WB

Mr. Justice White

Copies to the Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM O. DOUGLAS

April 21, 1975

Dear Byron:

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

WADP

William O. Douglas

Mr. Justice White

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

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,

Bill

Mr. Justice White

cc: The Conference

✓
Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE POTTER STEWART

March 25, 1975

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

Dear Byron,

I am glad to join your opinion for the Court in
this case.

Sincerely yours,

?S.
✓

Mr. Justice White

Copies to the Conference

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated: 3-20-75

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2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1233

National Labor Relations Board et al., Petitioners, *v.* Sears, Roebuck & Co. On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

The National Labor Relations Board (the Board) and its General Counsel seek to set aside an order of the United States District Court directing disclosure to respondent, Sears, Roebuck & Co. (Sears), pursuant to the Freedom of Information Act, 5 U. S. C. § 552 (the Act), of certain memoranda, known as "Advice Memoranda" and "Appeals Memoranda," and related documents generated by the Office of the General Counsel in the course of deciding whether or not to permit the filing with the Board of unfair labor practice complaints.

The Act's background and its principal objectives are described in *EPA v. Mink*, 410 U. S. 73, 79-80, and will not be repeated here. It is sufficient to note for present purposes that the Act seeks "to establish a general philosophy of full agency disclosure unless information is exempted under clearly delineated statutory language." S. Rep. No. 813, 89th Cong., 2d Sess., at 3 (1965); *EPA v. Mink*, *supra*, at 80. As the Act is structured, virtually every document generated by an agency is available to the public in one form or another, unless it falls within one of the Act's nine exemptions. Certain documents described in 5 U. S. C. § 552 (a)(1) such as "rules of

pp 3, 22, 23, 25, 28-31

B2W
Perryman
Perryman

To: The Chief Justice
Mr. Justice Douglas
Mr. Justice Brennan
Mr. Justice Stewart
Mr. Justice Marshall
Mr. Justice Blackmun
Mr. Justice Powell
Mr. Justice Rehnquist

From: White, J.

Circulated:

Recirculated: 3-25-75

3rd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 73-1233

National Labor Relations Board et al., Petitioners, v. Sears, Roebuck & Co. } On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[March —, 1975]

MR. JUSTICE WHITE delivered the opinion of the Court.

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Supreme Court of the United States
Washington, D. C. 20543

LC

CHAMBERS OF
ICE BYRON R. WHITE

May 8, 1975

MEMORANDUM FOR THE CONFERENCE

Re: No. 74-375, Shell Chemical Co. v. NLRB (Held
for NLRB v. Sears, Roebuck & Co., No. 73-1233)

This case was first held for ITT and then, at my request, for Sears. Brother Rehnquist's memorandum of February 4, to which I refer you, recommended that the case be denied. The issue is reviewability rather than a question of disclosure under the Public Information Act. Nevertheless, resolution depends to a great extent on whether the Board's dismissal of the 10(k) proceedings, which automatically requires dismissal of the associated unfair labor practice charge, is final agency action subject to review. Arguably, the dismissal is as final as the refusal to file an unfair labor practice charge which was dealt with in Sears. But refusals to file charges are committed to agency discretion and are not subject to judicial review, however final they may be. I am content to deny here, although here agency "discretion" is controlled by a regulation seemingly requiring dismissal by the General Counsel after the 10(k) proceeding washes out.

B.R.W.

73-1233
Oct 74
W.W. Daugh

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

SC
February 4, 1975

Re: No. 74-375 - Shell Chemical Co. v. NLRB
(Held for No. 73-113 - ITT v. Local No. 134)

Like Local No. 134, Shell involves a section 10(k) proceeding under the National Labor Relations Act, and the relationship between that Act and the Administrative Procedure Act. Shell, however, differs from Local No. 134 in that in the former it is the employer who seeks review of the Board's determination in the section 10(k) proceeding, while in Local No. 134 it was the union which sought review. We held in Local No. 134 that the APA did not govern the Board's section 10(k) proceeding because a section 10(k) determination was neither an "order" nor "agency process for the formulation of an order" as those terms are used in the APA. Nonetheless, the union would ultimately have full opportunity to renew its claim by refusing to comply with the Board's section 10(k) order, proceed to a hearing on the section 8(b)(4)(D) complaint, and if that were adversely determined it would be entitled to judicial review of that order. 29 U.S.C. § 160(f).

The tables here are turned, and the employer is in effect grounded by the Board's determination adverse to it in a section 10(k) proceeding since no section 8(b)(4)(D) proceeding, with the availability of judicial review, will follow. I am not inclined to think that this fact would warrant a different result under our analysis in Local No. 134, but at

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W.M. Dugay

Att. 6A to
BW min
5/8/77

any rate the Court of Appeals for the Fifth Circuit in Shell held that the Board's section 10(k) determination was not judicially reviewable, and that holding is completely consistent with the thrust of Local No. 134.

The Court of Appeals for the Ninth Circuit in Waterways Terminal Co. v. NLRB, 467 F. 2d 1011 (1972), decided the same issue the other way, holding that an employer might obtain judicial review in the Court of Appeals of the Board's section 10(k) determination that there was not reasonable cause to believe the union had violated section 8(b)(4)(D). In reaching this result, that court held that the Board's section 10(k) determination was the "final order" as that term is used in section 10(f) of the NLRA, 29 U.S.C. § 160(f). The reasoning of the Court of Appeals in Waterways Terminal, if not its precise holding, conflicts with our decision in Local No. 134. However, that is not the case before us, and I would think if the issue arose again in the Ninth Circuit that court would reconsider its decision in Waterways Terminal in the light of our subsequent decision in Local No. 134. Meanwhile, the case that is before us -- Shell -- has been decided consistently with our analysis in Local No. 134 on the "final order" point.

The remaining issue in the case, relating to an issue of recognitional picketing, is not related in any way to Local No. 134.

I shall vote to deny certiorari in this case.

Sincerely,



Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

March 26, 1975

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

Dear Byron:

Please join me.

Sincerely,

T.M.
T. M.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

March 26, 1975

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

Dear Byron:

Please join me.

Sincerely,

J. A. S.

Mr. Justice White

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

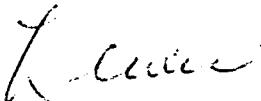
March 20, 1975

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

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

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,

WM

Mr. Justice White

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WILLIAM H. REHNQUIST

April 8, 1975

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

Dear Byron:

On second thought, please join me.

Sincerely,

Wm

Mr. Justice White

Copies to the Conference