

**OVERSIGHT OF THE NATIONAL LABOR RELATIONS  
BOARD**

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**HEARING**  
BEFORE THE  
SUBCOMMITTEE ON HUMAN RESOURCES  
OF THE  
COMMITTEE ON GOVERNMENT  
REFORM AND OVERSIGHT  
HOUSE OF REPRESENTATIVES  
ONE HUNDRED FIFTH CONGRESS  
FIRST SESSION

—————  
JULY 24, 1997  
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**Serial No. 105-77**

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## OVERSIGHT OF THE NATIONAL LABOR RELATIONS BOARD

THURSDAY, JULY 24, 1997

HOUSE OF REPRESENTATIVES,  
SUBCOMMITTEE ON HUMAN RESOURCES,  
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT,  
*Washington, DC.*

The subcommittee met, pursuant to notice, at 11 a.m., in room 2247, Rayburn House Office Building, Hon. Christopher Shays (chairman of the subcommittee) presiding.

Present: Representatives Shays, Snowbarger, Pappas, Towns, Lantos, Barrett, Kucinich, Allen, and Sanders.

Staff present: Lawrence J. Halloran, staff director and counsel; Doris F. Jacobs, associate counsel; R. Jared Carpenter, clerk; and Cherri Branson, minority counsel.

Mr. SHAYS. I would like to call this hearing to order and welcome our distinguished witnesses, the members of this committee and our guests.

This is our first hearing on the National Labor Relations Board, the NLRB.

When my good friend and colleague, Congressman Tom Lantos, chaired the former Employment and Housing Subcommittee, we had an oversight hearing almost every year on the NLRB. We dutifully tried to monitor their performance, primarily as measured by the Board's case backlog. Each year, the backlog was examined, explained and denounced. Each year, commitments were made to do better next year.

It was repetitive, but necessary, oversight because we had no clear benchmarks or standards against which to measure the Board's activities from year to year. As successive administrations appointed Board members and general counsels, and as economic and labor conditions changed, it became more difficult to make meaningful comparisons or discern trends in NLRB effectiveness and productivity.

Implementation of the Government Performance and Results Act, what we refer to as the "Results Act," promises to free us and the NLRB, from the oversight treadmill. By requiring a clear mission statement, a long-range strategic plan, outcome goals and performance measures, the Results Act will allow Board executives, Congress and the public to know how well cases are being decided, not just how many.

The qualitative and quantitative measures required by the Results Act could be important, even essential, tools for the NLRB, which is often called upon by fiercely competing constituencies to

justify its actions and defend its neutrality. In performing its important mission to enforce the laws governing the peaceful, orderly resolution of labor-management disputes, the NLRB should make measurable progress toward objective goals to reassure those on both sides of the bargaining table of the Board's effectiveness and fairness.

Policies of the current Board on the use of injunctive relief, or the use of mail ballots, might be better understood when expressed as components of a long-range plan, clear goals and measurable objectives, just as the Results Act scrutiny will require alteration of NLRB practices that do not meet legitimate objectives or produce measurable results.

However, the NLRB's first step toward Results Act compliance—the development of a 5-year strategic plan—has, so far, fallen significantly short of the mark. While the Board calls the plan a “work in progress,” that characterization may confuse random movement with forward motion.

Performance measures in the first draft, while poorly defined, disappeared altogether from the version provided to the subcommittee on July 8. Two days ago some measurable performance standards reappeared in a third draft, in response to an analysis of the July 8 plan by the General Accounting Office, GAO, requested by this subcommittee.

Based on these versions of the strategic plan, Results Act compliance appears to be a paper exercise, far removed from the fundamental operations of the NLRB. For example, an audit by the NLRB inspector general, IG, last year found long-standing performance measurement systems applicable to Results Act implementation, yet those systems are only vaguely incorporated into the plan.

More troubling, the GAO found the computerized NLRB case tracking system under development, on which the Board will have spent more than \$10 million through next year, could be incompatible with the Results Act requirements and need expensive retrofitting. Nor does the plan include provisions to get NLRB computers, new or old, across the year 2000 threshold.

According to the Board's latest strategic plan, its mission, “Is to encourage and promote stable and productive labor management relations and thereby to promote commerce and strengthen the Nation's economy.” The subcommittee's mission is oversight, to ensure the NLRB meets its statutory mission effectively and efficiently. The Results Act requires we pursue our missions together, through consultation or on development of the strategic plan. That consultation begins today.

This subcommittee and this chairman welcome the testimony of our witnesses today.

[The prepared statement of Hon. Christopher Shays follows.]

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**Statement of Rep. Christopher Shays**  
**July 24, 1997**

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**Statement of Rep. Christopher Shays**  
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**Page 2**

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We welcome the testimony of all our witnesses in that important process.



Mr. SHAYS. Before calling on the ranking member, I want to say that there is no hidden agenda here. The purpose of this hearing is to learn how this department can operate better. It is a goal that I am sure is shared by the administration and by you, Mr. Gould, in particular.

I want to apologize to the members who may have statements. I have a 15-minute meeting that I have to get to. Because of votes, I am going to recognize Mr. Towns. I will miss the statements made, but I am going to really hustle back, Mr. Gould, to make sure that I am here for your testimony.

At this time, I would call on Mr. Towns, the ranking member.

Mr. TOWNS. Thank you, Mr. Chairman. Let me also thank you for holding this hearing. It seems to me that today's hearing is really about two things: the Government Performance and Results Act and the effective performance of the NLRB.

First, let's talk about the Government Performance and Results Act. As the committee which initiated this legislation, we should be concerned not only about compliance, but about the meaning the law has been given by those who are charged with its interpretation.

It should be remembered that GPRA was never intended to be narrowly interpreted. We did not intend for GPRA to operate as a noose around the neck of agencies. Our intention in enacting GPRA was to create an ongoing dialog between Congress and the agencies, which would facilitate increased communications about agency performance and the use of appropriated funds.

The belief was that open communication would foster increased discussion, consultation and positive interaction. However, that does not seem to be what we have gotten. It is my understanding that despite a September 30, 1997 deadline, most of the agencies and departments have not submitted their GPRA.

One reason for this reluctance may be that of the 16 plans that GAO has reviewed, only 1 plan has been deemed to meet all the criteria. It would seem to me that this overwhelming amount of failing grades has more to do with agencies being unsure of the requirements than with the lack of agency resolve.

Years ago I had a teacher who said that if the majority of the class fails, two things have happened. The teacher has failed to teach and the students have failed to complain. I think we may have a similar situation here. I say to the chairman, I hope that in addition to examining whether the requirements of GPRA have been met, we examine whether the spirit of discussion, incorporation and vision by GPRA have been met.

Our second topic today appears to be the economy and efficiency of the NLRB. In 1990, the GAO found that the Board headquarters were terribly slow in hearing and deciding appeals. Some believe that this foot-dragging was politically motivated. Today, far from foot-dragging, some are accusing the NLRB of moving too fast, issuing injunctions and becoming involved in too many disputes. Those who make these allegations also charge political motivation.

Again, let me just bring some facts to light. In an effort to eliminate the backlog of cases, Chairman Gould has appointed an advisory panel of prolabor and promanagement lawyers to recommend ways to improve the processing of cases and improve the agency's

service to the public, and I applaud him for that. Additionally, the chairman has instituted speed teams that reduce the time and paperwork involved in hearing a case. These procedures have enabled the Board to reduce its backlog. As the Committee on Government Reform and Oversight, we should also say thank you.

Finally, there is some concern about whether the Board is a partisan body. During the Reagan administration and during the Bush years, many accused the Board of being promanagement and decidedly antiunion. Therefore, these concerns are not new. It seems to me that if the Board's decisions were out of touch with the established law, the courts would serve as an effective check on the Board's authority. It is my understanding that the courts have upheld the Board's decisions in over 90 percent of all of the cases. Therefore, it seems to me that although these decisions may not be popular with some, they are in accord with the law.

Again, let me say to the chairman, I want to thank you for holding today's hearing, and I look forward to hearing the testimony of all of the witnesses.

At this time I yield back.

Mr. SNOWBARGER [presiding]. I think I am going to take the prerogative of going out of order and just have Mr. Allen, if you want to make a statement.

Mr. ALLEN. I have no statement at this time.

Mr. SNOWBARGER. OK. Mr. Barrett.

Mr. BARRETT. I have no formal statement.

I just simply want to say, as we talk about the NLRB, that the major experience that I have had has been the involvement—the active involvement in a situation in my district where Pabst Brewery pulled out after 140 years in Milwaukee; and there were charges made by the union, and the National Labor Relations Board has been very active, and I want to thank you for that. I think you have responded very well and have given a glimmer of hope to what has been otherwise a very sad situation in my district.

Mr. GOULD. Thank you, Congressman.

Mr. SNOWBARGER. Mr. Lantos.

Mr. LANTOS. I have no formal opening statement, Mr. Chairman, but I would like to say a couple of things.

Chris Shays was correct in saying that when I chaired this subcommittee, during the happier days of this body, we did have annual hearings concerning the work of the NLRB, and I am pleased that Chairman Shays called this hearing.

I have a number of specific questions I will put to Chairman Gould, but let me say at the opening that I have been enormously impressed by the Gould chairmanship of the NLRB.

You have been operating, Mr. Chairman, under enormously difficult circumstances, not of your own making, and I want to publicly tip my hat to you for having maintained the dignity and the decorum and the effectiveness of this body under the most extremely difficult circumstances. I hope we will be able to remove those circumstances so that an NLRB at full complement, fully confirmed, can finally do its job properly.

I think you have been subjected to unfair criticism from many quarters. I have very carefully looked at and analyzed those bits

of criticism and I have found them to be wanting. I think you are performing in a remarkable fashion in an almost untenable situation with only three members of a five-member Board, with two of the three members not having been confirmed.

As a matter of fact, may I ask, are you in fact the only confirmed member of this Board?

Mr. GOULD. I am, Congressman.

Mr. LANTOS. Well, I think that it is an appalling state of affairs that a body of such importance which should have a full complement of five members, all five fully and duly confirmed, so they can do their job without fear and intimidation, should be overlooking the whole labor management picture in the United States. It would be analogous to having eight Supreme Court justices on temporary appointment, waiting to be confirmed, and I would like to see how the Supreme Court's decisions would be unfolding under those circumstances.

So let me commend you and congratulate you, Mr. Chairman, and I look forward to asking some specific questions of you.

Mr. GOULD. Thank you, Congressman Lantos.

Mr. SNOWBARGER. I would remind Mr. Lantos that happier days kind of depend on your perspective, I think, but Mr. Sanders.

Mr. SANDERS. Thank you, Mr. Chairman. I am going to have to be leaving in a moment because I have an amendment on the floor, but I want to just concur in the statement that Mr. Lantos has made.

It is no secret that the work that Chairman Gould is involved in is highly contentious. There are some of us who believe that workers in this country have an absolute right to come together in union to fight for their rights, and some of us believe that one of the reasons that the standard of living of American workers has gone down precipitously over the last 25 years is the weakening of the trade union movement.

It is no secret that there are other people within the Congress who do not hold these views. It is also no secret that there are people who are working very hard and are spending huge amounts of money trying to destroy the trade union movement, making it harder and harder for workers to come together in unions.

One of the real problems that I have—and I have introduced legislation to try to address this problem—is that right now the truth of the matter is that it is in fact very difficult for workers to come together to form a union; that an employer with strong consultants, with good legal staff, can stall and stall and stall; and if workers do all of the right things, if workers play by the rules, some of their most active proponents of unionism will be fired, the process will be delayed, and there will be no retribution on the part of the employer.

I find it, as Mr. Lantos just indicated, extremely unfortunate and extremely unfair that both Mr. Gould and Mr. Gould's department is understaffed, is not given the opportunity to do the work that they are supposed to do, which is to protect the interests of American workers in a fair way.

I just want to applaud Mr. Gould for the work that he has been doing, and I hope that this Congress can give him the staff and the associates so that he can do his job adequately.

Thank you, Mr. Chairman.

Mr. SNOWBARGER. Mr. Kucinich.

Mr. KUCINICH. Thank you, Mr. Chairman. I would like to welcome the NLRB Chairman, William Gould, to his first appearance before the Human Resources Subcommittee.

During my 6 months in Congress, I can say that this subcommittee has developed an excellent record of adopting a reasonable and bipartisan approach to its review of agency operations. When it comes to questions of labor management relations, however, it may be a challenge to maintain this constructive spirit.

Since its formation in the 1930's, the NLRB has played an important role in our society. It is the main government organization that ensures that employees can freely decide whether or not to band together into labor organizations. It is critical, absolutely critical, to the stability of our society that the NLRB have the capacity to carry out that mission.

The Government Performance and Results Act provides an opportunity to determine whether the NLRB does have enough resources to carry out its mission for the good of our country. I would like to echo Mr. Sanders' remarks. Working people have rights in this country. The nature of a democratic society is that we defend workers' rights. We do that legislatively, we do that in speeches, we do that in meetings, and we do that through having a national labor relation board to make sure that workers' rights have not been stripped covertly through tactics which undermine people's right to organize, the right to be able to strike, the right to file grievances, the right to be able to stand up and protect the interests of their fellow workers.

The National Labor Relations Board has a long and proud history of representing American workers, and I have to say that Mr. Gould, among all the NLRB chairs that I have been familiar with or have read about, stands out as someone who has fearlessly defended workers' rights. I want to welcome you to this committee and let you know that in this committee there are members who are going to defend your ability to stand up for American workers and to use the agency of government and put it on the side of American workers and their hopes and dreams, and I thank you.

Mr. TOWNS. Will the gentleman yield?

Mr. KUCINICH. I will yield.

Mr. TOWNS. The gentleman is still a Democrat, isn't he?

Mr. SNOWBARGER. He is real uncomfortable over here.

Mr. KUCINICH. Imagine if I had crossed over and made that statement as a Republican, we would all be singing from the same hymn book. I am here as an American first, as a supporter of labor, as a Democrat, but also as a friend to the Republicans to work with you to make sure that working people have the opportunity to be well represented in NLRB.

Mr. SNOWBARGER. Has the gentleman's time expired yet?

Just a few brief comments before we get to the witnesses. We want to thank you for your appearance here today, and as the chairman indicated, he will be back shortly.

As has been indicated, though, there are two sides to some of these issues. I come from the State of Kansas which is a right-to-work State, and about a year ago—I believe a year ago in April—

there were field hearings held in my district by my predecessor and other Members of Congress on the issue of salting.

The thing that concerned me, again in a right-to-work State where we have both union members and shops that are open and do not have union members, was the practice of unions sending organizers into those businesses where there were not labor organizations and were not union representatives, and there was no interest in union representatives. The workers in those companies were pleased with management and were communicating very well with management, and very frankly, the NLRB made the right decision in most of those cases. The problem was, they made the right decision in those cases after the employers were forced to spend hundreds of thousands of dollars on legal fees in trying to protect their interests and protect even their employees.

So I will be having some questions later on about the practice of salting and about NLRB's approach to that.

I take a different approach to this than Mr. Kucinich. I think that the NLRB should be taking a neutral approach to these subjects, not to be an advocate; and unfortunately, I think that they have in later years become an advocate for labor unions as opposed to taking a neutral stance in just protecting the rights of both workers and management.

With that, let me make a couple of business actions here. First of all, I would ask unanimous consent to enter into the record a statement from the Associated Builders and Contractors that has been presented to me and again indicates problems with the practice of salting.

Seeing no objection, then I would ask unanimous consent that all members of the subcommittee be permitted to place any opening statement into the record and that the record remain open for 3 days for that purpose. Without objection, so ordered.

[The prepared statement of the Associated Builders and Contractors, Inc., follows:]



**Oversight Hearing on the  
National Labor Relations Board  
before the  
Human Resources Subcommittee of the  
Government Reform and Oversight Committee  
U.S. House of Representatives  
July 24, 1997**

*Associated Builders and Contractors (ABC) and its over 19,500 contractors, subcontractors, suppliers, and associated firms from across the country believes that the present National Labor Relations Board has abandoned its position as a neutral arbiter in labor relations, instead allowing its procedures to be abused by unions, legitimizing and forwarding the unions' unscrupulous "salting" campaigns.*

- Salting is being used in bad faith by unions, as a harassment technique, strictly to set up open shop companies for numerous frivolous NLRB complaints.
- Unions have trained their agents to use and abuse the procedures of the National Labor Relations Board (NLRB) as an offensive weapon against non-union employers, largely by filing frivolous unfair labor practice charges. Unions send paid, professional organizers and union members into non-union workplaces under the guise of seeking employment. The unions' avowed purpose in these "salting" programs is to harass the company, its employees, and to disrupt the jobsite until the company is financially devastated or joins the union.
- Investigating and prosecuting frivolous complaints wastes the Board's limited resources and has literally driven many small companies out of business. In defending themselves against these frivolous charges, the employers must incur thousands of dollars in legal expenses, delays and lost hours of productivity in time spent fighting the charges, and risk jeopardizing their work on a project through excessive problems they may not endure. While unions have the right to attempt to organize workers, open shop companies and their employees also have a right to refrain from supporting union activities and to be free from unwarranted harassment.
- There is currently no viable remedy for the unscrupulous abuse of NLRB processes by labor organizations.
- The NLRB needs to reappraise its staffing and case handling priorities in order to achieve a level of efficiency expected of departments and agencies.
- ABC strongly encourages Congress to combat the Administration's planned "debarment/blacklisting" regulations to prevent unions from having an additional tool through the National Labor Relations Board to eliminate open-shop competitors.

**1300 North Seventeenth Street ■ Rosslyn, Virginia 22209 ■ (703) 812-2000**

*All of the following contractors who have testified before Congress about their personal experiences surrounding the injustice of union salting abuse are examples of contractors who will be at risk of debarment/blacklisting under Clinton's proposed regulation:*

**Little Rock Electrical Contractors, Inc., Little Rock, AR; George E. Smith, president (Testified before the Senate Labor and Human Resources Committee on June 10, 1997):** Little Rock Electrical Contractors is a family owned business that contracts for work across the United States. George Smith was introduced to "salting" at a job site in Louisiana. Two men drove up and asked if the company was taking applications. They were told "no" and drove off. Five months later, Smith was notified that the NLRB had filed charges of discrimination against him. He hired a labor attorney who informed Smith that he would win. However, the cost associated with the two-day hearing was \$15,000. Since the unions would likely appeal if Smith won, additional costs up to \$8,000 could be assessed to Smith. The alternative was for Little Rock to settle by paying each man \$3,000. Later, copies of these settlement checks appeared on one of Smith's work sites in North Carolina with a statement saying that this is an example of what happens when employers interfere with the rights of employees. Smith testified that he had never interfered with anyone's rights. *"The reason that we paid was real simple. It was pure mathematics. [I]f it cost me \$23,000 to win and \$6,000 to lose; I can't afford to win."* Smith now has a policy of never settling, regardless of costs. When dealing with union salting, settlements do not mean that violations actually occurred, often it is simply less expensive for businesses to lose than it is for them to win.

**Wright Electric, Delano, Minnesota; Terrance G. Korthof, principal (Testified before the Senate Labor and Human Resources Committee on June 10, 1997):** Over a period of 2 ½ years, salting abuse cases against the company have cost \$150,000 in legal fees and between \$200,000-\$300,000 in lost time due to appearances before the National Labor Relations Board. In 1992, two agents from the local IBEW applied at different times for employment. In both instances, the agents included false information about their job history in the applications. Several other union representatives also applied for jobs that were not open and brought video cameras to intimidate the front desk receptionists. Although state courts have found that Wright Electric fired the union representatives for lying about their employment history (not their union affiliation), the NLRB continues to pursue meritless cases against the company. Terrance Korthof has difficulty understanding how the taxes that his company pays ironically help unions bring frivolous charges against him

**Bay Electric Co., Inc., Cape Elizabeth, ME; Cindy and Don Mailman, owners (Testified before the Senate Labor and Human Resources Committee on June 10, 1997):** This small, family-owned company had 14 NLRB charges filed against it, all of which were eventually dismissed for lack of merit. They have been targeted by the IBEW, which brags that their intent is to not only put him out of business but to do the same to every other open shop contractor in Maine. In one incident, a union member, who happened to be a personal friend of the contractor, stopped by for a social visit and asked the company for a donation to "Calculators for Kids." He never mentioned he was looking for work. Immediately afterwards, the union filed an unfair

labor practice charge against the company for refusing to hire him. The union also filed charges against its own members for working for merit shop companies, and agreed to drop the charges if the members go back to the union and vow to put this contractor, and others, out of business. In March 1997, the NLRB upheld an administrative law judge's finding that Bay Electric did not discriminate against the union salts when it failed to hire them in the fall of 1993. The Board held that there were no jobs available during the 60-day period in which the salt's applications were active.

**hth companies, inc., Union, MO; Barbara Jo Hoberock, Owner, and Gregory Hoberock, Vice President (Testified at Joint Hearing before Committee on Economic and Educational Opportunities Committee on Small Business on April 12, 1996)**: During an 18 month period in 1995 hth companies, inc. withstood 48 frivolous charges brought before the National Labor Relations Board. Although one of these cases was settled, the remaining 47 cases were thrown out at the first level of hearing. However, the costs incurred by the company for attorney and court costs in the effort to dismiss the frivolous cases were large. Typically, the salting abuse included the sabotage of equipment and the harassment of workers. Throughout the union's salting campaign, the employees of hth companies, inc. were never once petitioned to join the union, despite all the unnecessary harm inflicted upon them.

**Gaylor Electric, Carmel, IN; John Gaylor, principal (Testified before House Committee on Economic and Educational Opportunities on October 31, 1995)**: This Indiana contractor is a favorite target of the local IBEW. In fact, he budgets annually nearly \$250,000 to defend himself in court against frivolous charges. Over the years Gaylor has had to defend himself against 80 unfair labor practice complaints. In every instance, the charges were dismissed as frivolous. On one occasion, John Gaylor had to fire a union worker who refused to wear his hard-hat on his head. "He would strap it to his knee and then dare us to fire him because he said our policy stated *only* that he had to wear the hard hat. It [the employee manual] didn't say *where* he had to wear it." Gaylor said he has had "salts" create OSHA violations and then report those violations to OSHA, "just to get us to fire him so he could file an unfair labor practice." Gaylor testified before Congress as to the severe damage, both monetarily and physically, that union salting has done to his company.

**Van Til Mechanical, Grand Rapids, MI; Cheryl Van Til, principal (Testified before the House Economic and Educational Opportunities Committee on July 12, 1995)**: Cheryl Van Til's first contact with union salts occurred after subcontracting with pipefitters from a local employment agency. When the NLRB notified Van Til that an unfair labor practice complaint had been filed against her firm, she discovered for the first time that 3 of the 8 temp agency workers were actually union salts. Eventually, she exposed safety hazards that had been intentionally created on two of her jobs by union salts. If Van Til Mechanical had not tested the water system at the school they were building and discovered the sabotage, children could have been doused with 200-degree hot water.

The extent of the monetary damage that Van Til Mechanical has endured due to the unethical practice of union salting is summed up in her following statement: "*It has taken every cent we have in savings to defend ourselves.*"



Over the next several months, Van Til had to defend the company against such charges as: Threatening employees with discharge because of their union activities. *"In truth, we gave two employees a verbal warning for refusing to work."* The union alleged Van Til had questioned employees if they had received any union materials from any employee and if they had signed a union card. *"In both instances, the employees approached us and asked what the cards were all about. We never asked about it, or questioned any union activities; we simply answered their questions."*

The union alleged that Van Til discharged an employee because of his union sympathies and vote in the election. *"Here, we had to lay off one worker because he slashed another on the job site with a knife. The other apprentice had been thrown off the site by the construction manager who called to tell us to get rid of him because he wasn't working."*

Mr. SNOWBARGER. I ask further unanimous consent that all witnesses be permitted to include their written statements in the record.

Without objection, so ordered.

It is the practice of this committee, as with most congressional committees, to swear in our witnesses. So I would like to ask them to stand, if they would, please.

If you have people that will be testifying with you, I would ask them to stand as well.

[Witnesses sworn.]

Mr. SNOWBARGER. I note for the record that the witnesses did respond in the affirmative. Thank you, gentlemen.

I will call on the chairman of the National Labor Relations Board, Mr. Gould.

**STATEMENTS OF WILLIAM B. GOULD, IV, CHAIRMAN, AND FRED L. FEINSTEIN, GENERAL COUNSEL, NATIONAL LABOR RELATIONS BOARD, ACCOMPANIED BY ALFRED L. WOLFF, CHIEF COUNSEL; ROBERT A. GIANNASI, CHIEF ADMINISTRATIVE LAW JUDGE; AND HARDING DARDEN, BUDGET OFFICER**

Mr. GOULD. Thank you, Congressman. It is a pleasure to be able to come here and speak to you about our agency, our act, and the progress that we have made under it, and to focus on GPRA as well.

With me, to my left, is Fred Feinstein, the general counsel of the agency; and to my right, Al Wolff, my chief counsel. Also with us is Robert Giannasi, the chief administrative law judge; and Harding Darden, our budget analyst. I have asked them to stand and be sworn in, because from time to time we may want to consult with them.

I want to say that I have, during these past 3½ years as chairman of the agency, viewed it as an honor and privilege to serve the U.S. Government and to accept President Clinton's invitation to serve. I regard myself as part of this administration, but I want to note for the record, as I have on other occasions, that never has there been any communication between the White House and myself about any issue that will come before our agency, whether it involves adjudication or rulemaking.

This is a great agency, the National Labor Relations Board. It consists of competent and professional people throughout the United States, who are deeply committed to the rule of law; and although I believe that here in Washington in the 1980's and the early 1990's, the agency lost its way in terms of meeting the goals that are set forth in the statute, it remains a very important and great agency.

In late 1995, our Board brought the backlog—which, as you know, reached 1,600 cases in the 1980's—to a historic low, the lowest it has ever been since 1974; and I think that this is one of the indicia of the success that we have been able to obtain over these 3½ years. Although affirmance by the courts of appeals of our orders is not necessarily dispositive of our success, we have achieved a record, I think, that we can be proud of, that compares favorably with our predecessors in obtaining affirmance of our decisions.

I might say that these statistics which I have set forth are deflated by the fact that they don't include our settlements, which almost invariably provide for relief and, therefore, enforcement, at a minimum, in part; and they don't include consent decrees and summary judgments which also are a measure of our success in the circuit courts of appeals.

As I have indicated in my statement, fiscal year 1996 really represents the first year in which the Board appointed by President Clinton has had its success before the courts measured, and we have done, I think, appreciably better than the boards before us.

When I came to Washington, I had as my objective three important considerations, three important objectives. No. 1, I set out to attempt to expedite our administrative process for unions and employers, involving unfair labor practice charges filed by both sides, as well as representation petitions. No. 2, I attempted to induce through a number of mechanisms—the advisory panel that has been referred to by Congressman Towns—an environment in which we could bring labor and management together and foster a greater measure of cooperation and substitute dialog and discussion for strife. I think that we have done that as well.

Finally, I wanted to achieve a better balance in administrating our statute than has been done in previous years, and I think that this Board has acted as an impartial arbiter between the competing claims of labor and management. Let me just refer to a few of the specifics, some of which I have outlined in my statement.

Section 10(j) of the statute: We have used 10(j), I think, with good results on 258 occasions since March 1994, and we have had a success rate on the order of 90 percent. I think that we have taken seriously the requirements of GPRA and tried to become a more effective agency. This agency historically has been concerned with the kinds of concerns that GPRA is focused upon.

Since 1959, since the time of General Counsel Rothman, there have been timetables in the regions for the disposition of cases. We have moved effectively with our new computer system, our CATS system, the initiative that was undertaken in 1994. We have pursued a number of strategies, superpanels, settlement judges, bench decisions, speed teams, time targets for our administrative law judges, all of which, I think, have made this agency more effective and able to accomplish its mission more effectively.

Now, it may be, Mr. Chairman, that we have not articulated all of this as well as we should have in our mission statement. We are really learning as we go about the requirements of GPRA. This statement, I am sure, is in need of revision; and we welcome your input, Mr. Chairman, and the input of all of the members of this committee as to how we can make our mission statement more compatible with the purposes of the statute. We recognize that the purpose of the statute is to involve us in a process where we speak with the Congress, where we consult with the Congress, and where we get the input of the Congress.

We have served our mission statement upon not only your committee, but all of the other relevant committees, and we stand ready to get your advice about how we can do better in this regard.

And I am pleased, Mr. Chairman, that you have invited us here to be with you and to testify about these matters, and I stand ready to answer any questions or comments—respond to comments that you and your colleagues may have.

Thank you very much for your time.

[The prepared statement of Mr. Gould follows:]

STATEMENT OF WILLIAM B. GOULD IV  
CHAIRMAN OF THE NATIONAL LABOR RELATIONS BOARD  
BEFORE THE  
SUBCOMMITTEE ON HUMAN RESOURCES OF THE  
COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT  
U.S. HOUSE OF REPRESENTATIVES

11:00 a.m.  
July 24, 1997  
Hearing Room 2247  
Rayburn House Office Building  
Washington, D.C.

Good morning. My name is William B. Gould IV. I am Chairman of the National Labor Relations Board. Accompanying me are General Counsel Fred Feinstein, Chief Counsel to the Chairman Alfred L. Wolff and Chief Administrative Law Judge Robert A. Giannasi.

It is a pleasure to speak with you today on the progress that we have made at the Board in the administration and enforcement of the National Labor Relations Act. Although this is my fourth oversight hearing,<sup>1</sup> it is my first opportunity to meet with the Subcommittee on Human Resources of the House Committee on Government Reform and Oversight since coming to the helm of this Agency nearly three-and-a-half years ago. I am pleased to review highlights of the operations of the National Labor Relations Board, and I will be glad to respond to your questions.

**THE NLRB'S STATUTORY MISSION**

The NLRB was created in 1935 during the Great Depression when many feared for the very survival of our democratic, free enterprise system. The industrial revolution had transformed a society of self-employed farmers and small businessmen into one where more and more people worked in factories and lived in big cities. Millions of workers migrated from a self-sufficient life on the farms and in the small towns of the South and Midwest to Pittsburgh, Cleveland, Detroit and Chicago, the great industrial centers of the Midwest. Along with high wages, these jobs brought new insecurities such as unemployment due to

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<sup>1</sup> 7/12/95 Subcommittee on Oversight and Investigations of the Committee on Economic and Educational Opportunities, House of Representatives, *Hearing on Oversight of the National Labor Relations Board* (Congressman Hoekstra).

3/7/96 Subcommittee on Regulation and Paperwork of the Committee on Small Business, House of Representatives, *Examining the Issues Surrounding the National Labor Relations Board's Rulemaking Concerning Single Location Bargaining Units* (Congressman Talent).

9/17/96 Hearing Before the Committee on Labor and Human Resources, U.S. Senate, *Oversight of the National Labor Relations Board* (Senator Kassebaum).

**injury, illness, recession or unfair dismissal, among other problems now dealt with by private and public policies long taken for granted.**

**These are the conditions that led to the passage of the National Labor Relations Act and to our system of free collective bargaining between unions and employers, with a minimum of government involvement, over wages, hours and working conditions. Rather than intervene in the arena of substantive employment conditions, the Act and our Agency are concerned essentially with proper procedures to be followed by both labor and management. Today, with the amendments of 1947 and 1959, the Act and the decisions of the National Labor Relations Board and the courts have established rights *and* obligations for *both* sides, labor and management. This balanced approach has been hallmark of my Chairmanship of the Board and my scholarly writings and work as an impartial arbiter of labor disputes prior to assuming my current position.**

**The National Labor Relations Act, which I and other Board Members are called upon to interpret, has proved to be a workable and stabilizing mechanism for accomplishing the diverse adjustments required for our nation's transformation from an agrarian to an industrial to a space and information age society. Our Agency, along with employers and unions, is the custodian of the system that is a key element in the foundation of our democratic, free enterprise system.**

**The NLRB was formed when it became clear to Senator Robert S. Wagner and the Congress that an independent, quasi-judicial agency with special expertise was needed to develop and foster a rule of law in industrial relations in this country. The statute's fundamental goal was expressed clearly in the Act's original preamble contained in Section 1 as follows:**

**Experience has proved that protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees. . . .**

**It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and**

conditions of their employment or other mutual aid or protection.

This original understanding has guided the NLRB's mission for the past 62 years. The Act substitutes the rule of law for strife of all kinds including strikes, slowdowns and various forms of antisocial misconduct.

As I have stated on many occasions, the genius of the National Labor Relations Act is that it provides a framework for orderly and constructive labor-management relations designed to keep the government out of the workplace, leaving most problems to resolution by the parties who are best equipped to solve them. Our decisions have attempted to reflect balance and consideration for the competing interests of labor, employers and individuals, as well as a commitment to the practice and procedure of collective bargaining and the promotion of procedures voluntarily negotiated by the parties. As Congressman Hoekstra noted on my first appearance before his committee, my stated intention has been "to promote a balance between the parties, the policy that is inherent in the National Labor Relations Act, and in good sense, and most important, to let workers, union officials and business people know that they will be treated with respect and civility and fairness."<sup>2</sup> I believe that the Board's decisions and policies during my tenure have reflected this concern.

#### IMPORTANCE OF LABOR-MANAGEMENT COOPERATION IN A COMPETITIVE WORLD ECONOMY

More unions are recognizing that to compete effectively in the global market place they must adopt a more cooperative and collaborative relationship with employers, in addition to, not as a substitute for, their traditional collective bargaining and employee advocate roles. And some employers increasingly are recognizing that divisiveness and conflict hurt their bottom line, and they are coming to understand the value of a relationship with their employees and their union based on trust, cooperation and mutual respect. Constructive relationships between labor and management are a valuable asset to workers and employers, and to our country, in today's competitive world economy.

Last month I addressed the Alabama Governor's Conference on Labor-Management Relations which was jointly sponsored by the Alabama Department of Labor and the Federal Mediation and Conciliation Service. The conference brought about 300 key employer and union representatives together for three days, outside the bargaining room, to discuss how they could contribute to an improved employment and investment climate in the state. What impressed me was how well everyone got along and the possibilities presented by such collegiality.

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<sup>2</sup> Page 2, Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Economic and Educational Opportunities, House of Representatives, Washington D.C., July 12, 1995.

During my tenure with the NLRB, fostering an environment of labor-management cooperation has been one of the highest priorities of the Agency. I have tried to reach out to the Agency's constituents among both employers and unions and, in this connection, my first act was to form the Advisory Panels consisting of 52 of America's most distinguished labor lawyers representing both unions and employers. These panels have advised us on a wide variety of issues and have been successful in helping us assess the views of those who use the Board's processes.

*Our attempt to promote cooperation has manifested itself in decisions encouraging employee involvement in union and non-union workplaces insofar as possible within the current law; in our actions which ended the Major League Baseball strike and sent the parties back to the bargaining table where they eventually reached a mutually satisfactory agreement; in the numerous settlements arrived at, in part, as the result of our strong law enforcement stance; and in new procedures designed to encourage voluntary compliance and the resolution of disputes before our Agency by the parties themselves without costly and time-consuming litigation.*

#### NLRB'S PRINCIPAL FUNCTIONS

The NLRB performs two main functions: conducting representation elections and adjudicating unfair labor practices.

##### Secret Ballot Elections

We conduct approximately 3,000 secret ballot elections each year to determine whether or not a majority of employees in appropriate bargaining units wish to be represented by a union or, in the case of decertification elections, whether they wish to cease being represented by a union. The majority of these elections are conducted routinely without incident within 40 days of the filing of a union certification or decertification petition. For example, in 1996, 2,827 out of 3,327 elections, or 85 percent, were conducted by stipulation, meaning they were not contested by the parties. Only 484 were directed by the Regional Directors. In a minority of cases, various issues such as the appropriate scope of the bargaining unit, whether or not certain employees are eligible to be included in the unit, and the like, are appealed to the Board for resolution.

##### Unfair Labor Practice Adjudication

The Agency adjudicates claims by unions and employers of unfair labor practices, both in the context of union certification elections and in collective bargaining negotiations, and involving other conduct protected or prohibited by the National Labor Relations Act. In FY 1996 the NLRB received about 33,000 unfair labor practice charges against both employers and unions. More than 90 percent were resolved quickly at the regional level without ever reaching the Board in Washington. During that period, 85.9 percent were resolved without the issuance of a complaint, 10.4 percent were resolved after issuance of a



complaint but without the necessity of a formal Administrative Law Judge hearing. Only 289, less than one percent, had to be resolved by U.S. Circuit Court rulings.

As these statistics indicate, the vast majority of charges filed with the NLRB are handled expeditiously at the regional level. Only those cases that are appealed from an Administrative Law Judge's ruling reach the Board members in Washington for deliberation.

#### USAGE OF 10(j) INJUNCTIONS

The Board has increased its use of 10(j) injunctions as a means of quickly putting a stop to certain violations of the Act by employers or unions.

In the first full year of my term, March 1994 to March 1995, 126 injunctions were authorized by the Board. And during the entire three years and four months of my term on the Board, March 1994 to July 1997, the Board has authorized a total of 258 injunctions. In 17 cases I have voted against authorization out of a concern that the Board select carefully the strongest possible cases for Section 10(j) relief and those in which our policy objectives can be most effectively implemented. In 15 of these cases, a majority of the Board has voted with me to deny authorization.

The number of 10(j) injunctions sought during my tenure is substantially higher than the number of injunctions sought by predecessor Boards. For example, in fiscal year 1993, the Board authorized only 42 injunctions and in FY 1992, only 26 injunctions.

The Board's success rate in those cases authorized during my tenure has been 89 percent, including both wins and settlements. This success rate is on par with the success rate enjoyed by prior Boards.

Perhaps the most publicized success by the Board was the injunction authorized by the Board in the Major League Baseball case. The injunction authorized by the Board and granted by the court effectively ended the strike and returned the parties to the bargaining table, thereby saving the 1995 Baseball season.

More recently, the Board filed a petition for an injunction requiring the Detroit Newspapers to reinstate employees in the context of an Administrative Law Judge's finding that the employer had violated its bargaining obligation under the Act. The Board's petition is currently pending before the federal district court in Detroit. I attach herewith my opinion authorizing the General Counsel to seek an injunction in that case (see Attachment A), the first such opinion to be issued which I prepared so that the public can better understand what we did and why we did it.

## COURT REVIEW OF NLRB DECISIONS

The Board historically has been very successful in getting its orders enforced by the U.S. Courts of Appeals, and its experience in this Administration is no exception. Because of the time lag from issuance of a Board decision until issuance of a court decision, it was not until 1996 that our statistics really reflected the performance of the Clinton Administration Board.

### U.S. Circuit Court Affirmance Rate

For example, last year, the Circuit Courts affirmed the Board's decisions in full in 98 cases, or 65.8%; affirmed or remanded in part in 27 cases, or 18.1%; and remanded in full or set aside 24 Board decisions, or 16.1%. I am gratified that our 1996 statistics showed a marked improvement over those of 1995 when 60.8% of our cases were enforced in full and 11.7% were enforced or remanded in part. For 1994 the comparable figures were 62.7% affirmed in full and 14.8% percent enforced or remanded in part. I am also pleased to report that the first nine months of fiscal 1997 show a further improvement: 72.4% were enforced in full and 11.4% were enforced or remanded in part.

In considering the affirmance rate in the courts it should be recognized that out of 29,485 unfair labor practice cases and the 8,845 cases deemed to have merit which were closed in 1996, only 289 or less than one percent required court rulings, and only 50 NLRB actions were modified in any way by appellate court decisions. Only 18 Board rulings were set aside in full.

To use an analogy from our national pastime, we struck out only 18 times in 8,845 at bats in merit cases! Be that as it may, the fact that only 289 NLRB decisions were appealed to the U.S. Courts of Appeals out of more than 8,845 NLRB merit cases at the regional level, alone is a strong indication that the NLRB is enforcing the National Labor Relations Act in accordance with the law and the expectations of the parties.

### Supreme Court Review

Similarly, in its language and holdings, the Supreme Court has accorded deference to NLRB decisions. There were no rulings by the Supreme Court on National Labor Relations Act Cases in the current term of the Court. However, in the previous term the Supreme Court decided three NLRB cases. In each case the Agency's position was upheld by the Court.

In *NLRB v. Town and Country*, 116 S. Ct. 450 (1995), the Court unanimously held that paid union organizers are "employees" within the meaning of the National Labor Relations Act.

In *Auciello Ironworks, Inc. v. NLRB*, 116 S. Ct. 1754 (1996) the Court again unanimously upheld the Board's position that an employer may not refuse to bargain with

an incumbent union on the ground that it has lost majority status where it is party to a contract with such a union.

And, third, the Court in *Holly Farms Corp v. NLRB*, 116 S. Ct. 1396 (1996), held that some workers involved in chicken processing were “employees” within the meaning of the Act and not excluded by virtue of the agricultural employee exemption contained in the Act.

The Board’s credibility with the Court and the federal judiciary has never been better.

#### GOVERNMENT PERFORMANCE REVIEW ACT (GPRA)

In the NLRB’s Inspector General’s 1996 report, “Review of the Agency’s Process for Measuring and Reporting on its Performance,” the Inspector General pointed to the NLRB’s 36-year history of using performance data to manage workload, evaluate employees, and report on agency operations and that time objectives have been established for various stages of handling a case. Performance is measured against the amount of time required to complete a particular stage in a typical or average case. In addition to these time factors, there are other performance factors such as percentage of cases settled and litigation success.

Despite this tradition and numerous initiatives already devised and implemented during these past three-and-a-half years, pursuant to GPRA, the Agency nevertheless has engaged in an ongoing process to improve its case processing methods. In this regard the Agency has tentatively adopted the following mission statement and goals pursuant to GPRA:<sup>3</sup>

#### MISSION STATEMENT

The mission of the National Labor Relations Board (NLRB) is to encourage and promote stable and productive labor management relations and thereby to promote commerce and strengthen the Nation’s economy. The NLRB enforces the law on behalf of both employees and their representatives and employers.

The NLRB enforces the “ground rules” for workers and management alike, and thereby provides a framework for the peaceful, orderly resolution of labor disputes. Thus the NLRB – without presuming to dictate terms of employment – defines the arena to which employers and employees can bring their respective economic interests and power to work out their differences over terms and conditions of employment.

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<sup>3</sup> Agency’s draft Strategic Plan dated July 22, 1997. (See Attachment B)

**The NLRB is an independent federal agency created by Congress in 1935 to administer and enforce the National Labor Relations Act (NLRA). Section 1 of the Act states in part that:**

**protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.**

- **Goal No. 1: Determine and implement through secret ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union.**
- **Goal No. 2: Prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.**
- **Goal No. 3: The NLRB will continue to maintain a well trained, highly effective, productive customer-oriented workforce.**
- **Goal No. 4: The NLRB will fully integrate information resource management into its working environment in order to provide employees with automated case management data, research tools and other technological aids to enhance their ability to work more effectively and efficiently and to provide the Agency with the ability to more effectively assess and manage its workload.**

**Although the specific goals are tentative the Agency has already implemented strategies to improve casehandling performance regardless of the final goals agreed upon. Of course, our strategic plan remains a “work in progress.” This week we submitted copies of our draft plan to the appropriate Congressional committees for their review and input.**

## NLRB INNOVATIONS UNDER CLINTON BOARD

In the past three-and-a-half years since March 1994, the NLRB has instituted a number of administrative innovations designed to make our processes more efficient and conducive to labor-management cooperation.<sup>4</sup> Although I have reported on most of them to the Congress already, I think it will be worthwhile today to bring the members of this committee up to date on our progress in implementing them and the results achieved to date. They are examples of solid NLRB accomplishments which are consistent with the Administration's reinvention initiative and with the purposes of the Government Performance Review Act (GPRA) and which may serve as examples for future improvements.

As noted above, innovations during the past three-and-a-half years include the appointment of Advisory Panels composed of outstanding employer and union attorneys. Others include the adoption of new Administrative Law Judge procedures designed to encourage voluntary settlements by the parties and expedite ALJ decisions. Speed Team and SuperPanel procedures have simplified and speeded up the Board's decision-making processes in the simpler, more routine cases. Increased use of mail ballots in representation elections has reduced expenses and encouraged employees who might not otherwise vote to do so.

### Advisory Panels

One of the Board's first actions after confirmation was to appoint Advisory Panels composed of distinguished union and management labor lawyers, 26 of each. These panels serve without compensation and meet twice yearly to advise the Board on improving service to the public. The panels have provided an invaluable sounding board for the Agency on various public policy issues and a link to the labor law bar and our constituents in labor and management.

### Administrative Law Judge Reforms

One of the first innovations discussed with the Advisory Panels and adopted by the Board involved our Agency's Administrative Law Judges, who are the first level of appeal of unfair labor practice findings by our regional offices. The agency now has fewer judges than at any time in recent history. Their numbers have been reduced by attrition from 117 in 1981 to 62 today. More than 1,000 cases are resolved by our judges each year by decisions and by settlements. The ALJ hearings often last several weeks and produce long transcripts of hundreds and even thousands of pages. The median time required for decisions in 1996 was 111 days from close of hearing (62 days from receipt of briefs by the parties). These cases consume considerable resources of the NLRB and of the parties, so this was the first area we tackled for ways to improve.

<sup>4</sup> A more detailed accounting of these innovations appears in "Three-Year Report by William B. Gould IV, Chairman, NLRB," Attachment C.

Three changes were made: (1) an informal settlement judge process was created to produce settlements agreeable to the parties through informal conferences ; (2) a rule was adopted permitting the judges to hear oral arguments in simple cases, dispense with briefs and issue bench decisions; and (3) time targets were adopted for the issuance of ALJ decisions.

#### Settlement Judges

Under the Board's settlement judge rule, the Chief Administrative Law Judge, or the appropriate Associate Chief Judge, may assign a settlement judge "who shall be other than the trial judge to conduct settlement negotiations," provided that all parties agree to the procedure. The rule provides that, "where feasible, settlement conferences shall be held in person," and settlement negotiations "shall not unduly delay the hearing." The rule also provides that all discussions between the parties and the settlement judge "shall be confidential." Any settlements reached under the auspices of a settlement judge are subject to the approval of the Regional Director prior to the opening of the hearing or of the trial judge after the hearing has opened.

We generally honor requests by parties for the appointment of a settlement judge, assuming that all parties agree, but most settlement judge efforts are at the initiative of one of the chief judges and most are conducted by telephone. We schedule on-site conferences when the proposed settlement case can be linked with regularly scheduled trials or other settlement efforts. We also occasionally schedule a single case for settlement conference when the case is of such magnitude to warrant sending out a judge solely for that purpose. In fiscal 1996, despite budget constraints, we held 26 on-site settlement judge conferences, 12 of which resulted in settlements, including some in cases with trial estimates of two weeks or more.

We are proud of the results achieved to date under the new procedures. We have reached settlements in more than two-thirds of the cases referred to our settlement judges. Since February 1995 when the procedure was instituted, through June 30, 1997, 211 cases have been referred to settlement judges, and 141 of the referrals have resulted in settlements. These cases were settled without formal hearings, lengthy transcripts or costly appeals to the Board in Washington and possibly to the Courts of Appeals. This has meant big savings for the agency<sup>5</sup> and, more importantly, for the parties.

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<sup>5</sup> The average cost to the Agency of an Administrative Law Judge hearing is currently estimated to be \$23,000 including attorney and judge time, travel, witness fees and court reporting.

### Bench Decisions and Oral Arguments

In a rule change first implemented on a trial basis in February 1995 and made final on March 1, 1996, Administrative Law Judges were given the authority to issue bench decisions. The judge first notifies the parties "at the opening of the hearing, or as soon thereafter as practicable, that he or she may wish to hear oral argument in lieu of briefs." After oral argument, the judge reads the decision into the record, and, when the transcript is received, issues a written certification of the transcript that contains the decision, along with any additional discussion and any necessary order and notice. The case is transferred to the Board and the time for exceptions begins to run upon service of the written certification on the parties.

It appears that judges have chosen wisely those cases that warranted bench decisions. Not only has the bench decision rule saved time on Board review, but the bench decisions are themselves issued earlier than they would have issued after full briefing and a full written exposition.

Such decisions are issued either from the bench or within 72 hours of the conclusion of the hearing. On an average it takes approximately 1.5 months from the time of the close of the hearing until the submission of briefs and 3 months from the briefs to the decision. Thus, the bench decisions produce an elimination of delay, saving the Agency and the parties approximately 4.5 months of litigation time.

From February, 1995 through June 30, 1997, 54 bench decisions have been issued. In 1996, bench decisions were used in 4.5 percent of all ALJ decisions.

### Time Targets

The ALJ time targets<sup>6</sup> adopted by the Board have accelerated the administrative process as well. The median number of days from receipt of briefs to decision dropped from 83 days in 1993, to 71 in 1994, to 64 in 1995 and to 62 in 1996, a steady improvement totaling 25 percent. To give you an idea of the resources involved in this process, the average ALJ hearing transcript was 603 pages in 1996, significantly increased over the comparable figures of 519 pages in 1995 and 506 pages in 1994. The efficiency and productivity of our Administrative Law Judges have increased in the teeth of an even greater burden imposed upon them.

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<sup>6</sup> In cases with transcripts of less than 500 pages, 60 days from receipt of briefs; in cases with transcripts of between 500 and 1000 pages, 90 days from receipt of briefs; in cases of over 1000 pages of transcript, the time target is determined by consultation between the chief judge and the trial judge.

Overall, our Administrative Law Judges issued 442 decisions and obtained 775 settlements in 1996. The settlements represented a 13 percent increase over the previous year. *This significant improvement reflects greater emphasis by the Board on settling cases where possible in order to reduce the cost and delay of litigation.* Chief Administrative Law Judge Robert Giannasi and his corps of judges deserve great credit for achieving this improvement.

#### Administrative Law Judge Conference

In the coming year an Administrative Law Judge conference is being planned. One of the objectives of the conference will be improvements in the utilization of the new settlement judge and bench decision techniques and to discuss other ways for improving the performance of this key component of Board decision-making processes.

#### Speed Teams and SuperPanels Expedite Board Decisions

For many years a recurring criticism of the NLRB has been the time required for the rendering of Board decisions. I wish I could report to you today that the problem of delay has been completely solved. It has not, notwithstanding the progress we have made. However, we have adopted two new processes in an effort to respond to this issue which are designed to speed up the processing of simpler and less controversial cases. They are called "Speed Teams" and "SuperPanels."

Speed Team cases are presented orally to a Board member and, after discussion, a written decision is prepared within a few days so that the Board member can approve it and circulate it to the other Board members while the case is still fresh in his or her mind. This procedure eliminates the preparation of duplicative memorandums in cases which are essentially factual and where credibility determinations have already been made in Administrative Law Judge hearings. The Speed Team procedure has been used in about 30 percent of our cases since it was adopted with a reduction of about 20 percent in the time required for decisions. This has contributed to a reduction in median overall case processing times from 105 days in 1993 to 84 days in 1996.

The SuperPanel system was implemented in November 1996 for processing certain cases carefully pre-selected by the agency's Executive Secretary. Under this procedure, a three-Board-member panel meets weekly to decide cases which lend themselves to quick decisions without lengthy written analyses by each Board member's staff. Most of these cases are resolved unanimously based on straightforward application of settled precedent within a few days of their receipt by the Board.

Each week up to 10 cases are carefully selected for oral presentation to a three-member Board panel. These cases are primarily representation cases but do include some of the less difficult unfair labor practice cases.



SuperPanel sessions are usually held on Tuesday mornings. On the prior Friday the Executive Secretary circulates to the Board members a list of cases for the Tuesday SuperPanel. Accompanying the list is a packet of all the papers for each case plus any supplementary materials. The Board members read all of the materials and come to the meetings prepared for the brief oral presentation and discussion of each case.

This preparation and the Board members' commitment has resulted in a clear and simultaneous focus of the members of the SuperPanel on the cases and an impressive record of quickly resolving them, compared to cases handled in the traditional manner. SuperPanel decisions are issued on the day of the meeting or within a few days in more than 90 percent of the cases. The median days from receipt of request for Board review to issuance of Board order has been 12 days. From election petition to certification the median was 176 days, substantially below the median for comparable non-SuperPanel cases. Of course, the limitation of this procedure is that only a minority of cases are appropriate for the SuperPanel. For those cases that are appropriate for the SuperPanel, however, the reduction in processing time is impressive.

Since the SuperPanel procedure was implemented, of the 151 cases referred to the panel, 125 were resolved unanimously, 16 with brief dissents, and 10 were not resolved and returned to the normal procedures for processing. During the period of its operation, the SuperPanel procedure has been used to resolve about one-third of the representation cases received by the Board since it was adopted.

#### **Board Casehandling Committee Work Continues**

The Board's Casehandling Committee will continue to examine the Board's own processes, seeking improvements in the Board's decision-making procedures with emphasis on ways of avoiding delays in deciding the more complex and novel cases while continuing to refine and build on the Speed Team and SuperPanel systems for handling the simple, more routine cases.

#### **Impact Analysis System for Prioritizing Cases**

The General Counsel has adopted an impact analysis system for prioritizing casehandling in the field and has given special priority to the processing of representation election matters. The Board is currently working on the development of its own performance standard for processing representation cases from the receipt of all papers in Washington until the final certification.

#### **Goals and Strategies for Processing Representation Cases**

The General Counsel has studied the representation case processes handled or overseen by the Regional Offices, and has established a series of goals and measures to streamline and improve case processing at the Regional level. For example, the General Counsel has announced that the parties to Board representation proceedings can rely on

the Board to go to an election within six weeks from the filing date of a petition, with only the most complex cases up to eight weeks.

Similar efforts are underway on the Board-side to establish goals and strategies for reducing the post-election time period until certification.

At present the Agency is, in my opinion, doing a good job of holding prompt elections in most cases. It is after the election, and in particular in proceedings before the Board in Washington, that delays continue to be excessive. Our belief is that by developing performance standards and improving our decision-making procedures, we can deliver our "product" to our customers more expeditiously and effectively.

#### Other Continuing GPRA Actions

Other continuing actions pursuant to GPRA include savings through improved space utilization, reductions in supervisory and clerical ratios and in the size of headquarters staffs, and a major project to update the Agency's computerized case handling and data processing system. Refinements in our long-standing performance measurements and goals are under consideration also – notwithstanding, as I stated earlier, that an extensive audit and evaluation by our Agency's previous Inspector General last year concluded that our current performance measurement systems comply with GPRA.

The innovations I have outlined provide a solid base and examples for future improvements in accordance with the Government Performance Review Act in an Agency that has long been a leader in performance measurement and efficient case management. For many years improvement has been a continual process at the NLRB.

In developing our response to GPRA we have consulted our stakeholders by the creation of Advisory Panels, by direct customer satisfaction surveys, through consultation with the Office of Management and Budget, and through our continuing dialog with Congressional Committees such as this one, whose views we give our most serious consideration and conscientious response. A copy of the latest draft of our strategic plan was submitted to this committee along with this statement and that of General Counsel Feinstein.

We are interested in your suggestions for improvements in this initial plan and the goals and strategies contained in it. The strategic plan is predicated on the assumptions that the National Labor Relations Act remains fundamentally unchanged, that recent levels of case intake remain relatively constant, neither decreasing nor increasing substantially, and that the Congress enacts the President's request for the NLRB. The initiatives that have begun during the past three-and-a-half years are continuing and others are under consideration. We recognize that this is an ongoing process.

### PROBLEM AREAS

Since the end of 1995 and the beginning of 1996, the number of cases which have been with the Board more than two years and the backlog generally in Washington has begun to climb. The reasons for this are manifold.

First, the government shutdowns beginning in November 1995 and continuing through January 1996 cost us time.<sup>7</sup> Second, since August, 1995, the Board has been at less than full strength. The Board has had only four members from October 1995 through February 1997. It has had three members since February 1997. And as Member Browning's illness became more serious in the months prior to her death, on February 28 of this year, the rate of case processing slowed.

In 1991 the General Accounting Office issued a report in which it stated the following:

Turnover contributes to delayed decisions because departing members' undecided cases are added to remaining members' caseloads, and some cases in the final decision stage are recycled to earlier decision stages. Likewise, new members require time to hire senior staff and become familiar with the issues in cases they inherit.

....

.... Vacancies increase the workload for other members ....

The same situation of turnover and instability which plagued the Agency in the '80s prevails again in the '90s by virtue of the fact that we are operating with a three member Board and two of them are recess appointees. The fact that only three of five authorized Board Member positions are filled leaves the Board short-handed and is a factor in lost productivity.

### CONCLUSION

It is my belief that the processes afforded by the National Labor Relations Act and the NLRB to resolve disputes between labor and management through collective bargaining are an essential contribution to an efficient national economy. During my tenure as Chairman, the Board has and will attempt to resolve all matters within its jurisdiction in a timely, fair, and professional manner and will develop a constructive and workable strategic plan for compliance with the Government Performance and Review Act.

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<sup>7</sup> The NLRB was shut down twice for a total of 16 work days during this period.

**Thank you for the opportunity to appear before this committee. I will be pleased to respond to your questions.**

**# # #**

**NATIONAL LABOR RELATIONS BOARD**

WASHINGTON, D.C. 20541

FOR IMMEDIATE RELEASE  
Tuesday, July 1, 1997(R-2236)  
202/273-1991**Statement by NLRB Chairman William B. Gould IV  
Regarding the Board's Authorization to Seek  
Injunctive Relief in The Detroit Newspapers Case**

I am pleased that a unanimous Board has this day authorized injunctive relief in The Detroit Newspapers dispute in that city. In so doing, we have invoked a special mechanism of our law and we have instructed both the General Counsel in Washington and the Regional Director in Detroit and their representatives to proceed immediately in federal district court in Detroit and to seek an injunction which will, if granted, obtain the reinstatement of those strikers who have unconditionally offered to return to work and who have not been discharged for strike misconduct.

When I took the oath of office as Chairman of the National Labor Relations Board more than three years ago, I pledged and renewed my commitment to the rule of law in labor-management relations throughout the United States. My vote to seek injunctive relief now mirrors that commitment.

The public policy of this country, as reflected in the National Labor Relations Act, which my agency administers, is the encouragement of the practice and procedure of collective bargaining and the promotion of freedom of association amongst all employees covered by the Act. Thus, collective bargaining – through which our Nation seeks to translate the democratic principles so well accepted in our political process into workplace relations – is at the heart of our legal system. This means rights and obligations for both sides – labor and management.

Two years ago, the Board took similar action, albeit in a different context, in the difficult and lengthy baseball dispute of 1994-1995. The success of that initiative restored peaceable relations between the parties, saved the baseball seasons of 1995 and 1996, revived collective bargaining, and led to the negotiation of a comprehensive collective bargaining agreement late last year.

The National Labor Relations Act contains great strengths, notwithstanding its deficiencies. In the final analysis, its ability to function effectively lies in its enforcement mechanism under Section 10(j). It is this provision which we have invoked today – and the purpose of my vote is to substitute dialogue for strife, to induce the parties to reason with one

another, and to foster the practice and procedure of collective bargaining within the parameters of the law.

This approach, which lies at the heart of our law, is what I have opted for today. It seeks to prod all parties to resolve their differences through their own autonomous system which has served our Nation so well. Today I urge the parties to use their procedures to the best of their abilities.

# # #

UNITED STATES GOVERNMENT  
National Labor Relations Board



## Memorandum

TO: Fred Feinstein  
General Counsel

DATE: July 1, 1997

FROM: Jeffrey D. Wedekind  
Acting Solicitor

SUBJECT: The Detroit Newspaper, f/k/a  
Detroit Newspaper Agency,  
The Detroit News, Inc. and  
the Detroit Free Press, Inc.,  
Case 7-CA-39522

After reviewing your 10(j) memorandum, the 10(j) position statements filed by the parties, and the administrative law judge's June 19, 1997 decision, the Board (Chairman Gould and Members Fox and Higgins) has decided to authorize you to seek an interim order requiring the Respondent to offer reinstatement to the strikers who have unconditionally offered to return to work and who have not been discharged for alleged picket line misconduct, as requested. However, with respect to the alleged status of the striking employees as unfair labor practice strikers, the Board would not authorize you to rely on the allegation that the Respondent unlawfully insisted to impasse on modification of the memorandum of understanding and scope of the unit, an allegation which the ALJ dismissed.<sup>2</sup>

JDW

cc: Board Members  
Executive Secretary

<sup>1</sup> The Board decided to deny the Respondent's request for oral argument.

<sup>2</sup> In your memorandum, you did not recommend that the Board rely on the allegation that the Respondent unilaterally set terms and conditions of employment for the strike replacements, an allegation that the ALJ also dismissed. The Board agrees with your position not to rely on that allegation. In addition, Member Higgins would not authorize you to rely on the allegation that the Respondent's unilateral implementation of a merit pay program was unlawful under a McClatchy theory. However, he would authorize you to rely on the allegation that the unilateral implementation of the merit pay program was unlawful because there was no good faith impasse.



CHAIRMAN GOULD, partially authorizing the General Counsel's recommendation:

Introduction

I am not aware of any precedent for the issuance of a written opinion by a Board Member providing a rationale for a Member's vote in cases involving Section 10(j). And, most certainly, in the overwhelming number of cases this could not be done because of the sheer volume of work and the need for prompt decisionmaking. However, in the instant case, I am of the view that it is important to set forth my rationale because of the high national and international visibility given to this case. As a general matter, and certainly in the circumstances of this case, the public needs to know more about what we do and, even more important, why we do it. That is why I write this opinion which sets forth my rationale.

This case is before the Board by virtue of a recommendation made on May 23, 1997 by the General Counsel at the request of five unions that so-called Section 10(j) proceedings be instituted against The Detroit Newspapers, f/k/a Detroit Newspaper Agency, The Detroit News, Inc. and the Detroit Free Press, Inc. (hereinafter to be referred to as the Employers) to obtain interim relief for violations of the National Labor Relations Act in refusing to reinstate unfair labor practice strikers who have made unconditional offers to return to work and have not been discharged for strike misconduct.<sup>1</sup> The General Counsel, the Employers, the Union, and Counsel

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<sup>1</sup> "Where a strike is caused in part by an employer's unfair labor practices, the employees are entitled to reinstatement." W. Gould, *A Primer On American Labor Law*, p. 98, MIT Press, (3<sup>rd</sup> edit. 1993) See *NLRB v. International Van Lines*, 409 U.S. 48 (1972). The Board has long held that an employer's unfair labor practices during an economic strike do not *ipso facto* convert it into an unfair practice strike. *C-Line Express*, 292 NLRB 638 (1989) enf. denied on other grounds, 873 F.2d 1150 (8<sup>th</sup> Cir. 1989). Rather the General Counsel must prove that the unlawful conduct was a factor (not necessarily the sole or predominant one) that caused or prolonged the work stoppage, and, in determining this causal nexus, the General Counsel may rely upon both subjective and objective factors. *Chicago Beef Co.*, 298 NLRB 1039 (1990) enf'd. 944 F.2d 905 (6<sup>th</sup> Cir. 1991). As noted



for replacement workers presented position statements on the propriety of Section 10(j). New procedures instituted in early 1994 by our Board make it possible for all Board Members to have access to position papers filed by *all* parties. I requested those position papers and, on May 30 1997, they were provided. Although I do not touch upon all contentions raised by all parties, I have reviewed the documents in their entirety.

Oral Argument was requested by the Employers, but a unanimous Board has this day denied this request.

More than 100 unfair labor practice charges have been filed by and against the parties to this dispute with multiple allegations. Indeed, on March 14, 1997,<sup>2</sup> the Board disapproved a settlement between the General Counsel and the Respondent Unions Teamsters Local No. 372, International Brotherhood of Teamsters, et al., arising out of unfair labor practice charges filed by the Employers. I wrote a concurring opinion providing the basis for my views.<sup>3</sup>

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*infra*, the Administrative Law Judge's decision, coupled with the position papers presented, provide a basis for concluding that there is an adequate nexus between the conduct found by the Administrative Law Judge and the strike.

<sup>2</sup> *Teamsters Local No. 372 et al. (Detroit Newspapers)*, 323 NLRB No. 38 (1997).

On June 27, 1997, in *Teamsters Local No. 372, et al. (Detroit Newspapers)*, Cases 7-CC-1667 and 1670, the Board disapproved another proposed unilateral formal settlement (resubmitted) agreement between the General Counsel and the Respondent Unions.

On June 25, 1997, in *Detroit Newspapers, f/k/a Detroit Newspaper Agency & Detroit News, Inc.*, Cases 7-CA-38079, et al., the Board granted the General Counsel's and Charging Parties' special appeal, vacated another administrative law judge's May 6, 1997 protective order and remanded to the judge for reconsideration after obtaining the parties' positions and for issuance of a fully articulated decision setting forth the legal and factual basis for his decision.

<sup>3</sup> In my view, the proposed settlement agreement in *Teamsters Local No. 372 et al. (Detroit Newspapers)* failed to adequately address the complaint allegations that the Respondent Unions violated the secondary boycott prohibition contained in Section 8(b)(4)(ii)(B) by engaging in certain specified conduct, including signal picketing, mass handbilling, and walkthroughs. As I noted, the Board, in evaluating settlement agreements, both formal and informal, considers a number of factors, including whether the settlement stipulations

On June 19, 1997, Administrative Law Judge Thomas R. Wilks rendered a 113-page decision in which he made numerous findings and found various violations of the statute and that the unfair labor practices found either caused or prolonged the strike. Subsequent to the issuance of Judge Wilks' decision, the Board members cast their votes. Today, I have cast my vote to partially authorize the General Counsel to seek injunctive relief in federal district court. Thus, there is a majority to authorize the General Counsel to proceed in this matter. As discussed below, I am of the view that there is reasonable cause to believe that a violation of the Act has been made on the basis of Judge Wilks' findings and that these violations caused or prolonged the strike.<sup>4</sup>

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are reasonable in light of the nature of the violations alleged in the complaint and other surrounding circumstances, and whether it will bring an early restoration of industrial peace. See *Independent Slave Co.*, 287 NLRB 740, 741-743 (1987). I found that these factors were particularly applicable to the alleged 8(b)(4)(B) violations which are subject to the mandatory injunction procedures of Section 10(l) of the Act. Under 10(l), unlike 10(j), the Board is not involved in statutory interpretation and must rely upon the General Counsel's determination that there is "reasonable cause" to support an 8(b)(4) complaint, and must assess the settlement agreement against the allegations and determine whether it is consistent with the integrity of the General Counsel's complaint. The proposed settlement agreement rejected by the Board left close issues under 8(b)(4) unresolved by including a nonadmissions clause and by failing to specify whether the alleged conduct was prohibited and subject to contempt sanctions. Further, statements by the Unions indicated that they intended to continue their prior activities and that they believed that the settlement sanctioned such conduct. Such statements clearly undermined the efficacy of the stipulated notice to employees and members. Accordingly, in the circumstances of this case, I found that the Board could best preserve the integrity of its remedial authority by rejecting the settlement.

<sup>4</sup> The Administrative Law Judge found no merit in the complaint allegation related to the modification of unit work. I do not authorize the General Counsel to proceed on the basis of that allegation. Nor do I authorize the General Counsel to proceed on the theory that the Employers were obliged to bargain with the Unions about the terms and conditions of strike replacements. The General Counsel, in his proposed authorization to us, is silent on this issue -- although the Regional Director explicitly states that this theory "would not be an appropriate basis on which to argue for injunctive relief."

## Statutory Background

Under the Act's remedial provisions, the Board may, at its discretion, petition a federal district court for a preliminary injunction whenever the Board believes that temporary relief is required to accomplish the purposes of the Act. Section 10(j) provides that, subsequent to the General Counsel's recommendation, "[t]he Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court . . . for appropriate temporary relief or restraining order."<sup>5</sup> Thus, Section 10(j) provides express statutory implementation of the Board's broad authority contained in Section 10(a) of the Act to "prevent" any person from engaging in any unfair labor practice. Enacted as part of the Taft-Hartley amendments of 1947, Section 10(j) represents Congressional recognition that

by reason of lengthy hearing and litigation enforcing its order, the board has not been able in some instances to correct unfair labor practices until after some substantial injury has been done . . . [I]t has sometimes been possible for persons violating the Act to accomplish their illegal purpose before being placed under any legal restraint and thereby to make it impossible or not feasible to restore or preserve the status quo."<sup>6</sup>

The courts also recognize that Section 10(j) is "designed to fill the considerable time gap between the filing of a complaint by the Board and issuance of its final decision, in those cases in which considerable harm may occur in the interim."<sup>7</sup>

<sup>5</sup> 29 U.S.C. Sec. 160 (j).

<sup>6</sup> S. Rep. No. 105, 80<sup>th</sup> Cong., 1<sup>st</sup> Sess. 8, 27 (1947).

<sup>7</sup> *Fuchs v. Hood Industries, Inc.*, 590 F.2d 395 (1<sup>st</sup> Cir. 1979) (citing *Sears, Roebuck & Co. v. Carpet, etc., Layers, Local Union No. 419*, 397 U.S. 655, 658-659 & fn. 5 (1970)). In 1996, the median days from the filing of a charge to the issuance of the Board's decision was 591, and from issuance of an administrative law judge's decision to the Board's final decision was 217.

As the 1994-1995 baseball dispute made clear,<sup>8</sup> Section 10(j) is a critical element of the National Labor Relations Act's statutory scheme. Under Section 10(j), after the issuance of the complaint, a regional director who believes that injunctive relief is warranted sends a recommendation for 10(j) relief to the General Counsel. If, after reviewing the case, the General Counsel agrees that injunctive relief is warranted, the regional memorandum is sent to the Board for review. Board authorization is a precondition to the institution of a Section 10(j) proceeding. If a majority of the Board authorizes the 10(j) request, the General Counsel notifies the regional director who then files a petition for injunctive relief in district court.

Upon the filing of a petition for preliminary relief, the court has "jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper."<sup>9</sup> In deciding when injunctive relief is warranted under 10(j), the district court must decide whether there is "reasonable cause" to believe that the respondent has engaged in unfair labor practices and whether temporary relief is "just and proper" under the circumstances.<sup>10</sup> In assessing whether injunctive relief is required, the courts have considered:

<sup>8</sup> In *Silverman v. Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2<sup>nd</sup> Cir. 1995), the federal judiciary approved the Board's request for injunctive relief and, as noted *infra*, peaceful relations between the parties were substituted for strife and a comprehensive collective bargaining agreement was negotiated.

<sup>9</sup> 29 U.S.C. Sec. 160(j).

<sup>10</sup> Sec. 10(j) does not expressly establish a "reasonable cause" standard, however, the courts have generally applied this test. *Major League Baseball Player Relations Committee, Inc.*, 880 F. Supp. 246 (S.D.N.Y. 1995), *aff'd*, 67 F.3d 1054 (2<sup>nd</sup> Cir. 1995); *Hood Industries, Inc.*, 590 F.2d 395 (1<sup>st</sup> Cir. 1979); *Levine v. C & W Mining Co., Inc.*, 610 F.2d 432 (6<sup>th</sup> Cir. 1979); *Boire v. Teamsters(Pilot Motor Freight Carriers, Inc.)*, 479 F.2d 778, 787 (5<sup>th</sup> Cir. 1973). The case law is less uniform with respect to the interpretation of the "just and proper" standard. The United States Courts of Appeals for the First, Second, and Seventh Circuits have read the "just and proper" requirement as a statement that traditional equitable criteria apply. *Maram v. Universidad Interamericana de Puerto Rico, Inc.*, 722 F.2d 953 (1<sup>st</sup> Cir. 1983); *Silverman v. 40-41 Realty Associates, Inc.*, 668

such factors as the need for an injunction to prevent frustration of the basic remedial purpose of the act and the degree to which the public interest is affected by a continuing violation as well as more traditional equitable considerations such as the need to restore the status quo ante or preserve the status quo.<sup>11</sup>

In *Fuchs v. Hood Industries, Inc.*, the First Circuit found it unnecessary to stay a Section 10(j) petition until an administrative law judge rendered an opinion.<sup>12</sup> Although the court found that a decision regarding the 10(j) petition could be rendered before the results of a full evidentiary hearing were known, the court recognized that the administrative record could be of "considerable assistance, in expediting the work of the court, which now must develop a record and make findings which would be capable of review."<sup>13</sup> The Second Circuit, in *Seeler v. Trading Port, Inc.*, affirmed a district court's finding that it had reasonable cause to believe that unfair labor practices had been committed, noting that "the district court's conclusion is bolstered by the subsequent findings of the administrative law judge to the effect that extensive unfair labor

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F.2d 678 (2<sup>nd</sup> Cir. 1982); *Squillacote v. Meat & Allied Food Workers*, 534 F.2d 735 (7<sup>th</sup> Cir. 1976). In *Kimney v. Pioneer Press*, 881 F.2d 485 (1989), the Seventh Circuit held that the only question for the court was whether injunctive relief was "just and proper" and rejected the "reasonable cause" requirement. The Third, Sixth, Eighth, Tenth, and Eleventh Circuits have held that the "just and proper" requirement is met by a showing that the relief is necessary to restore the status quo and protect the Board's remedial powers under the Act. *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221 (6<sup>th</sup> Cir. 1993); *Pascarella v. Vibra Screw, Inc.*, 904 F.2d 874 (3<sup>rd</sup> Cir. 1990); *Mimesota Mining & Mfg. Co.*, 385 F.2d 265 (8<sup>th</sup> Cir. 1967); *Angle v. Sacks*, 382 F.2d 655 (10<sup>th</sup> Cir. 1967); and *Arlook v. S. Lichtenberg & Co.*, 952 F.2d 367 (11<sup>th</sup> Cir. 1992). In *Miller v. California Pacific Medical Center*, 19 F.3d 449 (1994), the Ninth Circuit joined the Seventh Circuit in abandoning the "reasonable cause" standard in 10(j) proceedings, applied traditional equitable criteria to the "just and proper" requirement, and concluded that district court should also weigh the possible frustration of the Board's remedial purposes as a factor in considering the underlying purpose of Section 10(j).

<sup>11</sup> *Szabo v. P\*I\*E Nationwide*, 878 F.2d 207, 210 (7<sup>th</sup> Cir. 1989) (quoting *Meat & Allied Food Workers*, 534 F.2d at 744).

<sup>12</sup> 590 F.2d 395 (1979).

<sup>13</sup> *Id.*

practices had in fact been committed."<sup>14</sup> In the instant case, the Board has the benefit of the Administrative Law Judge's rulings, findings, and conclusions.

#### Analysis

The General Counsel's argument, and Administrative Law Judge Wilks' decision, deal with the allegation that the employers have engaged in an unlawful refusal to bargain with the unions in a number of respects by virtue of the following conduct: (1) unilaterally modifying and abrogating an agreement to engage in "hybrid" multi-party bargaining; (2) unilaterally instituting a bargaining proposal which modified the scope of the bargaining unit and other contractual obligations; (3) refusing to furnish relevant information about its merit pay increases and overtime exemption proposals to the union; (4) unilaterally implementing merit increases and changes in conditions of employment relating to television appearances by reporters; and (5) refusing to provide requested information about striker replacement employees.

In accordance with the above-cited precedent, the Court of Appeals for the Sixth Circuit, in whose jurisdiction this case arises, has held that in order for an injunction to issue under Section 10(j) of the Act two ingredients must be present: (1) a reasonable cause to believe that unfair labor practices have occurred and (2) that injunctive relief is just and proper.<sup>15</sup>

<sup>14</sup> 517 F.2d 33, 37 fn. 7 (1975).

<sup>15</sup> See *Kobell v. United Paperworkers International Union*, 965 F.2d 1401, 1406 (6th Cir. 1992); *Gottfried v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987). In their position papers the Employers refer to a "competing strike" newspaper, the threat of sabotage, "unclean hands" and harm to both the Employers and replacement workers as a basis for denying injunctive relief under the just and proper standard. But union assurances that they will discontinue publication of the strike newspaper in the event of reinstatement of strikers, the absence of evidence that strikers reinstated to date have engaged in misconduct or unprotected activities, the General Counsel's determination not to seek injunctive relief providing for reinstatement for those who were discharged for strike misconduct and the fact that economic difficulties for employers and employees in reinstatement cases are always present, convince me that equitable relief cannot be denied on these grounds.

The bulk of Section 10(j) litigation arises subsequent to the issuance of a complaint by the General Counsel, but prior to a ruling by an administrative law judge.<sup>16</sup> This is because it takes an appreciable period of time from issuance of a complaint until an administrative law judge's ruling.<sup>17</sup> However, in this case, the Administrative Law Judge has ruled, and the relevance of this is that the existence of such a decision serves as an important adjunct to our reasonable cause determination. The findings, based upon the record before the Administrative Law Judge, as well as his assessment of the demeanor of the witnesses and his conclusions of law, are our starting point.

I am of the view that there is reasonable cause to believe that a violation of the Act has been made out in connection with all of the refusal to bargain areas where the Administrative Law Judge has found violations and that the violations caused or prolonged the strike. Specifically, I do not vote to authorize the General Counsel to seek injunctive relief on the grounds, cited by the General Counsel but dismissed by the Administrative Law Judge, that on May 11, 1995, the Detroit Newspaper Agency unilaterally implemented a bargaining proposal modifying the scope of the bargaining unit and modifying the "Memorandum of Agreement" dated June 17, 1975. Nor do I authorize the General Counsel to proceed on the theory that the Employers were obliged to bargain with the Unions about the terms and conditions of strike replacements. Though I am of

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<sup>16</sup> However, it is not unprecedented to authorize Sec. 10(j) relief after an administrative law judge's decision has issued. In 1994, the Board authorized 4.

<sup>17</sup> Ordinarily, the Board would not delay authorizing Sec. 10(j) relief while awaiting the issuance of an administrative law judge's decision. In this case, the failure to reinstate occurred in February 1997. Accordingly, there has been no undue delay, and the Board has the advantage of considering the judge's findings and conclusions without the risk that undue delay might undermine the propriety of injunctive relief.

the view that existing Board precedent<sup>18</sup> is inconsistent with the principles of the Act, e.g., *Chicago Tribune Co.*, 318 NLRB 920, 928, n. 30 (1995), I do not believe that the reversal of precedent should be undertaken through Section 10(j) litigation.<sup>19</sup>

Accordingly, I believe that there is reasonable cause to believe that violations of the statute have been made out and this view is buttressed substantially by the Administrative Law Judge's decision. I am of the view that the relief sought, i.e., reinstatement of the strikers who have offered unconditionally to return to work and have not been discharged for strike misconduct, under Section 10(j) is thus just and proper under the circumstances of the instant case and therefore should be granted by a district court.<sup>20</sup>

The Administrative Law Judge found on June 19, the issue of the right of strikers to return to work and their ability to displace replacement workers has "become a major impediment in negotiations."<sup>21</sup> In my view, the collective bargaining process cannot proceed effectively in the weeks and months to come unless prompt relief is granted on the reinstatement issue. This

<sup>18</sup> See e.g., *Leveld Wholesale, Inc.*, 218 NLRB 1344 (1975), *Service Electric Company*, 281 NLRB 633 (1986), and *Goldsmith Motors Corp.*, 310 NLRB 1279 (1993). Reversal of this line of authority is more consistent with the holding of the U.S. Supreme Court in *Curtin Matheson Scientific v. NLRB*, 494 US 775 (1990) in which the Court said that the Board's refusal to presume strike replacement opposition to the union was not "irreconcilable" with these holdings.

<sup>19</sup> Of course, novel points of law -- as distinguished from reversal of precedent -- are appropriate for Section 10(j) proceedings. See note 8 *supra*. While the General Counsel has distinguished the instant case from existing precedent by virtue of the strike's unfair labor practice context, my judgment is that this issue should be resolved only after briefs are filed with the Board in a full fledged Section 10(c) proceeding, rather than by the federal district court in the Section 10(j) aspect of this litigation.

<sup>20</sup> I have not always agreed with the General Counsel's recommendations to seek Sec. 10(j) relief, and, during my tenure at the Board, I have voted against authorizing injunctive relief in 17 cases. I have always assumed -- and do so again in this opinion and authorization -- that the same standards applicable to federal district courts under Section 10(j) apply to the Board at the authorization stage.

<sup>21</sup> *Detroit Newspapers*, *supra* at p. 104.



appears to be an appropriate part of Section 10(j) relief inasmuch as through such relief, the Board attempts to promote the collective bargaining process which has thus far been burdened by what the Administrative Law Judge found to be unfair labor practices -- and what I find here to be reasonable cause to believe are unfair labor practices. It is to be recalled that two years ago in the baseball dispute, injunctive relief produced both industrial peace and the revival of the collective bargaining process which culminated in the negotiation of a comprehensive collective bargaining agreement.

An equally appropriate part of Section 10(j) relief is the avoidance of the delay caused by lengthy litigation before the Board and in enforcing the Board's order. Although the median number of days from issuance of an administrative law judge's decision to the issuance of the Board's decision has continued to decrease during these past 3 years,<sup>22</sup> the average time remains approximately 7 months. When viewed together with the length of the hearing transcript, approximately 3,000 pages, more than 5 times the length of an average transcript, the likely delay before relief is granted is considerable, even putting aside the time required to gain enforcement of the Board's order in the circuit court of appeals. The enforcement proceedings are likely to add significantly to the period required for the resolution of the issues here. In those cases where the propriety of the Board's order has been challenged in court, the median number of days from

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<sup>22</sup> In 1994, the median number of days from issuance of the administrative law judge's decision to issuance of the Board's decision was 241. By 1997, the median number of days had decreased to 210. The reduction in time is due, at least in part, to several initiatives, namely the "Speed Team" case handling process, the "Super Panel" System, and the increased use of bench decisions, implemented by the Board to expedite the resolution of certain cases. For a more detailed description of these initiatives, see *Three-Year Report by William B. Gould IV, Chairman, National Labor Relations Board*, Bureau of National Affairs Daily Labor Report, No. 45, at A1; text at E1-E14, March 7, 1997; 48 Lab. L.J. 171 (April 1997).

issuance of the Board's decision to the Court of Appeals' order is 474. Thus, I would also find that Section 10(j) relief is just and proper to avoid the harm which is likely to occur before the Board's decision is enforced in the event that the Board finds a statutory violation and sufficient nexus to the strike.

The strikers, like dismissed workers, may "scatter to the winds," thus making ultimate relief at some point in the future an ineffective remedy. Indeed, the parties have asserted that many have already left the area in search of alternative jobs -- and there is no reason to assume that this process will not continue. As the court said in *Blyer v. Domsey Trading Corp.*:<sup>23</sup> "Any further delay in reinstatement will likely cause the employees to seek employment elsewhere, rendering ineffective any final relief ordered by the Board." The one decision providing for a contrary result, *Kobell v. Suburban Lines, Inc.*<sup>24</sup> arose where the court found that a "small and intimate bargaining unit" established a history of collective bargaining which could reconstitute itself upon issuance of the Board order in the unfair labor practice case itself. But *Suburban Lines, Inc.* is quite different from the relationship involved here and the numerous unfair labor practices found by the Administrative Law Judge. Moreover, *Domsey Trading Corp.* represents the weight of authority.<sup>25</sup>

<sup>23</sup> 139 LRRM 2289, 2291 (E.D.N.Y. 1991).

<sup>24</sup> 731 F.2d 1076, (3rd Cir. 1984).

<sup>25</sup> See *Pascarella v. Orit Corp./Sea Jet Trucking*, 705 F. Supp. 200, 204, (D. N.J. 1988), aff'd. mem. 866 F.2d 1412 (3<sup>rd</sup> Cir. 1988); *Silverman v. Reimauer Transportation*, 130 LRRM 2505, 2508 (S.D. N.Y. 1988), aff'd. 880 F.2d 1319 (2<sup>nd</sup> Cir. 1989); *D'Amico v. Cox Creek Refining Co.*, 719 F. Supp. 403, 409 (D. Md. 1989). Accord. *Berkowitz v. Galvanizers, Inc.*, 105 LRRM 3447 (N.D. Cal. 1980); *Leventhal v. Car-Riv Corp.*, 96 LRRM 2899, 2902 (E.D. Pa. 1977). Cf. *Rivera-Vega v. ConAgra, Inc.*, 70 F.3d 153 (1<sup>st</sup> Cir. 1995).

Finally, as noted *supra*, all that is required for reinstatement is a nexus between unfair labor practice conduct and the strike. Thus, the Employers' June 24 Fifth Additional Information Letter which states that Judge Wilks found that, "the strike was largely caused by economic factors and might well have occurred in the absence of any unfair labor practices" misses the point. In fact, in the context of discussing the Employers' duty to bargain regarding strike replacements, Judge Wilks stated that "the strike was caused in large part by the unfair labor practices . . . ." and that the unions and unit employees "chose to strike in part to redress certain unfair labor practices." Under the circumstances of this case the Administrative Law Judge's decision establishes an adequate nexus.

#### Conclusion

Thus, on the basis of the position papers provided by the parties and the legal arguments set forth therein as well as the Administrative Law Judge's decision, I conclude that relief is just and proper and that there is reasonable cause to believe that violations have been committed.

Accordingly, except on the issues of unilaterally instituting a bargaining proposal that changed the scope of the bargaining unit and the duty to bargain about the terms and conditions of strike replacements where the Administrative Law Judge found no violations, I vote to authorize the General Counsel to proceed in federal district court to obtain Section 10(j) relief which would require the reinstatement of striking employees who have unconditionally offered to return to work and have not been discharged for strike misconduct.

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William B. Gould IV, Chairman

NATIONAL LABOR RELATIONS BOARD

**D R A F T**

**STRATEGIC PLAN**

Fiscal Years 1998 - 2002



**DRAFT**

**FOR CONSULTATION AND REVIEW**

**Government Performance and Results Acts of 1993**

## I. MISSION STATEMENT

The mission of the National Labor Relations Board (NLRB) is to encourage and promote stable and productive labor management relations and thereby to promote commerce and strengthen the Nation's economy. The NLRB enforces the law on behalf of both employees and their representatives and employers.

The NLRB enforces the "ground rules" for workers and management alike, and thereby provides a framework for the peaceful, orderly resolution of labor disputes. Thus the NLRB—without presuming to dictate terms of employment—defines the arena to which employers and employees can bring their respective economic interests and power to work out their differences over terms and conditions of employment.

The NLRB is an independent federal agency created by Congress in 1935 to administer and enforce the National Labor Relations Act (NLRA). Section 1 of the Act states in part that:

protection by law of the right of employees to organize and bargain collectively safeguards commerce from injury, impairment, or interruption, and promotes the flow of commerce by removing certain recognized sources of industrial strife and unrest, by encouraging practices fundamental to the friendly adjustment of industrial disputes arising out of differences as to wages, hours, or other working conditions, and by restoring equality of bargaining power between employers and employees.

## II. CURRENT ENVIRONMENT

The NLRB is an independent agency. The NLRB has strived to meet new challenges to reinvent its work processes in order to resolve disputes of greater complexity and meet the demands of an increasing backlog in an environment of government downsizing. This strategic plan is our effort to meet these challenges. Agency staffing for FY 1996 was 1,925 FTE, the lowest since 1962. The net effect of the FTE reduction, unaccompanied by a commensurate decline in case intake, has been that the case handling burden per FTE has risen markedly: the intake per FTE for 1996 was more than 50 percent above the figure for 1962 and 28% more than 1985.

The NLRB receives approximately 40,000 cases per year and additional 200,000 inquiries from the public. The NLRB does not initiate cases on its own. All charges and petitions to be investigated are filed voluntarily by individuals, employers or unions.

At the beginning of FY 1997 there were 7,498 charges pending investigation in our regional offices and 332 representation cases pending determination. The number of overage cases stood at 7,826. The number of cases pending compliance with Board Decisions and court orders was 1,095 on October 1, 1996.

The NLRB has long prided itself on timeliness of service, while maintaining the highest standards of fairness, quality and effectiveness. The National Labor Relations Act has been best administered when cases coming before the Agency are quickly resolved and the expense of litigation is limited. This task of combining timeliness with fairness and quality is one of the main challenges faced by the agency.

The resolution of labor disputes is inherently labor-intensive. The NLRB's mission begins to be accomplished through our agents at our field offices who investigate, prosecute, and settle labor disputes and conduct representation elections; through the headquarters employees who handle these cases in the latter stages of regional processing; through employees assigned to the administrative offices, then through Administrative Law Judges, through the Board, and through the Enforcement Litigation Division, including the Appellate Court Branch, the Contempt Litigation Branch, the Special Litigation Branch, and the Supreme Court Branch.

Consistent with the requirements of the Government Performance and Results Act of 1993 (GPRA), the NLRB is engaged in the process of refining its performance measurements. Performance measures are not a new concept for the NLRB. For many years this Agency has had a well-developed set of criteria designed to gauge the performance of its Regional Offices, where 90 percent of the NLRB's cases are finally resolved; the performance of the administrative law judges; and the performance of the Board Members. However, the traditional time targets the Agency has employed for over three decades years to judge its success in serving the public have become increasingly more difficult to meet in the Regional Offices. Many investigations are no longer completed within 30 days of the filing of a charge and the Agency very seldom issues a complaint within the 45 day target that had historically been the goal. The Agency is attempting to meet this challenge by revising its performance measures to allocate resources in cases in proportion to their impact on the public.

In 1994, the NLRB commenced a Case Activity Tracking System (CATS) initiative to meet its increased automation needs for case processing. The NLRB's case tracking systems at that time were antiquated and composed of numerous, unrelated databases. These independent systems do not adequately support the Agency's need for prompt, accurate, and comprehensive information needed nationwide to effectively manage the Agency's workload - both from the standpoint of coordinating casehandling activities on a national scale as well as for the juggling of caseload by individual field agents. When the CATS project is

completed over the next two years, depending on resource allocation, it will be possible to conduct case-related research and other important aspects of case processing with greater efficiency, thus yielding enhanced productivity.

### III. INPUT FROM OUR STAKEHOLDERS

In identifying what is required to become a more effective organization, we have also continued to receive input from our stakeholders. The Agency has surveyed its customers to determine the level of satisfaction with its services. The survey included unfair labor practice cases, representation cases, and the Information Officer program. It focused on three major points of service: A) quality in case processing; B) timeliness; and C) the utility of casehandling changes in resolving cases more effectively. The survey indicated customer support for the effectiveness of our procedures for screening cases; the implementation of measures designed to expedite the resolution of questions concerning representation; and the prioritization of cases based upon their impact on the public.

In addition, the Agency has benefited from the input of Labor-Management Advisory Panels. The Panels are made up of practitioners from both the management and labor communities and meet semi-annually in Washington, D. C. The purpose of the Advisory Panels is to provide input from the practitioners who appear before the Agency and to advise the Board and General Counsel on changes in Agency procedures that will expedite case processing and improve Agency service to the public. Among the issues discussed have been greater use of mail ballots, expediting the processing of representation cases, bench decisions by Administrative Law Judges, settlement judges, time targets for Administrative Law Judges, adjusting the Board's jurisdictional standards to account for inflation, consolidation of all federal administrative law judges under one agency, and expanding the "10 percent rule" (proceeding to an election when election eligibility issues do not impact more than ten percent of the presumed eligible voters).

Through the establishment of the national and local partnerships with the labor organizations representing Agency employees, the Agency has received valuable input with respect to how to improve casehandling processes. The Agency also has benefited from the input of its managers and supervisors regarding improvements in work processes, including issues of quality. The Agency will continue to seek input from its employees, designated bargaining representatives, managers and supervisors.

Input from our customers through these and other vehicles has provided the Agency with valuable insight into the needs and concerns of the public we serve and has helped the Agency in fashioning its goals, objectives and performance measures.

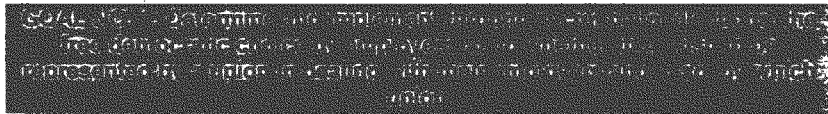
Currently we have not consulted with the Congress. It is our intention to consult with Congress and receive their input.

**IV. GOALS**

In recognition of our obligation to the public as set forth in our mission statement, and with input from our stakeholders, the NLRB has established the following 4 goals:

1. Determine and implement through secret ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union.
2. Prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.
3. The NLRB will continue to maintain a well trained, highly effective, productive customer-oriented workforce.
4. The NLRB will fully integrate information resource management into its working environment in order to provide employees with automated case management data, research tools and other technological aids to enhance their ability to work more effectively and efficiently and to provide the Agency with the ability to more effectively assess and manage its workload.

**V. OBJECTIVES, STRATEGIES AND PERFORMANCE MEASURES**



**OBJECTIVES**

The NLRB will resolve questions concerning representation expeditiously and effectively. The NLRB seeks to effectively protect the rights of employees to select or reject a labor organization as their collective bargaining representative. To this end, it is essential that the NLRB resolve all questions concerning representation and conduct representation elections fairly and as expeditiously as possible.



## STRATEGIES

### ◆ Expediting Representation Cases in the Regional Offices

The General Counsel has publicly identified the prompt resolution of questions concerning representation as one of our most significant priorities because it is directly related to the accomplishment of the Agency's mission. After consultations were conducted with field managers and supervisors and after soliciting input from Agency employees through their labor organizations, time targets were revised and continue to be evaluated to ensure that these types of cases are processed in an expeditious manner. On a continuing basis, casehandling procedures have been analyzed and changes have been implemented to enhance the regions' ability to effectively process these cases and provide better service to the public. In order to ensure that the resolution of post-election issues is not delayed by concurrently filed meritorious unfair labor practices, regions utilize an expedited hearing procedure which provides for the scheduling of consolidated hearings within 28 calendar days of the issuance of a complaint or where appropriate, may use an alternate procedure to hold the unfair labor practice case in abeyance while the post election hearing is held. We continue to assess our training needs in this area and provide necessary training to ensure these cases are processed in a prompt and high quality manner.

### ◆ Triage Approach to Representation Appeals

In early 1996, the Board implemented a triage approach to processing representation case appeals in the Office of Representation Appeals. Under this system the Director of the Office of Representation Appeals, prior to assignment of a case, will determine whether it is a Category I, II, or III case. If it is a Category I or II case, the written legal analysis of the case generally is substantially reduced from the pre-triage approach to legal analysis of representation cases. A Category III case receives the traditional, more lengthy written analysis because of the complexity of the legal issues involved. The Board will continue to monitor and evaluate these new procedures and will implement additional procedures as warranted.

### ◆ Super Panels

In November 1996 the Board implemented an experimental "Super Panel" system for processing certain pre-selected cases. Under this procedure, a panel of three Board Members meets each week to hear cases that involve In November 1996 the Board implemented an experimental "Super Panel" system for processing certain pre-selected cases. Under this procedure, a panel of three Board Members meets each week to hear cases that involve issues that lend themselves to quick resolution without written analyses by each Board Member's

staff. Most of the cases are resolved unanimously based on straightforward application of settled Board precedent. The occasional case that presents issues that are not susceptible to resolution by the Super Panel is referred to the regular case procedure for further analysis and briefing by Board and Office of Representation Appeals staffs. "Super Panel" cases also include some pre-selected unfair labor practice cases to be decided by the Board which may also be eligible for the speed team approach discussed later.

The primary advantage of the Super Panel procedure is the speed with which the issues are resolved, sometimes only a few days after an appeal or exceptions are filed. This avoids delays in conducting representation elections and deciding the merits of objections to the conduct of the elections. Also, by providing for direct participation by Board Members on the Super Panel at the outset of each case, staff time for analysis and writing is saved, as well as eliminating intermediate levels of review. The Board will continue to monitor and evaluate these new procedures and will implement additional procedures as warranted.

#### **Performance Measures**

- The Agency will hold 51% of all elections within two months of the filing of a petition.
- The Agency will develop baseline data to monitor the time it takes to issue a certification of election results after the filing of an election petition.
- The Agency will increase the use of Super Panel in deciding representation cases by 5%.
- The Agency will develop baseline data for the evaluation of prioritizing the processing of representation cases in the Representation Appeals Unit.

**SECTION 4. Prevent the Agency from processing cases with special priority by other employees in order to solve**

#### **OBJECTIVES**

The NLRB will resolve unfair labor practice charges expeditiously and effectively, with a special priority on resolving at the regional level those disputes with the greatest impact on the public and the core objectives of the National Labor Relations Act.

To prevent the potential interruption to interstate commerce caused by unresolved labor disputes, the NLRB regards the prompt resolution and/or processing of unfair labor practice cases as a critical factor in maintaining peace in labor markets affecting interstate commerce.

Essential to the success of resolving and/or processing labor disputes is the careful winnowing out, through our Information Officer Program, of matters which are best resolved in other forums; prompt investigation of cases that are filed, with priority given to cases having the most impact on the public; the vigorous efforts to quickly and fairly settle meritorious cases; and speedy trials of, and decisions rendered in, those matters not susceptible to settlement, while maintaining at all times procedures to ensure the quality and thoroughness of decisions.

The NLRB will vigorously pursue compliance with its Orders and with court judgments to obtain appropriate remedial redress for violations of the NLRA and the parties impacted by those violations.

### STRATEGIES

#### ◆ Information Officer Program

The Information Officer Program also serves as a screening process for weeding out obvious no-merit charges before they are filed. While no charge brought to the NLRB is summarily dismissed or refused acceptance, many potential charges which relate to matters outside the jurisdiction of the NLRB are directed to the appropriate federal or state agency early in the assessment process, before extensive resources have been expended. The General Counsel will continue to monitor the efficiency of its information officer program.

#### ◆ Impact Analysis: Prioritizing Cases in the Regions

Historically, cases were assigned and investigated in Agency regional offices on a first come-first serve basis with established time targets for completion of the investigation and determination of merit. However, with the dwindling of resources it has become difficult to continue to meet those time targets and process all cases within the time targets.

Through the establishment of a committee with representatives of management and employees through their labor organizations, an Impact analysis approach to handing cases based on prioritization has been developed and is being implemented in our regional offices.

Impact Analysis provides an analytical framework for classifying cases so as to differentiate among them in deciding both the resources and urgency to be assigned each case. It requires that all cases be assessed in terms of their impact on the public and their significance in the effective achievement of the Agency's mission. Impact Analysis, as it is applied for purposes of this approach, is directly related to the two primary purposes of the Act, which are to resolve questions concerning the representation of employees and to remedy unfair labor practices committed by employers and unions. In furtherance of our mission,

cases would receive our most immediate attention where the alleged unlawful activity is having a demonstrable impact on the general public through disruptions of business activities. Moreover, if the remedy would significantly affect many employees, or most of the employees in a small complement, the charge would normally be handled most promptly. Thus, Impact Analysis provides national principles for determining which cases can afford to wait and which cases must be resolved with urgency.

The General Counsel will continue to monitor the appropriate and full implementation of Impact Analysis in our field offices and make adjustments in this case management system, where warranted.

◆ Injunction Litigation

Several provisions of the Act provide for injunctive relief to enable the Board to obtain a prompt remedy in cases where not doing so could jeopardize the effectiveness of a final order. Section 10(*l*) of the Act mandates the seeking of injunctions to halt ongoing union conduct involving secondary boycotts, hot cargo agreements, and recognitional picketing. Under §10(*j*), the Board may seek injunctive relief in all other cases.

The NLRB will continue to make appropriate use of the Act's injunction provisions to obtain prompt, interim relief from unfair labor practices by:

In Regional Offices, according priority in investigation to cases where §10(*l*) relief may be warranted, making prompt merit determinations, and initiating court proceedings as appropriate;

In Regional Offices, promptly identifying cases where §10(*j*) relief may be warranted, investigating issues bearing on appropriateness of injunctive relief along with merits issues, deciding suitability of case for injunction proceedings and making appropriate recommendations;

In Headquarters, promptly and thoroughly considering regional recommendations to seek injunctions under § 10(*j*), applying applicable legal standards and giving due weight to views of all affected parties;

◆ Pursuit of Settlements

The NLRB's effectiveness and efficiency in administering the act is greatly enhanced by its ability to effect a voluntary resolution of meritorious unfair labor practice cases. It has long been the NLRB's belief that all parties are better served if we are able to settle their disputes without the need for time-consuming and costly formal litigation. The Agency will continue to emphasize settlements as a means of promptly resolving disputes and is committed to maintaining the traditionally high settlement rate.

◆ Settlement Judges

Based on the success of a 13-month experiment, the Board adopted two rule modifications on March 1, 1996. One of those procedures allows for the appointment of settlement judges. Under this new procedure, the Chief Judge, in appropriate cases, may appoint a "settlement judge" to work with the parties informally in an effort to reach a settlement – thus avoiding the costs to the parties and the public, and the delay required by a formal ALJ hearing and possible appeals. If a settlement is not reached informally, the case proceeds to a hearing before an ALJ other than the settlement judge. The other rule allows for the issuance of bench decisions.

The results to date of the settlement judge and bench decision procedures have been very promising. The Agency's goal is to expand the use of these procedures where and when feasible. A five-year training plan is being developed which will provide for bi-annual training conferences for all judges and orientations training, which will cover, inter alia these new procedures.

◆ Briefs, Oral Arguments and Bench Decisions

If the Agency is unsuccessful in settling a case and it must go to hearing before an administrative law judge, under new procedures, an administrative law judge has the discretion to decide whether briefs are needed in any case before rendering a decision. If the judge decides that briefs are not required, the parties are to be given the opportunity to present proposed findings and conclusions, either orally or in writing, as well as through oral argument. In any case in which the judge believes that written briefs or proposed findings of fact and conclusions may not be necessary, he or she is to notify the parties at the opening of the hearing or as soon thereafter as practicable, in order to alert the parties to the possibility that they may be called upon to present their positions orally, rather than in writing, at the close of the hearing.

The new procedures also give the administrative law judges the authority to render bench decisions in appropriate cases, delivered within 72 hours after conclusion of oral argument. These decisions, like any other decisions, must be rendered in conformity with the provisions of the Administrative Procedure Act.

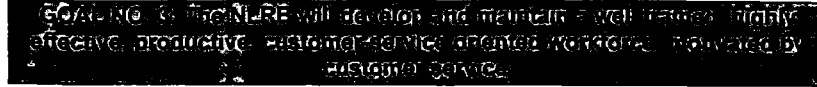
◆ Board "Speed Teams"

In an effort to expedite the processing of cases, the Board instituted a "speed-team" subpanel procedure whereby the assigned originating Board Member identifies cases involving straightforward issues which, with the agreement and early involvement of the other two panel members, can be drafted and circulated promptly without the need for detailed, time-consuming covering memoranda.

- ◆ The Agency will emphasize compliance as a central aspect of Regional Office performance;
  - The Contempt Litigation and Compliance Branch will provide advice, resources, and assistance to Regional Offices in carrying out the compliance program;
  - Regional Offices will be encouraged to take potential compliance issues into account in determining the prosecutive merit of cases and in settling cases;
  - Regional Offices will be expected to take appropriate steps to obtain provisional relief when confronted with likely or apparent asset dissipation or other conduct likely to prevent compliance;
  - Regional Offices will be encouraged to deploy a full range of investigative techniques to determine whether a respondent is likely to avoid, or is avoiding, compliance;
  - Regional Offices will be expected to make appropriate use of guarantee and security arrangements, and of formal settlements providing for judicial orders enforceable through contempt, attachment, garnishment, offset, and other available remedies;

#### **PERFORMANCE MEASURES**

- The percentage of unexcused overage cases pending in Category III will be no greater than 10% in fiscal year 1998 at the President's requested funding level. The current level of unexcused overage cases is 19.2 per cent.
- In cases where the number of transcript pages is less than 500 pages the ALJ decision will issue within 60 days from the filing of the briefs in 50% of the cases.
- In cases where the number of transcript pages is between 501 and 1000 pages the ALJ decision will issue within 120 days from the filing of the briefs in 50% of the cases.
- The regional offices will review the number of inquiries received through the Information Officer program and review quarterly the number of charges filed through the Information Officer program and maintain the necessary data to review the effectiveness of the program.
- The Agency will continue to review and develop baseline data for the evaluation of the Impact Analysis case prioritization system.
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### OBJECTIVES

The NLRB recognizes that the key to its success in serving its customers is the investment in its human resources. Accordingly, the Agency is committed to providing Agency employees with the work environment, support, training, guidance and resources necessary to carry out the Agency's mission.

### STRATEGIES

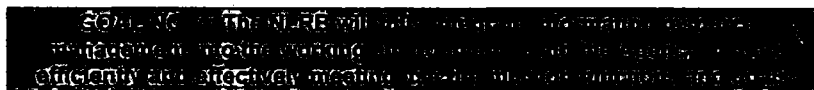
- ◆ Provide managers and employees with training to enhance their understanding of the Agency's customer service standards.
- ◆ Provide employees with developmental training opportunities.
- ◆ Invest in staff development by identifying organizational and individual training needs.
- ◆ Create and maintain central internal bulletin board for notification of external training opportunities, including seminars, conferences, and internal training. Increase employee feedback concerning the effectiveness of training.
- ◆ Improve procedures for ensuring that the information and enhanced skills gained in training are incorporated in agency work practices.
- ◆ Improve documentation and data collection from participants concerning the extent to which training expenditures have enhanced the ability of employees to perform the work of the Agency more effectively and efficiently.
- ◆ Improve documentation and data collection concerning the extent to which family-friendly initiatives foster a stable, productive workforce and preserve the Agency's investment in training employees in the performance of their jobs.

Create, maintain, and make accessible documentation, data collection and progress reports of equal employment opportunities.

### PERFORMANCE MEASURES

- The Agency will provide training to 33 regional directors on the management initiatives, customer service standards and implementation of the Agency's strategic plan.

- The Agency will provide 110 field supervisors with training on their responsibilities in the case processing system, evaluating employees, implementation of the Agency's strategic plan and customer service standards.
- The Agency will provide training to 120 new employees on the mission of the NLRB, casehandling process and requirements and customer service standards.
- The Agency will provide specialized training on investigative techniques to 60 field examiners.
- The Agency will conduct training for approximately 66 compliance personnel.
- The Agency will conduct training on Freedom of Information Act (FOIA) issues for approximately 66 employees.
- The Agency will continue to provide training to meet continuing education requirements for professional staff members.
- The Agency will provide training to 65 administrative law judges in decision writing and alternative dispute resolution.



#### **OBJECTIVES**

To support the Agency's core mission functions and goals, the NLRB will provide employees with automated case management data research tools, and other technological aids to enhance their ability to work more effectively and efficiently and to provide the Agency with the ability to more effectively assess and manage its workload.

#### **STRATEGIES**

Develop the Case Activity Tracking System.

The Case Activity Tracking System is required to support the management information and case tracking requirements of the Agency. In addition, the System will support the working activities of the Regional and Headquarters Offices. The Case Activity Tracking System will replace existing systems that are based on old technology and are not integrated. The Case Activity Tracking System will provide the following functionality: Case tracking and case status, support for the Information Officer, support for docketing, support for the Service



Sheet of case participants, correspondence, statistical and management reports, Annual and Election Reports, ability to search for prior cases involving the same participants and ability to do queries and respond to Freedom of Information Act requests. The System will provide access to integrated data from all NLRB offices.

#### Develop on-line NLRB Legal Research System

Legal Research will meet Agency requirements for access to legal documents produced by the Agency. This System will take advantage of modern document management and retrieval technology for organizing and searching large collections of documents. This System will provide access and rapid searching for electronic versions of documents from past cases and NLRB activities that are used by NLRB personnel as they deal with current cases. This System will include such documents as Board Decisions, documents providing guidance from the Headquarters offices, administrative and procedural documents.

#### Complete implementation of the Litigation Support Software

Litigation Support will provide software to support Board agents in their work with documents for open cases. This software will provide the ability to organize, maintain and search case documents. This software provides for rapid searching of documents, and for user annotations and comments. This software is especially useful for attorneys and NLRB staff dealing with very large documents or sets of documents such as transcripts from hearings.

#### Install automated forms software.

The Forms System will provide for creation, maintenance and use of electronic forms. Users may complete forms at their personal computers. The need for paper copies of blank forms will be minimized. Eventually, this System will reduce the need to capture the same data multiple times as the forms will be integrated with the database.

### PERFORMANCE MEASURES

The performance measures for this section must be reviewed and in many instances redeveloped.

### VI. EXTERNAL FACTORS

Several factors will inhibit the Agency's ability to accomplish the goals set out in this plan. The NLRB does not control its own caseload. Employees, employers or labor organizations voluntarily file all charges or petitions in one of the 33 regional offices. An unexpected large increase in intake without sufficient increase in resources will result in delays in processing of cases as well as an

accumulation in the backlog of overage cases. External factors will also impact the settlement rate as the parties to such a contentious process decide whether or not they want to informally settle the case before the Agency and before expensive litigation. We have no control over this decision. It is estimated that a one percent drop in the settlement rate will cost the Agency an additional \$2 millions as the process becomes formal and litigation takes over. Another factor not within the control of the Agency is the timely appointment and confirmation of Board Members. This impacts the Board's ability to issue decisions. Also any regulatory or statutory changes either in the NLRA or in the management of the Federal government can adversely impact the ability to meet the goals of this plan. Finally, the ability to achieve all goals set forth in this plan depends heavily on the level of resources appropriated by the Congress.

## VII. PROGRAM EVALUATION

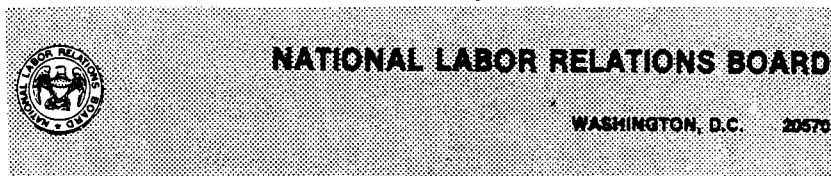
The NLRB will continue to evaluate its programs as it has done for many years. The Agency has in place a Quality review program for its regional offices in which regional operations are annually assessed and case files are reviewed to ensure proper case handling procedures have been followed. Also a quality review has been the decisions and opinions from the courts upon the review of board decisions. The implementation of Impact Analysis also provided a review of timeliness and quality in casehandling. Before the system was implemented a year of study of casehandling procedures in the regional offices was undertaken to ensure all casehandling objectives were thoroughly considered. The Office of the General Counsel followed similar procedures in implementing procedures to expedite the processing of representation cases. A committee of managers, supervisors and employee representatives reviewed the existing programs and produced recommendations for changes to facilitate faster processing of cases. Also in the Office of Appeals employee representatives and managers in supervisor reviewed the system for processing cases in that office. Again through the evaluation of program and the objectives of the office a decision was made to initiate a program where timely casehandling of those cases that had the greatest impact on the parties and the public would be process more expeditiously.

In addition the Agency's Division of Administration has conducted its own customer survey to evaluate its effectiveness in serving the agency. Finally in evaluating program effectiveness the Office of the Inspector General issued a report in which the Office conducted a review of the Agency process for measuring performance and reporting on the results. The report concluded that the case management system that the Agency has used for 40 years basically complied with the requirements of GPRA.

The Agency has also utilized in the past year external resources to evaluated how we operate. A review of how the Agency's field support staff would operate and what changes need to be in the new information technology environment .

Recommendations have been received and some of those recommendations are being implemented. We continue to utilize internal and external resources to evaluate agency programs and operations.

ATTACHMENT C



FOR IMMEDIATE RELEASE  
March 7, 1997

R-2202  
202/273-1991

**IN 3-YEAR REPORT, NLRB CHAIRMAN GOULD  
ASSESSES AGENCY DECISIONS, INITIATIVES;  
SEES PROGRESS IN LABOR RELATIONS ENVIRONMENT**

National Labor Relations Board Chairman William B. Gould IV said he believes the decisions the Board has issued and the initiatives it has implemented during the past three years have improved U.S. labor-relations by better balancing the competing interests of labor and management and by streamlining administrative procedures.

In a three-year report released today by Chairman Gould on the third anniversary of his appointment, he said his primary goal has been "to uphold the law impartially, to promote some measure of balance between labor and management, and to bring both sides closer together by fostering a more cooperative environment." Another objective has been to reduce the need for litigation and to simplify and expedite NLRB procedures, he said.

"In the main, the initiatives have been successful -- though some aspects of my reforms have met with resistance," Mr. Gould stated. For the remaining 18 months of his term, he said he will continue pursuing his original goals while "reaching for the middle ground -- or vital center, as President Clinton has described it. After all, the NLRB is neither pro-labor, nor pro-employer -- nor should it be."

As an indicator of the Board's impartiality, Chairman Gould pointed out that the Board's decisions during his tenure have been enforced by the U.S. Courts of Appeals in whole or part about 80% of the time, and in the last quarter the enforcement rate was more than 90%.

The NLRB chairman expressed disappointment that the Board's proposed "single unit" rule "became a hostage in the deliberations over our budget" and could not be finalized. He said the proposed rule was intended "to eliminate unnecessary delays and litigation in the traditional case-by-case litigation method" by setting forth the factors it would use in determining the appropriateness of a single location bargaining unit where the employer has more than one facility. A rider prohibiting its implementation was attached to the NLRB's final appropriations bill for FY 1996 and FY 1997.

The report assesses a number of Chairman Gould's initiatives and identifies selected decisions rendered by the Board since March 1994. Among the highlights:

- While disagreeing with some Board precedent, Chairman Gould stated "my primary focus has been and will continue to be effectively implementing existing law."
- A "Super Panel" system for processing certain cases has expedited the decisional process. Under this procedure, a panel of three Board Members meets each week to hear cases which involve issues that lend themselves to quick resolution without written analyses by each Board Member's staff.
- "Speed Teams" are used to reduce the amount of staff time devoted to cases where the Board is adopting recommended decisions of Administrative Law Judges.
- "Settlement Judges" are assigned in select cases that may lend themselves to quick resolution. Under this procedure, a judge is assigned to a case other than the trial judge to conduct settlement discussions.
- "Bench Decisions" are permitted in certain cases. The judge notifies the parties early in the process that oral argument will be heard in lieu of briefs. After oral argument, the judge reads the decision into the record and later certifies the transcript that contains the decision.
- Judges were given time targets for issuing their decisions.
- The Board increased the use of injunctions under Section 10(j) of the National Labor Relations Act as an effective means of bringing about compliance. Since March 1994, the Board has had a success rate of 88%, including wins and settlements, on a par with or better than the experience of prior Boards.
- Advisory Panels composed of distinguished labor and management attorneys were formed to provide the Board and General Counsel with practical input from practitioners on a wide range of topics. Six sets of panel meetings have been held to date.
- The Board was able to reduce its backlog to 397 cases as of the end of FY 1996 – one of the lowest levels in over two decades. By comparison, the backlog in February 1984 was 1,647.

# # #

March 7, 1997

**THREE-YEAR REPORT<sup>1</sup> BY WILLIAM B. GOULD IV,  
CHAIRMAN, NATIONAL LABOR RELATIONS BOARD**

**Introduction**

Having reached the three-year mark in my term as Chairman of the National Labor Relations Board, I can report considerable progress in carrying out the agency's mission of enforcing the National Labor Relations Act and implementing several new initiatives to make our processes and procedures more efficient.

**I. Fostering a More Cooperative Labor-Management Environment**

My goals remain the same as when I took the oath of office on March 7, 1994. My primary mission was to uphold the law impartially, to promote some measure of balance between labor and management, to bring both sides closer together by fostering a more cooperative environment -- both through Board procedures and substantive law. I also pledged to workers, union officials and business people that they would be treated with respect, civility and fairness. Finally, I have attempted to reduce the need for litigation and to simplify and expedite NLRB procedures. In the main, these initiatives have been successful -- though some aspects of my reforms have met with resistance.

I stated that I viewed the role of Chairman as most akin to my former role as an impartial arbiter, mediator and fact-finder in both the private and public sector. In both jobs, my role has been to decide cases based upon the facts and relevant law, not to fashion legislation. For over three decades, I arbitrated and mediated more than 200 labor disputes. I would hope that all of my work as an arbitrator -- interpreting collective bargaining agreements, sometimes making recommendations about agreements and sometimes imposing agreements -- has demonstrated a sense of balance and impartiality. And that is what I have tried to bring to bear on my work as Chairman of the NLRB. Though I disagree with some of the Board precedent which emerged in the 1980s and before, my primary focus has been and will continue to be effectively implementing existing law.

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<sup>1</sup> The views herein are those of the Chairman. They do not necessarily reflect those of the entire Board.

## II. Enforcement Rate

A reliable baseline indicator of the impartiality of Board decisions is how well they fare upon appeal to the U.S. Courts of Appeals. I am particularly proud that the Board's decisions during my tenure have been enforced by the courts in whole or part about 80% of the time, and in the last quarter the enforcement rate was more than 90%.

Of the 44 court decisions handed down during the period (October - December 1996), the Board prevailed in 93% of contested cases involving review or enforcement of its orders (84% were complete wins, while 9% involved either modification of the Board's order or partial remand). In comparison, the Board's enforcement rate since FY 1990 has averaged 83%. (See Attachment A for a year-by-year breakdown since fiscal year 1990).

## III. Supreme Court Review

Similarly, the Supreme Court has accorded deference to NLRB decisions.

The agency argued three cases before the Court during this past Term. In each case the Agency's position was upheld by the Court. In *NLRB v. Town & Country*, 116 S. Ct. 450 (1995), the Court unanimously held that paid union organizers are "employees" within the meaning of the Act and are, therefore, protected against employer retaliation in the form of discharge or discipline for protected activity. The Court recognized that "the Board often possesses a degree of legal leeway when it interprets its governing statute," but added that "the Board needs very little legal leeway here to convince us of the correctness of its decision." 116 S.Ct. at 453.

In *Auciello Iron Works Inc. v. NLRB*, 116 S. Ct. 1754 (1996), the Court again unanimously upheld the Board's position and held that an employer may not refuse to bargain with an incumbent union on the ground that it has lost majority status where it has previously entered into a contract with such a union. The Court stated that "the Board's judgment is entitled to prevail. To affirm its rule of decision in this case, indeed, there is no need to invoke the full measure of the 'considerable deference' that the Board is due . . ." 116 S.Ct. at 1759.

And, third, the Court in *Holly Farms Corp. v. NLRB*, 116 S. Ct. 1396 (1996), held that some workers involved in chicken processing were "employees" within the meaning of the Act and not excluded by virtue of the agricultural employee exemption contained in the Act. Although *Holly Farms* was a 5-4 decision -- in contrast to the unanimous holdings of the Court in both *Town & Country* and *Auciello* -- the major theme involved in each of these cases is the same. The Court, time and time again, noted the Board's expertise and its policy of granting deference to the expert agency's interpretation of its own statute. See 116 S.Ct. at 1401 and 1406.

In another case during the past Term, *Brown, et al. v. Pro Football Inc.*, 116 S. Ct. 2116 (1996), involving the relationship between antitrust and labor law, the Court sounded the same theme. Here, while concluding that the federal labor law shields football from antitrust liability

when the owners act unilaterally subsequent to bargaining to impasse, the Court noted that it could not resolve the ultimate issue of accommodation between the competing statutes until it hears "the detailed views of the Board, to whose 'specialized judgment' Congress 'intended to leave' many of the 'inevitable questions' concerning multi-employer bargaining bound to arise in the future . . . ." 116 S.Ct. at 2127. Again, the Court stressed the central role of the Board and the Court's policy of deference to this agency.

The language employed by the Court, coupled with its holdings, indicate that the Board's credibility with the Court has never been better. And the same is true throughout the entire federal judiciary.

#### IV. Advisory Panels

One of our first actions after confirmation was to appoint Advisory Panels composed of distinguished labor lawyers -- 26 union labor lawyers and 26 attorneys who represent employers. These panels serve pro bono and meet twice each year to advise the Board and General Counsel on processing and improving agency service to the public. Six sets of advisory panel meetings have been held to date, in June and October 1994, March and November 1995, June 1996 and January 1997. The next meetings are scheduled for October of this year.

My work as a private practitioner representing both management and labor, impartial arbitrator and law professor, has made me sensitive to the importance of providing opinion makers in this field with direct input in devising solutions to the practical problems involved in labor litigation and negotiations. My judgment is that we have been well informed and advised by the individuals on our Advisory Panels who confront day-to-day real life problems in the field. By the same token, these distinguished practitioners have gained insights into the problems that we face as an independent quasi-judicial agency.

We have discussed a wide range of topics, including proposals put forward in the House of Representatives for indexing the NLRB's jurisdictional standards for inflation and the agency's efforts to reinvent and streamline its operations. With almost complete unanimity, the panels -- both union and management lawyers -- stated their skepticism about the value of indexing the agency's jurisdictional standards to the CPI without the benefit of Congressional hearings and research on the impact of this proposal. Moreover, both labor and management lawyers expressed considerable concern about the inability of either side to have any rights or remedies under an indexing formula if it were to deprive the NLRB of jurisdiction over a substantial number of employers and their employees. Such a consensus on both sides of the bargaining table about policy issues is unusual, indeed.

A third topic was the proposal in the Congress to merge NLRB Administrative Law Judges into a government-wide ALJ corps along with Social Security judges and those of other agencies. The management and union advisory panels both agreed that this would be a mistake because the expertise of NLRB judges in labor law would be diluted and eventually lost. The ALJ corps legislation died in the waning days of the 104th Congress.



The Advisory Panels have provided a valuable sounding board on various policy issues and a link to the labor law bar and our constituents in labor and industry. Other early Board proposals discussed with the panels included proposed Administrative Law Judge reforms which met with initial skepticism from both the union and management panels in 1995 but had gained wide support by the completion of a trial period in 1996.

#### V. "Super Panel" System

In November 1996 the Board implemented an experimental "Super Panel" system for processing certain cases carefully pre-selected by the Executive Secretary. The procedure was recommended by the agency's Joint Labor-Management Partnership.

Under the procedure, a panel of three Board Members meets each week to hear cases which involve issues which lend themselves to quick resolution without written analyses by each Board Member's staff. Most of the cases are resolved unanimously based on straightforward application of settled Board precedent. The occasional case submitted to the Super Panel that presents issues that are not susceptible to resolution by the Super Panel is referred to the regular case procedure for further analysis and briefing by Board and Office of Representation Appeals staffs.

Since the procedure was implemented on November 5, 1996, of the 78 cases referred to the Super Panel 67 were resolved unanimously, nine with a dissent, and two were not resolved. This innovative procedure was used to quickly resolve more than one-third of the representation cases, including requests for review, received during the period since it was adopted last November.

The primary advantage of the Super Panel procedure is the speed with which the issues are resolved, sometimes only a few days after an appeal is filed. This avoids delays in conducting representation elections. Also, by providing for direct participation by each Board Member on the Super Panel at the outset of each case, staff time for analysis and writing is saved. Only one staff attorney, rather than one for each Board Member reviews each case, researches the issues, and presents his or her analysis and recommendations orally to the Super Panel. Of course, many cases are more complex and do not lend themselves to the expedited procedure. The success of the Super Panel process, thus, depends on the ability of the Office of Representation Appeals and of the Office of the Executive Secretary to quickly identify the cases that are good candidates for disposition by the Super Panel. Analysis of the cases by each Board Member in advance of the Super Panel meetings also is crucial.

Nearly all of the cases decided by the Super Panel to date have been representation cases. However, on March 3 the Board agreed to use the system for carefully selected unfair labor practice ("C") cases on a trial basis.

## **VI. Speed Teams**

In another initiative to expedite the resolution of cases, in December 1994, the Board adopted a "speed team" case handling process which has reduced the amount of staff time devoted to cases where the Board is adopting recommended decisions of Administrative Law Judges.

In a speed team case, the issues are presented orally to a Board Member and, after discussion, a written decision is prepared within a matter of days so that the Board Member can approve the written decision while the case is still fresh in the Board Member's mind. This procedure eliminates the preparation of duplicative and unnecessary documents in cases which are essentially factual where credibility determinations already have been made -- either by an Administrative Law Judge in an unfair labor practice hearing, or by a Hearing Officer in a dispute arising out of a representation proceeding. The key to the effectiveness of the speed team procedure is direct and active involvement of the participating Board Member.

We have used the speed team case handling method in more than 510 cases (about 30 percent of total cases) with great success in speeding up our decisional process. During FY 1996, 25 percent of all C cases and 48 percent of all R cases were handled through the speed team process. The result has been reflected in our ability to decrease, by approximately 20 percent, the processing time for cases coming to the Board for decision. For fiscal year 1993, for instance, the median time for processing of unfair labor practice (C) cases from assignment to issuance was 104 days, and the corresponding median for representation (R) cases was 106 days. For fiscal year 1996 the comparable medians dropped to 84 days both for C and R cases.

The speed team procedure, and an active meeting schedule, have allowed the Board to move with unprecedented dispatch. From March 1994 through this date we held 80 full Board meetings -- in contrast to 42 meetings held by our predecessors during the same period of time immediately prior to my arrival in Washington, D.C. (This is in addition to nine oral arguments and the 12 Advisory Panel meetings. This activity of the Board is unprecedented in scope and frequency.)

## **VII. Case Inventory**

All of this has enabled the Board to reduce its backlog to 397 cases as of the end of FY 1996 -- one of the lowest levels in over two decades. A range of 400 to 600 cases historically has been considered a normal case inventory. My sense is that we would have an even better record which could rival the records of earlier Boards before 1974, if the shutdowns and the disruption that ensued in their wake had not slowed the processing of cases. In any event, the present and historically low backlog stands in sharp contrast to the high-water mark of 1,647 cases in February 1984.

### VIII. New Administrative Law Judge Procedures

We are making progress at simplifying NLRB procedures so that the parties have clear guidance, the expenses entailed by extensive litigation are minimized, and case processing is expedited. On February 1, 1995, the Board announced a one-year trial period to experiment with revised Administrative Law Judge procedures designed to resolve disputes quickly, informally and early in the administrative process to avoid long and costly litigation, hearings and appeals. Favorable results from the new procedures led the Board to make them permanent effective March 1, 1996.

#### A. Settlement Judges

Under the Board's settlement judge rule, the Chief Administrative Law Judge, or the appropriate Associate Chief Judge, may assign a settlement judge "who shall be other than the trial judge to conduct settlement negotiations," provided that all parties agree to the procedure. The rule provides that, "where feasible, settlement conferences shall be held in person," and settlement negotiations "shall not unduly delay the hearing." The rule also provides that all discussions between the parties and the settlement judge "shall be confidential." Any settlements reached under the auspices of a settlement judge are subject to the approval of the Regional Director prior to the opening of the hearing or of the trial judge after the hearing has opened.

Since the settlement judge rule went into effect in February 1995, we have secured settlements in a little more than two-thirds of our settlement judge efforts. Through December 1996, we assigned settlement judges in 189 cases; settlements were achieved in 129 of those cases, some after a trial judge was assigned and made further settlement efforts. In FY 1996 approximately nine percent of all Administrative Law Judge cases were resolved by settlement judges.

We generally honor requests by parties for the appointment of a settlement judge, assuming that all parties agree, but most settlement judge efforts are at the initiative of one of the chief judges and most are conducted by telephone. We schedule on-site conferences when the proposed settlement case can be linked with regularly scheduled trials or other settlement efforts. We also occasionally schedule a single case for settlement conference when the case is of such magnitude to warrant sending out a judge solely for that purpose. In fiscal 1996, despite budget constraints, we held 26 on-site settlement judge conferences, 12 of which resulted in settlements, including some in cases with trial estimates of two weeks or more.

#### B. Bench Decisions

In a rule change first implemented on a trial basis in February 1995 and made final on March 1, 1996, Administrative Law Judges were given the authority to issue bench decisions. The judge first notifies the parties "at the opening of the hearing, or as soon thereafter as practicable, that he or she may wish to hear oral argument in lieu of briefs." After oral argument, the judge reads the decision into the record, and, when the transcript is received, issues a written

certification of the transcript that contains the decision, along with any additional discussion and any necessary order and notice. The case is transferred to the Board and the time for exceptions begins to run upon service of the written certification on the parties.

From February 1995 through February 1997, ALJs issued 40 bench decisions. (See Attachment B for a breakdown of bench decisions by type of violation.) In fiscal 1996, bench decisions represented about 4.5% of the total decisions issued by judges. Some 20 different judges have issued bench decisions. Most of the cases in which bench decisions were issued were one-day hearings and involved relatively simple credibility issues.

Most of the bench decisions were not appealed and were adopted, in the absence of exceptions, by the Board. Only 13 were appealed. Eight resulted in reported Board decisions, (most were short-form adoptions) and five bench decisions are pending review by the Board.

Board action on bench decisions included one partial remand and one partial reversal. In the latter case, the Board, in a footnote, cautioned that "[a]lthough judges have the authority to issue bench decisions . . . such decisions, like written decisions, must be well-considered and supported." *Pacific Maritime Association*, 321 NLRB No. 116 (Slip op. p. 2, note 4) (1996).

None of the bench decisions affirmed by the Board have been reviewed in the court of appeals, although an enforcement petition has been filed and is pending in one of the cases. It does not appear that any party has made a serious procedural attack on the bench decision rule in any of the cases thus far decided under the rule.

With the one possible exception cited above, it appears that judges have chosen wisely those cases that warranted bench decisions. Not only has the bench decision rule saved time on Board review, but the bench decisions are themselves issued, on average, some three or four months earlier than they would have issued after full briefing and a full written exposition.

#### C. Time Targets

In a separate action, in September 1994, the Board began phasing in time targets for Administrative Law Judges designed to reduce the time used for issuing their decisions. The targets became fully effective in May 1995. The results are encouraging thus far. The median number of days from hearing to decision has dropped from 138 in 1993 to 128 in 1994 to 114 in 1995 and to 111 in 1996. The median time from when briefs are filed to decision decreased from 83 days to 71 to 64 and to 62 days in the same period. We are also finding that the cases that do go to trial and require written decisions are longer and more complex than in the past. The average transcript length in cases in which judges' decisions issued in FY 1996 was 603 pages; in FY 1995 that figure was 519 pages.

#### D. Increase in Settlements

Overall, our Administrative Law Judges issued 442 decisions and obtained 725 settlements in FY 1996, a 13 percent increase over FY 1995. This significant increase reflects the heightened

emphasis the Board has placed on settling cases wherever possible, in order to save the agency and taxpayers a great deal in litigation costs and ensure that the parties themselves avoid the delays and cost inherent in the formal trial process and subsequent consideration by the Board and Courts of Appeals.

#### E. Number of Judges Declining

All of this has been accomplished with a diminishing number of Administrative Law Judges, which has been reduced to a historic low by retirements and other attrition. In November 1993 the agency employed 78 judges as compared to 62 today. (The high point was 117 in 1981).

#### **IX. Usage of 10(j) Injunctions Increased**

During my tenure, the Board's use of 10(j) injunctions has increased as a means of quickly putting a stop to certain violations of the Act by employers or unions and to provide an incentive to voluntary compliance.

In the first full year of the new Board's term, March 1994 to March 1995, 126 injunctions were authorized. This represented a substantial increase over the number of injunctions authorized by our predecessors. For example, in fiscal year 1993, the prior Board authorized 42 injunctions and in fiscal year 1992, only 26 injunctions. Since March 1994, the Board has authorized 237 10(j) injunctions and denied authorization in 12 cases or 5% of all cases. I voted against 10(j) authorization in those 12 cases and two other cases in which I dissented while the Board granted authorization. (See Attachment C for a breakdown of injunction activity since March 1994.) This increase in the use of injunctions has sent a message both to employers and unions that the Board is prepared to take prompt and effective action against violations of the Act in which the passage of time would render Board remedies ineffective. Of the cases pursued to a conclusion by the General Counsel since March 1994, the agency has had a success rate of approximately 88%, including both wins and settlements, on a par with or better than the experience of prior Boards.

One of the highlights of my tenure to date was participating in the Board's March 26, 1995 decision to seek injunctive relief against unfair labor practices by Major League Baseball teams. The agency played a decisive role in saving both the 1995 and 1996 seasons and creating an environment in which a comprehensive collective bargaining agreement could be negotiated in November 1996.

Finally, I would note that in connection with one 10(j) case, I was of the opinion that the Board should permit the parties to present oral argument as the employer had proposed. A majority of the Board, however, voted against the motion.

#### **X. Contempt Actions**

The Board has not hesitated to authorize contempt actions against recalcitrant employers and unions absent meaningful settlement discussions. Since March 1994, the Board has authorized the General Counsel to institute contempt proceedings in 31 cases against employers and in two cases against unions.

With respect to the union cases, both cases settled pursuant to consent orders. I voted to authorize contempt in both cases (and to disapprove one of the resulting settlements), as I did in all the employer cases.

Several of the cases against employers had especially good outcomes in that, after the cases were settled, the union and employers reached agreement on collective bargaining contracts and no further difficulties under the Act subsequently have come to the Board's attention.

#### **XI. Mail Postal Ballot Procedures Improved**

One of the early procedural improvements addressed by the Board was increasing the use of mail ballots in situations where conditions are such that costs would be lower and/or employee participation would be higher by using this procedure.

The Board also has encouraged greater use of mail ballots through its decisions and, as a result, the agency conducts about twice as many elections by mail ballot as it had under previous administrations. An important ingredient in this process has been the development of better mail ballot procedures.

Of course, the overwhelming number of secret ballot elections are held manually in the workplace of employees as has been the historic practice. There has been no intent to change this time-honored practice, but rather to employ mail ballots in situations where workers would not have the opportunity to cast their ballot and thus participate in the electoral process or where the Agency's pressed financial circumstances would be unduly burdened. Thus, we conduct representation elections by mail ballot only when it is cost effective, practical and consistent with the purpose of the Act. The agency's use of mail ballots has been approved by the courts in several cases.

#### **XII. Single Unit Rule**

In September 1995, the Board proposed a rule setting forth the factors it proposed to use in determining the appropriateness of a single location bargaining unit where the employer has more than one facility. The rule is designed to apply to all routine cases in which the issue is whether a petitioned-for unit of unrepresented employees at a single location is an appropriate bargaining unit.

The goal of the single unit rule is to eliminate the unnecessary delays and litigation in the traditional case-by-case litigation method. Under the current procedure, each union election petition for a single unit in a multiple-unit employer may be litigated by the parties with delay and needless cost to all, including the taxpayer, even though the circumstances are substantially identical to ones ruled on by the Board countless times over the years in previous cases.

The proposed rule, which has not been acted on by the Board, would set forth, clearly and simply for the public and labor bar, the factors the Board would find critical in most single location cases.

Because of the propagation of misinformation about it, the single unit rule has been met with opposition from employer groups and in the Congress. The proposed rule -- which was designed not to change the law nor advantage either unions or employers, but to save time and money for the agency and for the parties<sup>2</sup> -- became a hostage in the deliberations over our budget. A rider prohibiting its implementation was attached to the agency's final appropriations bill for FY 1996 and FY 1997.

### **XIII. Decisional Highlights**

The genius of the National Labor Relations Act is that it provides a legal framework for industrial relations designed to keep government out of the workplace, leaving most problems to resolution by the parties who are best equipped to solve them using the kinds of creative means preferred by those most directly affected. This is the antithesis of a "made in Washington, one size fits all" process.

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<sup>2</sup> This follows the recommendation of the Subcommittee on Separation of Powers of the Senate Committee on the Judiciary chaired by Senator Sam J. Ervin, Jr., of North Carolina, Congressional Oversight of Administrative Agencies (National Labor Relations Board) Report of the Committee on the Judiciary, United States Senate by its Subcommittee on Separation of Powers Together with Individual and Additional Views, 91st Cong., 1st Sess. (1970) (U.S. Government Printing Office). The Subcommittee stated the following:

Rulemaking would permit all interested parties to submit their learning and their views on such issues and broaden the informational and adversary base from which Board decisions are made. It would also ensure that the policy formulated is not skewed because it is adopted in the context of the facts of a particular case. It would, moreover, stop the practice of making individual parties the victims of delay, retroactivity and perhaps decisions unrelated to the facts of the particular case because the Board has chosen it at random to be the vehicle for a major policy pronouncement. And, finally, it would lessen the litigation which excessive reliance on case-by-case adjudication necessarily encourages.

Failure to use the rulemaking procedures also has undoubtedly contributed to the ever-increasing caseload which threatens a breakdown of the law's administration. It has already cost it much more, however, in the quality of its decisions.

We want the parties to rely upon their own resources using the creativity and spontaneity which the Act itself promotes. This is the overriding view of most of the Board majorities set forth in the cases in which I have participated. It is my commitment to continue to provide -- as I indicated to the Senate Labor and Human Resources Committee at my confirmation hearing -- a presumption in favor of stare decisis until my term expires.

I think that our decisions these past three years reflect a balance and consideration for the competing interests of labor, management, and individuals, as well as a commitment to the practice and procedure of collective bargaining and the promotion of voluntarily negotiated procedures by the parties. After all, this is the fundamental thesis underlying our decisions as well as our use of Section 10(j) preliminary injunctions and the rulemaking process.

(See Attachment D for a discussion of selected decisions rendered since March of 1994.)

#### XIV. Conclusion

My objective behind the initiatives we have implemented and with the decisions we have issued is to advance more constructive, cooperative, harmonious labor-management relations in the United States. I am hopeful that we will be successful in reaching the middle ground -- or "vital center," as President Clinton has described it. After all, the NLRB is neither pro-labor, nor pro-employer -- nor should it be.

For the remaining 18 months of my term -- and consistent with my approach these past three years (indeed, as it has been over the three decades I have worked in this field) -- I will seek that "vital center" and continue to restore the public's confidence in the NLRB's mission of impartiality and neutrality.

# # #



**Attachment A****ENFORCEMENT RATES  
FY 1990 Through First Quarter of FY 1997**

<b>Year</b>	<b>Full Enforcement</b>	<b>Partial Enforcement</b>	<b>Total</b>
1990	78.9	9.9	88.8
1991	76.4	10.1	86.5
1992	73.3	10.6	83.9
1993	78.2	10.6	88.8
1994	62.7	16.2	78.9
1995	60.8	11.7	72.5
1996	65.8	18.1	83.9
1990 - 96 avg.	71	12	83
1997-1ST QTR	84	9	93

**Attachment B****BREAKDOWN OF BENCH DECISIONS  
BY TYPE OF VIOLATION**

<b>Violation Alleged</b>	<b>No.</b>
8(a)(1)	5
8(a)(1) and (2)	1
8(a)(1) and (3)	16
8(a)(1), (3), and (4)	0
8(a)(1) and (4)	1
8(a)(1) and (5)	10
8(a)(1), (3) and (5)	2
8(a)(1)(A)	2
8(b)(1)(A) and 8(b)(2)	1
8(b)(2)	0
Backpay/Compliance	1
Other	1

Attachment C

BOARD DISPOSITION OF 10(J) INJUNCTION CASES SINCE MARCH 1994

	Authorized	Less pndg & w/d	Win	Loss	Settled/Adj	Success Rate	Win Rate
FY 94 MAR-OCT	65	58	23	10	25	83%	70%
FY 95	104	98	39	9	50	91%	81%
FY 96	54	52	20	6	26	88%	77%
FY 97	14	6	2	1	3	83%	67%
Total	237	214	84	26	104	88%	76%

## Attachment D

SELECTED CASES ISSUED DURING CHAIRMAN GOULD'S TENURE
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Representation Cases and Organizational Activities

In Sunrise Rehabilitation Hospital, 320 NLRB 212 (December 19, 1995), the Board held that monetary payments, that are offered to employees by unions or employers, as a reward for coming to a Board election, and that exceed reimbursement for actual transportation expenses, amount to a benefit "that reasonably tends to influence the election outcome." Accordingly, the Board overruled established precedent.<sup>1</sup> It noted that the standard for whether the offer of pay or monetary benefits is objective and not subjective, i.e., "... whether the challenged conduct has a reasonable tendency to influence the election outcome." It further stated that it takes into account, "... such factors as the size of the benefit in relation to its stated legitimate purpose, the number of employees receiving it, how the employees would reasonably construe the purpose given the context of the offer, and its timing."

On the other hand, in Good Shepherd Home, 321 NLRB No. 56 (May 31, 1996), the Board found that a good faith payment designed to reimburse for transportation expenses is not objectionable. Said the majority:<sup>2</sup> "As long as the reimbursement is clearly related only to actual travel expenses, and the party has made a good faith effort to estimate those expenses, we will conclude that the party has not engaged in objectionable conduct."

In Kalin Construction Company, Inc., 321 NLRB No. 94 (July 8, 1996), the Board adopted a new rule, similar to the anti-captive audience approach endorsed four decades ago prohibiting eleventh-hour captive audience speeches in Peerless Plywood<sup>3</sup> by prohibiting other forms of last minute campaign tactics. In this case employees could only gain access to the voting area by entering through an area where, contrary to past practice, the company handed them their pay envelopes. Here each employee received two checks for the pay period whereas in the past one paycheck per pay period had been issued. One was for the amount the employer claimed the employees would receive under union representation. The other was for the amount the employer claimed would be sent to the union.

In Kalin the Board concluded that because last minute campaign speeches and electioneering and changes in the paycheck process have an unsettling impact on employees and disturbed the laboratory conditions which are a prerequisite for a fair election, a change in the paycheck, paycheck distribution, the location or method of the paycheck distribution would be a basis for setting the election aside. It noted that if a change in the paycheck process was

1 Young Men's Christian Association, 286 NLRB 1052 (1987).

2 Member Cohen dissented in this case as well as Sunrise Rehabilitation.

3 107 NLRB 427 (1953).

motivated by a "legitimate business reason unrelated to the election" the new rule would not be violated. The Board sounded a theme that is similar to much that they have done elsewhere, i.e., an additional virtue of this approach was that it was both understandable and predictable and, therefore, would be less likely to give rise to "... extensive litigation, delay, and rulings that are difficult to reconcile."

Another important issue involving organizational tactics arose in Novotel New York, 321 NLRB No. 93 (July 8, 1996), where a union commenced an organizational drive among hotel workers in the midst of complaints about alleged irregularities involving the payment of overtime wages to the workers. A suit alleging violations of the Fair Labor Standards Act of 1938 was filed in Federal District Court by the union, which was represented by outside counsel. Consent forms were signed and filed. The issue presented was whether the union's litigation was a "benefit" which interfered with the conduct of the election.

In Novotel the Board noted that, historically, unions had undertaken a wide variety of actions and tactics to protect and advance the rights of workers. Assessing a wide variety of subjects with which unions have been concerned, it observed that unions have used training programs, litigation, and the advocacy and monitoring of legislation to advance their goals.

The Board noted the freedom of association cases in which the United States Supreme Court held that First Amendment protection applies to advocacy which sometimes takes place in the context of litigation. It held that constitutional and statutory precedent provided protection for both members and non-members in an organizational campaign and that protection was not removed "... the moment the union took the next logical step and sought financially or otherwise to assist non-members in gaining access to the Courts for vindication of their lawful rights." The major employer argument in Novotel was that, notwithstanding the protection afforded employees, the result of litigation by the union was an objectionable grant of benefit which would warrant setting the election aside. Said the Board:

[W]e would be standing the statute on its head if we were to set the election aside on the ground that the legal services [provided by the union to] ... employees were a 'financial benefit to which they would otherwise not be entitled' ... . Because the Act protects the Petitioner's conduct, we conclude that the legal services it provided Novotel employees were a benefit to which they were entitled under national labor policy."<sup>4</sup>

The Board noted the employees' lack of familiarity with the legal process and remedies, and their lack of financial resources. It observed that resorting to the judicial process might well have been "fruitless" without union assistance. Said the Board: "The Petitioner here did precisely what the Act intended labor organizations to do: it aided employees engaged in concerted activity."

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<sup>4</sup> Novotel New York, 321 NLRB No. 93 at page 13.

### Employees and Community of Interest

In PECO Energy Company, 322 NLRB No. 197 (February 14, 1997), the Board held that the general rule in favor of system wide units of public utilities does not operate as an absolute prohibition of smaller units. In this case, the Board stressed that PECO through its own reorganization had identified the power generation group as a well-defined administrative segment of the organization that could justify a smaller than system-wide unit. The Board found the same to be true of the nuclear generation group.

In Speedrack Products Group Limited, 320 NLRB 627 (December 29, 1995), the employer had an agreement with the Alabama Department of Corrections to employ prison inmates who would participate in a community based work release program that allows "free world" employment in a regular job just before the prisoner completes his sentence and is released on parole. The majority found that such workers could not be included in the same unit with so-called "free world" employees. Chairman Gould wrote a concurring and dissenting opinion. The Chairman concluded that any policy, such as that utilized by the Department of Corrections, which prohibits employees from joining unions is preempted inasmuch as state laws seek to prohibit that which federal law explicitly protects. Accordingly, he found no basis for excluding such employees from a bargaining unit and held that challenges to their ballots cast at a representational election should be overruled.

The supervisory status of charge nurses employed in hospitals and nursing homes has spawned considerable litigation and, indeed, has been the subject of controversy at the Board for years.<sup>5</sup> In two lead cases, on the basis of the evidence presented in each case, the Board found that disputed charge nurses were not statutory supervisors within the meaning of the Act. In Providence Hospital, 320 NLRB 717 (January 3, 1996), the Board stated that the record evidence did not establish that charge nurses' assignments of registered nurses was anything more than a routine clerical task and that their direction of employees did not require the use of independent judgment within the meaning of Section 2(11). The Board noted that while the charge nurses exercised considerable judgment in assessing patients' conditions and treatment, this was a part of their professional judgment shared by all staff registered nurses. Similarly, in Ten Broeck Commons, 320 NLRB 806 (February 2, 1996), the Board held that licensed practical nurses serving as charge nurses in a nursing home were not statutory supervisors. Again, in connection with assignment and direction, the question was whether the direction required the use of independent judgment or involved directions which were merely routine.

### Procedures in Representation Cases

In Bennett Industries Inc., 313 NLRB 1363 (June 3, 1994), a unanimous Board held that where an employer did not take a position about an issue in dispute in a representation hearing, the Hearing Officer properly refused to allow the employer to introduce evidence as to that issue

<sup>5</sup> See NLRB v. Health Care & Retirement Corp., 114 S.Ct. 1778 (1994); Northcrest Nursing Home, 313 NLRB 491 (1993); and cases cited therein.

and, further, that it would be inappropriate to permit relitigation of the same issue to the challenged ballot process. Said the Board:

[I]n order to effectuate the purposes of the Act through expeditiously providing for a representation election, the Board should seek to narrow the issues and limit its investigation to areas in dispute.

In another early decision, North Macon Health Care Facility, 315 NLRB 359 (October 26, 1994), the Board held that the full names of employees and not merely their initials must be provided with the so-called Excelsior list of names and addresses provided for employees within seven days of the Regional Director's order of election. The Board came to this conclusion because of the need to provide the electorate with a better informed and reasonable choice from both the union and the employer.

And in Angelica Healthcare Services Group, Inc., 315 NLRB 1320 (January 18, 1995), a unanimous Board held that a hearing in some form is required prior to the time that the election takes place. From a policy perspective, the Chairman's view is that employees should have ballots in most instances before a hearing so that representation matters may be resolved expeditiously and so that the electorate does not lose faith in the prompt delivery of the protections provided by the Act. But under the statute, a "hearing" is required -- although it was not addressed in Angelica precisely how one would define a hearing.

The Board again considered the proper scope of a representation hearing in Heartshare Human Services, 320 NLRB 1 (December 13, 1995). There, the Board denied review of a Regional Director's refusal to allow the employer to relitigate the appropriateness of a single facility unit, where that same issue was litigated at length only about one month earlier in another proceeding involving a different facility of the employer's. In both proceedings, the employer asserted that only a multi-facility, employer-wide unit was appropriate. The Board agreed with the Regional Director that, in these circumstances, the employer properly was limited to introducing evidence of changed circumstances, and could not introduce evidence that was or could have been produced at the prior hearing.

More recently, in Mariah, Inc., 322 NLRB No. 114 (November 25, 1996), the Board emphasized that the role of a hearing officer in a representation proceeding is to ensure a record that is concise as well as complete. In Mariah, the Board found that the hearing officer correctly exercised her authority to exclude irrelevant evidence and to limit a party to an offer of proof.

Another closely related issue is the challenged ballot procedure which the Board has recently discussed with its Advisory Panel. Traditionally, the Board has followed a practice of resolving disputes about voters through the challenged ballot procedure after the vote is taken where no more than ten percent of employees are affected. This is preferable to having extensive litigation which would delay the ballot. In early 1994, shortly after its confirmation by the Senate, the Board proceeded to a ballot where 33 percent of the voters in one unit, and 22 percent of the voters in a second unit, were in dispute. See North County Humane Society, 21-RC-19324,

review denied April 14, 1994. The theory behind this approach is that where the numbers of employees in dispute is manageable, it may be unnecessary to resolve such disputes even after the ballot is taken because the numbers may not affect the outcome of the election. This proved the case in one of its 1994 disputes as well as in Columbia Hospital for Women Medical Center, Inc., Case 5-RC-14033, at a time when the anticipated ratio of challenged ballots was 37.5 percent. Similarly in Baltimore Gas & Electric Company, Case 5-RC-14351, the Board went on to an election when 21 percent of the ballots were in dispute. Since the challenged number was 700, the election would have been delayed some period of time -- and again the numbers in dispute were not determinative.

In The Glass Depot, Inc., 318 NLRB 766 (August 25, 1995), a plurality of two members held that whenever a "representative complement" had voted, that acts of nature, such as snowstorms, would not result in a re-run election. Chairman Gould concurred with the result but stated that, as with political elections, the ballot should not be upset because a snowstorm prevented some employees from casting their ballots. An act of nature or a *force majeure* should be immaterial. Again, the Chairman's concern here and elsewhere is with the uncertainty arising out of the question whether a "representative complement" has voted in every instance of *force majeure* and the litigation and uncertainty that arises out of such imprecision.

The theme of Chairman Gould's concurring opinion -- and one which is consistent with the handling of representation cases and rulemaking proposals, settlement judge procedures and numerous positions outlined in the Jurisdiction, Voluntary Resolution, and Bargaining Relationships, as well as Employee Participation sections outlined below -- is to promote certainty and avoid wasteful litigation.

In Bishop Mugavero Center, 322 NLRB No. 32 (September 27, 1996), a majority upheld the Regional Director's recommendation that a ballot marked with an "X" in the "No" and a diagonal line in the "Yes" box be considered void and therefore not counted. The majority relied upon "well-established Board precedent" which says that where a voter marks both boxes on a ballot and the voter's intent cannot be ascertained from other markings on the ballot, the ballot is void. Chairman Gould dissented on the ground that the "No" box had a completed mark and that therefore the voter intended to register a "No" vote rather than a "meaningless gesture of indecision."

#### Postal Ballots

In Shepard Convention Services, Inc., 314 NLRB 689 (August 3, 1994), enf. denied 85 F.3d 671, 152 LRRM 2471 (D.C. Cir. 1996), the Board held that a mail ballot should be provided where it was unlikely that on-call employees would be able to exercise the franchise at the plant facility because of the irregular nature of their work and the fact that they have other employment. The Board held that the Regional Director's failure to provide for a postal ballot was an abuse of discretion.

Again, in early 1994, the Board granted review of a Regional Director's decision which held that postal ballots could not be provided where strikers did not cross the picket line and,



indeed, were working out of state -- the Regional Director's decision was based upon the NLRB's Casehandling Manual which does not provide for postal ballots under these circumstances. Lone Star Northwest, Case 36 RD-1434, review granted April 17, 1994.<sup>6</sup> Contrary to the Court of Appeals decision in Shepard<sup>7</sup> the Manual is not binding upon the Board -- and it states that it does not constitute a decision of the Board or Board policy. On the other hand, in Willamette Industries, Inc., 322 NLRB No. 151 (January 10, 1997), the Board did not order a mail ballot because "[T]he sole factor cited in favor of a mail ballot, that the employer's facility is approximately 80 miles from the Board's office, alone is insufficient to justify departure from the normal manual election procedure in light of the fact that the unit employees work at a single site." Chairman Gould wrote a concurring opinion because there was nothing in the record from which one could conclude that the ordering of a postal ballot would constitute an efficient use of Board resources. He said: "Presented with the record establishing such a burden, I would conclude that the Acting Regional Director did not abuse his discretion in ordering a postal ballot. But those facts are not presented in this record."

#### Jurisdiction

In Management Training Corporation, 317 NLRB 131 (July 28, 1995), the Board reversed the so-called ResCare doctrine<sup>8</sup> and established a new test for assertion of jurisdiction over employers who operate pursuant to contracts with government entities. Under the ResCare test, the Board, when confronted with a private sector employer contracting with the public sector which is excluded from the National Labor Relations Act, had examined the control over essential terms and conditions of employment retained by both the private sector employer and government to determine whether the private sector employer was "capable of engaging in meaningful collective bargaining."

In Management Training, the Board found that private employers, whether government contractors or not, are within its jurisdiction. (The statute excludes public employers.) The Board thus rejected the ResCare approach on the ground that it was inconsistent with the statute and that it was both "unworkable and unrealistic" stating that the question of whether there were sufficient matters over which union and employers could bargain was "better left to the parties at the bargaining table and, ultimately, to the employee voters in each case." It noted that the previous doctrine was an oversimplification "of the bargaining process," because it proceeded upon the assumption that economic terms are the most important aspects of the employment relationship even though other matters are negotiated at the bargaining table. Said the Board:

In times of downsizing, recession, low profits, or when economic growth is uncertain or doubtful, economic gains at the bargaining table are minimal at best. Here the focus of negotiations may be

<sup>6</sup> Subsequently, the Employer filed a motion for reconsideration in which it agreed to stipulate to a mail ballot for the eligible strikers. On that basis, the Board remanded the case to the Regional Director to conduct the election.

<sup>7</sup> 85 F.3d 671 (DC Cir. 1996)

<sup>8</sup> ResCare, Inc., 280 NLRB 670 (1986).

upon such matters as job security, job classifications, employer flexibility in assignments, employee involvement or participation and the like. Consequently, in those circumstances, it may be that the parties' primary interest is in the noneconomic area. It was shortsighted, therefore, for the Board to declare that bargaining is meaningless unless it includes the entire range of economic issues.

Similarly, the Board noted that a wide variety of issues such as arbitration, no strike clauses, management rights provisions and issues relating to transfers are often contested between the parties and that to treat them as "inconsequential," as the current Board's predecessors had, "demeans the very bargaining process we are entrusted to protect."

Equally important, the Board noted that such an approach was inconsistent with the so-called "freedom of contract" line of authority of the Supreme Court<sup>9</sup> which has obliged the Board not to regulate, directly or indirectly, the substantive terms that are involved in the collective bargaining process. This is a matter for the parties themselves and not the Board.

In Federal Express Corporation, 317 NLRB 1155 (July 17, 1995), a majority of the Board held that where a party alleges that an employer is excluded from the Board's jurisdiction and covered by the Railway Labor Act, the Board would "continue its practice of referring cases of arguable RLA jurisdiction to the National Mediation Board for an advisory opinion." Chairman Gould dissented and stated that, in his view, the NLRB has an obligation to determine whether a party is within its jurisdiction, and noted that "there is no other instance in which the Board effectively asks another agency to decide the scope of the Board's own jurisdiction." The Chairman also noted that the Board automatically has deferred to decisions of the NMB and thus abdicated its responsibility to another agency to determine the existence of its own jurisdiction. He said that this approach possessed no logical basis and was inconsistent with the exercise of primary jurisdiction articulated by the Court in the landmark case of San Diego Building Trades v. Garmon, 359 U.S. 236, 245 (1959).

In United Parcel Service, Inc., 318 NLRB 778 (August 25, 1995), enfd. 92 F.3d 1221, 153 LRRM 2001 (D.C. Cir. 1996), the Board came to the exact opposite conclusion, grounding its decision to retain jurisdiction on the fact that it historically had exercised jurisdiction over the employer. As the employer in this case noted subsequent to the Board's decision, it made no sense for the Board to abdicate its responsibility in one situation and then, apparently on some basis of a labor law doctrine of hot pursuit, exercise jurisdiction in the other.

#### Union Access Cases

The Board, in series of 3-2 decisions, has followed the Supreme Court's 1992 decision in Lechmere v. NLRB.<sup>10</sup> The Supreme Court's Lechmere decision requires the Board not to make

<sup>9</sup> NLRB v. American Insurance, 343 U.S. 395 (1952); NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960), and American Ship Building v. NLRB, 380 U.S. 300 (1965).

<sup>10</sup> 112 S. Ct. 841 (1992).

an employer's exclusion of nonemployee organizers where the union is trying to reach the public an unfair labor practice. (In Lechmere they were trying to reach the employees) See Makro Inc. and Renaissance Properties Co., d/b/a Loehmann's Plaza, 316 NLRB 109 (January 25, 1995); Leslie Homes Inc., 316 NLRB 123 (January 25, 1995). Chairman Gould's concurring opinion stressed his disagreement with Lechmere and his obligation to adhere to it as the law of the land and to follow its implications nonetheless.

In a series of decisions, however, the Board adhered to Lechmere's retention of the doctrine that discrimination in terms of providing access between different groups serves as a basis for invalidating the employer rule. See, for instance, Riesbeck Food Markets, Inc., 315 NLRB 940 (December 16, 1994); petition for review granted and cross-petitions for enforcement denied, 91 F.3d 132 (4th Cir. 1996); Dow Jones and Company, Inc., 318 NLRB 574 (August 25, 1995). See also Cleveland Real Estate Partners, 316 NLRB 158 (Jan. 27, 1995), enf. denied 95 F.3d 457, 153 LRRM 2338 (6th Cir. 1996), where a Board panel of Members Stephens, Browning and Cohen found that the employer, a privately-owned shopping center, violated 8(a)(1) by preventing non-employee union handbillers from distributing handbills on its property urging customers not to shop at nonunion stores, because the employer knew and permitted other political and charitable groups to solicit and distribute on its property.

#### Employee Speech

In Caterpillar, Inc., 321 NLRB No. 163 (August 27, 1996), a majority of the Board held, in affirming the Administrative Law Judge, that the employer violated Section 8(a)(1) by prohibiting its employees from displaying various union slogans including a statement, "Permanently Replace Fites" and violated Section 8(a)(3) by enforcing the rule. The Board stated that it agreed with the Administrative Law Judge that the slogan was a response to the employer's stated policy of using permanent replacements rather than an attempt to cause the removal of Fites as the chief executive officer. But, even if they were attempting to remove the chief executive officer, the Board's view was that the conduct was protected.

Chairman Gould concurred in a separate opinion expressing his dissatisfaction with Board and court precedent with respect to employee activity which seeks to influence management policy and its protected status. He said:

[T]he level of managerial policy or hierarchy protested by the union or employees should have little if anything to do with whether such employee activity is protected. Quite obviously, the level at which managerial representatives are involved in employment conditions will vary from company to company. While I am of the view that concerted activity for the purpose of influencing management policy, which is unrelated to employment conditions, is not protected under the Act, the fact of the matter is that the presence or absence of a particular corporate hierarchical structure or internal organization does not provide the appropriate answer to

the question of whether employee activity is protected under Section 7 of the Act.

#### Recognition Disputes

In Caterair International, 322 NLRB No. 11 (August 27, 1996), the Board, subsequent to a remand from the United States Court of Appeals for the District of Columbia,<sup>11</sup> reaffirmed its long-standing policy that an affirmative bargaining order is the standard appropriate remedy for the restoration of the status quo after an employer's unlawful withdrawal of recognition from an incumbent union and a subsequent refusal to bargain. The Board held that such an affirmative bargaining order was necessary in order to protect free choice of representation and to avoid a referendum on collective bargaining in the "... immediate wake of ... [the] employer's unlawful refusal to bargain and subsequent, often protracted, litigation resulting from this misconduct."

In Lee Lumber and Building Material Corp., 322 NLRB No. 14 (September 6, 1996), the Board held that some unfair labor practices taint evidence of union's subsequent loss of majority support. Said the Board in Lee Lumber: "[I]n cases involving unfair labor practices other than a general refusal to recognize and bargain, there must be specific proof of a causal relationship between the unfair labor practice and the ensuing events indicating a loss of support. In cases involving an 8(a)(5) refusal to recognize and bargain with an incumbent union, however, the causal relationship between unlawful conduct and subsequent loss of majority support may be presumed."

#### The Promotion of Voluntary Resolution of Disputes and Diminution of Litigation

In Smith's Food & Drug Centers, Inc., 320 NLRB No. 67 (February 13, 1996), the Board held that an employer's voluntary recognition of one union, the Intervenor, would bar a subsequent petition filed by a union which was not supported by a 30 percent showing of interest at the time of the recognition. A majority of the Board, (Members Browning and Cohen) held that the union may file a valid petition for representation where it has obtained, prior to recognition of the other union, a sufficient number of cards to support the petition, i.e., 30 percent. Chairman Gould concurred with the result, but stated that the Board should refrain whenever possible from involving itself in representation disputes because, "[T]he establishment of a successful collective bargaining relationship is best accomplished by the parties themselves -- the employer, the union, and the unit employees." The Chairman is of the view that clarity, as well as the expeditious resolution of such disputes, is best facilitated by permitting the parties to undertake bargaining without fear of a later challenge by another union. If, of course, the relationship is less than arm's-length and involves unlawful company assistance, the excluded union or disgruntled employees may avail themselves of the Board's unfair labor practice proceedings under Section 8(a)(2). He also expressed the view that the Board was undermining the stability of voluntary recognition and would generate reluctance by employers to do so -- especially when the Board facilitates that objective in unfair labor practice litigation where a union files a Section 8(a)(2) charge based upon such voluntary recognition.

<sup>11</sup> 22 F.3d 1114, cert. denied 115 S.Ct. 575 (1994).

In Douglas-Randall, Inc., 320 NLRB 431 (December 22, 1995), a majority of the Board agreed with the theme that Chairman Gould articulated in Smith's Food & Drug Centers and sustained the dismissal of a decertification petition when a settlement agreement subsequently entered into provided a bargaining provision with the incumbent union. Thus, it facilitated the promotion of both settlements and the collective bargaining process -- the objective that Chairman Gould sought in Smith's Food & Drug Centers.

#### Bargaining Relationships

In Goodyear Tire & Rubber Company, 322 NLRB No. 183 (January 31, 1997), a majority of the Board, although finding the superseniority clause lawful, adhered to the Dairylea<sup>12</sup> doctrine which declares presumptively unlawful employment status superseniority for union stewards. In a separate concurring opinion, Chairman Gould expressed the view that the rationale of Dairylea should not extend to elected officials. He said, "The prospective steward, . . . is beholden to the employees for their selection, [not the union hierarchy] and thus is encouraged to represent the employees in a manner acceptable to them."

In James Luterbach Construction Co., Inc., 315 NLRB 976 (1994), the Board considered the question of whether the Retail Associates rule applies to the construction industry and Section 8(f) agreements which do not require majority status under the Deklewa decision.<sup>13</sup> Chairman Gould agreed with the majority, which included Members Stephens and Cohen, that Retail Associates applies here, and he agreed with the view that in an 8(f) context an affirmative showing is required to bind an individual employer to a multiemployer successor contract. However, the Chairman parted company with them in their requirement that a "distinct affirmative action" to "recommit" to the union was required. He said that the following test comported with the expectations of the parties:

To strike a proper balance between an individual employer's Deklewa rights and the promotion of stability of multiemployer bargaining in the construction industry, I would require an affirmative expression from the association to the union at the beginning of negotiations specifying the individual employers on whose behalf it was negotiating. From that point forward, I would find that the union is entitled to rely on the association's representation, and the individual employer is bound by the results of the multiemployer negotiations.

In Canteen Company, 317 NLRB 1052 (June 30, 1995), enforcement granted, 103 F.3d 1355 (7th Cir. 1997), Chairman Gould joined Members Browning and Truesdale to form a majority, but fashioned a separate concurring opinion positing that, in a successorship situation, an employer may unilaterally set wage rates that were different from those paid by its predecessor

12 219 NLRB 656 (1975), *enfd.* 531 F.2d 1162 (2d Cir. 1976).

13 282 NLRB 1375 (1987).

under the collective bargaining agreement. The majority agreed that the wage rates were imposed unlawfully without first consulting with the union pursuant to the "perfectly clear" exception in NLRB v. Burns Security Services.<sup>14</sup> In his concurring opinion, the Chairman expressed the view that the Board's decision in Spruce Up Corp.<sup>15</sup> established an "[u]nduly restrictive reading of the Supreme Court's definition of circumstances in which a successor employer must bargain about initial terms and conditions of employment."

Spruce Up requires that the perfectly clear obligation to notify and bargain with the union relates only to situations where the employer has misled employees about the wages, hours, or conditions of employment or where the employer has failed to clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment. In the Chairman's view, Spruce Up grafted an additional requirement not contained in Burns itself. Under Burns the only requirement is that the new employer plans to retain all the employees in the unit. The Chairman pointed out that the employer's obligation was not to adhere to the predecessor agreement, but rather to simply negotiate about changes. In Canteen he said:

To eliminate instances [from the duty to negotiate] . . . where employers express an intent to provide changed employment conditions from the obligation to negotiate under the "perfectly clear" standard announced in Burns would both render the holding on this point meaningless and also disregard the careful balance between competing interests articulated by the Court in both Burns and Fall River Dyeing.<sup>16</sup>

Chairman Gould noted that where an employer announced his intent to adhere to the predecessor's agreement -- the one situation where the Board seemed to impose an obligation to negotiate -- there was little or nothing to bargain about. And finally, the Chairman noted that any kind of disincentive to hire the predecessor's employees -- the result that would flow from his position according to his critics -- already existed under established federal labor law.

In Lexington Fire Protection Group, Inc., 318 NLRB 347 (August 15, 1995), a 3-2 majority of the Board held that, where past practice supported the procedure employed, an employer could withdraw from a multiemployer association on the basis of a list which had been presented to the union at the commencement of multiemployer negotiations.

The union -- as well as the two dissenting members of the Board -- took the position that the list was a lengthy one and cumbersome and that therefore the union did not have adequate notice of withdrawal. But they noted that this was the practice historically followed and, in a separate concurrence, Chairman Gould pursued the theme that he had set forth in both Randall and Smith's Food & Drug Centers and said the following:

<sup>14</sup> 406 U.S. 292, 294-295 (1972).

<sup>15</sup> 209 NLRB 194 (1974), *enfd.* on other grounds 529 F.2d 516 (4th Cir. 1975).

<sup>16</sup> 482 U.S. 27 (1987).

The fact that it may not be the most efficient or best in the view of this Agency or other third parties is irrelevant. It is the process devised by the parties, which they have bargained for, that supports our decision today and not our own view about what is best for them.

In Chel LaCort, 315 NLRB 1036 (December 16, 1994), the Board reconsidered its Retail Associates rule which precludes withdrawal by an employer from an established multiemployer bargaining unit "[e]xcept upon adequate written notice given prior to the date set by the contract for modification, or to the agreed-upon date to begin the multiemployer negotiations."

The United States has never engaged in multiemployer bargaining to an extent comparable to Europe -- and the process has declined in this country in recent years. But the Board found no reason to modify the Retail Associates rule and stated that "unusual circumstances" did not apply to situations where the multiemployer association failed, either deliberately or otherwise, to inform its employer-members of the start of the negotiations. The Board held that the imposition of an "unusual circumstances" exception where the multiemployer association failed to notify its members would "[e]ffectively be imposing a notice requirement on the multiemployer association and inserting ourselves into the association/member relationship unnecessarily and with uncertain consequences." This adherence to the parties' own autonomous structures and procedures is, in Chairman Gould's view, consistent with the approach undertaken in Lexington Fire Protection.

#### Failure to Negotiate

In Daily News of Los Angeles v. NLRB, 315 NLRB 1236 (December 30, 1994), enforcement granted and cert. denied U.S. Sup. Ct, No 96-576 (January 21, 1997), the Board held that a unilateral change resulting in discontinuance of merit raises violated the Act. They held that the employer could not unilaterally withhold a wage increase from employees where it constituted a change in terms of conditions of employment. The remedy, i.e., backpay which would reflect the merit increases that the employees would have been awarded, as well as the violations were affirmed by the Court of Appeals for the District of Columbia.

In McClatchy Newspapers, Inc., 321 NLRB No. 174 (August 27, 1996), a Board majority held that an employer could not unilaterally implement merit pay proposals even when bargaining had taken place to the point of impasse. The Board said that if the employer was given carte blanche authority over wage increases without regard to time, standards, criteria it would be "... so *inherently* destructive of the fundamental principles of collective bargaining that it could not be sanctioned as part of a doctrine created to break impasse and restore active collective bargaining." They went on to say: "[W]e are preserving an employer's right to bargain to impasse over proposals to retain management discretion over merit pay while, at the same time, maintaining the Guild's opportunity to negotiate terms and conditions of employment."

### Employee Participation

In 1995, the Board issued six decisions which address the issue of under what circumstances employee participation committees violate a section of the National Labor Relations Act that prohibits employer-dominated labor organizations. In deciding these cases the Board relied, in part, on its 1992 Electromation decision, which held that an employee participation committee is illegal if it is a "labor organization" under the Act and if the employer dominates or interferes with the formation or administration of the committee, or contributes to it financial or other assistance.

In Keeler Brass Automotive Group, 317 NLRB 1110 (July 14, 1995), the Board found that the Keeler Brass Grievance Committee is a "labor organization" as defined by Section 2(5) of the Act, and that the respondent violated Section 8(a)(2) by dominating the reformation of the committee and interfering with its administration. Chairman Gould, in a concurring opinion, agreed with the view expressed in the Board's decisions in the 1970s that such entities were not labor organizations within the meaning of the Act and that therefore Section 8(a)(2) was not implicated where decisionmaking responsibilities had been delegated to the council, committee or entity in question. The Chairman expressed agreement with the position taken by the U.S. Court of Appeals for the Seventh Circuit in Chicago Rawhide Mfg. Co. v. NLRB<sup>17</sup> that the employee group found lawful there need not originate with the employees but could be proposed by the employer. He said a number of considerations were important. He spoke approvingly of decisions which are

[C]onsistent with the movement toward cooperation and democracy in the workplace which I have long supported. This movement is a major advance in labor relations because, in its best form, it attempts nothing less than to transform the relationship between employer and employees from one of adversaries locked in unalterable opposition to one of partners with different but mutual interests who can cooperate with one another. Such a transformation is necessary for the achievement of true democracy in the workplace. However, it does pose a potential conflict with the National Labor Relations Act, enacted in 1935 at a time when the adversarial struggle between management and labor was at its height.

The Chairman also said that he thought that the following factors were critical in determining lawful employee-employer programs:

First, there is the question of how the employee group came into being. The court in Chicago Rawhide stressed that the idea for an employee group began with the employees. Does this mean that

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17 221 F.2d 165 (7th Cir. 1995).



any employee group which does not originate with employees is subject to unlawful employer domination? I think not. Much of the initiative for cooperative efforts in the workplace has come from employers, particularly in the nonunion sector. I do not think these efforts are unlawful simply because the employer initiated them. The focus should, instead, be on whether the organization allows for independent employee action and choice. If, for example, the employer did nothing more than tell employees that it wanted their participation, I would find no domination provided employees controlled the structure and function of the committee and their participation was voluntary.

Second, the circumstances surrounding the creation of an employee committee are material to a determination of whether there is unlawful domination of the committee. If the employer created an employee participation organization in response to a union organizing campaign, I would draw the inference that the organization was designed to thwart employee independence and free choice.

The following five decisions issued on December 18, 1995:

In Vons Grocery Company, 320 NLRB 53, the Board, upholding the administrative law judge, found that a California company's quality circle group (QCG) was not a labor organization and did not violate the Act. The Board stated: "For nearly three years, the QCG existed lawful in the Respondent's unionized work force as a group devoted to operational matters. Then, on one and only one occasion, the QCG developed proposals on matters involving conditions of work such as a dress code and an accident point policy." Concluding that this one incident did not "transform a lawful employee participation group into a statutory labor organization" and did not "pose[] the dangers of employer domination of labor organizations that Section 8(a)(2) was designed to prevent," the Board determined that the QCG did not have "a pattern or practice of dealing with the Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work."

In Webcor Packaging, Inc., 319 NLRB 1203, the Board affirmed the administrative law judge's finding that a Michigan-based company's Plant Council was an illegal labor organization because it existed for the purpose, at least in part, of making proposals regarding proposed changes in working conditions which management would then consider and either accept or reject. The Board further agreed that Webcor unlawfully dominated the formation and administration of the Plant Council because Webcor determined the Council's function, defined the subject matters to be addressed, and chose employee and management representatives to sit on the Council. The Board stated that "the impetus behind the formation of the Plant Council emanated from the Respondent" and that "the Plant Council had no effective existence independent of the Respondent's active involvement and approval."

In Stoody Co., 320 NLRB 18, the Board reversed the administrative law judge and concluded that an employee "Handbook Committee" created and financially supported by the company, a Kentucky manufacturer, did not engage in a pattern of "dealing with" the company on employment conditions. Accordingly, the committee was not a labor organization and the employer did not violate the Act. The Board pointed out: "The Committee had the brief lifespan of 1 hour. Clearly, a 1-hour meeting in itself shows no pattern or practice of any kind. Further, the Board believes, contrary to the judge, that the evidence supports the inference that if additional meetings of the committee had been held, the meetings would not have resulted in proposals to management on working conditions." The Board held further:

Drawing the line between a lawful employee participation program and a statutory labor organization may not be a simple matter because it may be difficult to separate such issues as operations and efficiency from those concerning the subjects listed in the statutory definition of labor organizations. If parties are burdened with the prospect that any deviation, however temporary, isolated, or unintended, from the discussion of a certain subject, will change a lawful employee participation committee into an unlawfully dominated labor organization, they may reasonably be reluctant to engage in employee participation programs. We support an interpretation of the Act which would not discourage such programs.

In Dillon Stores, 319 NLRB 1245, the Board, agreeing with the administrative law judge, found that the company's Associates' Committees, comprised of hourly employees elected by their co-workers who met quarterly with management to discuss a variety of work-related issues, was a "labor organization under the Act and that the company violated the Act by dominating and interfering with and contributing support to committees at two of its retail stores in Kansas. The Board concurred with the judge who stated that the committees' functions "involved the receipt of proposals and grievances, seemingly on every possible aspect of the employment relationship; and that the communications involved, 'by word or by deed,' acceptance or rejection of those grievances and proposals. This is precisely the bilateral mechanism held to have constituted a labor organization in Electromation."

In Reno Hilton, 319 NLRB 1154, the Board found, as the administrative law judge did, that the Reno Hilton's quality action teams (QATs) were labor organizations and that the teams made recommendations on numerous work-related matters including safety hazards, staffing levels, work times, paid sick days and the wage structure. The Board acknowledged that although most of the team meetings did not involve wages, hours, or other terms and conditions of employment, "that fact alone does not mean that the QATs are not labor organizations," noting that management developed the QATs, determined their agendas, and paid employees for attending the meetings during worktime. "Although the employees volunteered for membership on the QATs and were not selected by management, it is clear that the Respondent thoroughly dominated and interfered with the formation and administration of the QATs," the Board said.

Permanent Replacements

In International Paper Co., 319 NLRB 1253 (December 18, 1995), the Board held that an employer cannot permanently replace employees who have been lawfully locked out where the work has been permanently subcontracted to a non-union firm in order to bring bargaining pressure in support of the employer's bargaining position.

Beck Dues

The Board's decisions in California Saw & Knife, 320 NLRB 224 (December 20, 1995), and Paperworkers Local 1033 (Weyerhaeuser Paper Co.), 320 NLRB 349 (December 20, 1995), are the first cases in which it decided questions arising from the Supreme Court's ruling in Communications Workers v. Beck. In Beck, the Supreme Court held that a union was not permitted, "over the objections of dues-paying nonmember employees," to expend funds on activities not related to collective bargaining, contract administration or grievance adjustment. The court concluded that such expenditures violated the union's duty of fair representation.

In California Saw, the Board ruled, among other things, that a union must inform each nonmember employee, at the same time or before it seeks to obligate the employee to pay dues and fees under a union-security clause, that he has the legal right to remain a nonmember and the right under Beck to object to paying more than "representational" expenses. The Board held that notice could be provided through a monthly magazine available to nonmembers as well as members. The Board said:

[T]he union should inform the employee that he has the right to be or remain a nonmember and that nonmembers have the right (1) to object to paying for union activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities not germane to the union's duties as bargaining agent and to obtain a reduction in fees for such activities; (2) to be given sufficient information to enable the employee to intelligently decide whether to object; and (3) to be apprised of any internal union procedures for filing objections. If the employee chooses to object, he must be apprised of the percentage of the reduction, the basis for the calculation, and the right to challenge these figures.

The Board also held that a union is not obligated on the basis of existing precedent to calculate its dues reductions on a unit-by-unit basis. They held that a dissident cannot object to litigation expenses incurred in a bargaining unit different from the objector's bargaining unit. The Board said:

[T]hat some litigation may be of value to employees even when the lawsuit at issue arises out of the contract or circumstances of employees in a different unit.

In Weyerhaeuser, supra, the Board held that a union must inform all employees in the bargaining unit, not just nonmembers, of the rights of nonmembers under Beck if they were not informed of those rights prior to assuming obligations under a union-security clause. In addition, the Board held that a union also must inform all such employees that they have a right under the Supreme Court's ruling in NLRB v. General Motors, to become nonmembers of the union in order to be eligible to exercise Beck rights.

Thus, for the first time, these decisions of the Board impose an affirmative duty on unions to disclose the precise obligations that workers have under union security agreements and the fact that "membership does not mean full membership to which employees may be contractually obligated." Therefore, the Board applied the principles set forth in California Saw and Weyerhaeuser and found violations of the Act based on union failures to provide employees notice of the Beck rights. See I.U.E. Local 444 (Paramax Systems), 322 NLRB No. 1 (August 27, 1996); Production Workers Local 707 (Mavo Leasing), 322 NLRB No. 9 (August 27, 1996); Laborers Local 265 (Fred A. Newman), 322 NLRB No. 47 (September 30, 1996); Carpenters Local 943 (Oklahoma Fixture), 322 NLRB No. 142 (January 10, 1997); and IATSE Local 219 (Hughes-Avicom), 322 NLRB No. 195 (February 14, 1997).

Oklahoma Fixture is noteworthy in that the Board obligated the union to provide the mandated accounting of expenditures, notwithstanding the fact the union contended it offered the objecting employee a reasonable accommodation by informing him that he could pay the equivalent of full dues to a mutually agreed-upon charity. Although the Board found Beck notice violations in the above cases, it dismissed an allegation in Paramax that the union violated Section 8(b)(1)(A) by failing to have its chargeable expenses verified by an independent auditor. And in Fred Newman, the Board found that because the union had waived an objector's obligation to pay dues, the union did not act unlawfully by not providing him Beck financial information.

#### Unlawful Union Conduct

In Laborers Union Local No. 324 Laborers International Union of North America, 318 NLRB 589 (August 25, 1995), enforcement denied, 154 LRRM 2417 (9th Cir. 1997), Chairman Gould joined the majority of Members Stephens and Cohen in upholding the administrative law judge's finding that the union violated Section 8(b)(1)(A) of the Act by adopting and maintaining an no-solicitation, no-distribution rule designed to preclude the distribution of dissident union material by threatening to have the dissident candidate for union office arrested and removed from the hiring hall and by threatening to have him arrested if he continued to disseminate such material outside the hiring hall. The Board held that this kind of conduct was a violation of the statute, notwithstanding the fact that it had not been enshrined into a formal rule, a requirement which dissenting Members Browning and Truesdale regarded as appropriate.

#### Illegal Secondary Conduct

In Painters and Allied Trades District Council No. 51 (Manganaro Corporation), 321 NLRB No. 31 (May 10, 1996), Chairman Gould and Member Browning, with Member Cohen dissenting, held that the anti-dual-shop clause sought by the union had a primary objective

and thus did not violate Section 8(b)(4)(B) of the Act. The majority agreed with the judge's finding that the clause was a primary work-preservation clause and that the clause was not unlawful on its face.

#### Remedies

In Fieldcrest Cannon, Inc., 318 NLRB 470 (1995), enfd. in part 97 F.3d 65, 153 LRRM 2617 (4th Cir. 1996), petition for rehearing denied February 10, 1997, the Board (Chairman Gould and Member Browning; Member Stephens concurring and dissenting in part) found that the respondent employer's unfair labor practices were so numerous, pervasive and outrageous that special notice and access remedies were necessary to dissipate fully the coercive effect of the violations.

In NLRB v. Unbelievable, Inc., 71 F.3d 1434, 150 LRRM 3002 (9th Cir. 1995), the Board and union sought sanctions against the respondent employer for filing a frivolous appeal from the Board's decision in the case (309 NLRB 761 (1992)). The court granted the requests and ordered the respondent employer and its original counsel, jointly and severally, to pay the Board and union attorneys fees and double costs.

In A.P.R.A. Fuel Oil Buyers Group, Inc., 320 NLRB 408 (December 21, 1995), Chairman Gould joined a Board majority which interpreted the Supreme Court's Sure-Tan decision, which had concluded in 1984 that undocumented workers are employees within the meaning of the National Labor Relations Act. The question in A.P.R.A. Fuel was whether such workers are entitled to backpay and the Board answered this question in the affirmative. The Chairman, along with Member Truesdale, rejected the view of Member Browning that the employer could be ordered to hire applicants referred by the union in the event that dismissed workers were not eligible for reinstatement. The Chairman explicitly stated that the Board does not have the authority to grant such a remedy.

The A.P.R.A. Fuel case has triggered legislative initiatives by the Congress, specifically, in the form of a bill put forward by Congressman Tom Campbell. Congressman Campbell in legislation initially offered in 1996 would substitute a fine for the backpay ordered by A.P.R.A. so as to eliminate the incentive for illegal behavior without compensating employees who are not lawfully in the United States.

In Temp-Rite Air Condition, 322 NLRB No. 134 (December 27, 1996), Chairman Gould joined with Member Higgins, over Member Browning's dissent, to hold that a deduction from backpay may be made where an employee sold the employer's property and did not reimburse the employer.

In one of the salting cases that has emerged as a result of the Supreme Court's unanimous affirmation of the Board's view that paid union organizers are employees within the meaning of the Act, Chairman Gould dissented from the holding of Members Browning and Cohen in Eldeco, Inc., 321 NLRB No. 121 (July 29, 1996), that an employee who was not capable or qualified to perform the work could nonetheless receive reinstatement and have backpay adjudicated in

compliance. Chairman Gould expressed the view that "reinstatement" and other traditional remedies are not to be awarded automatically.

Similarly, in Paper Mart, 319 NLRB 9 (September 20, 1995), Chairman Gould expressed the view that he would find unlawful discrimination in any case in which the General Counsel establishes that an employer's adverse action against an employee is based in whole or in part on anti-union animus. Chairman Gould would find that an employer's showing that the adverse action would have occurred in any event goes only to the remedy issued against the employer.

# # #

Mr. SHAYS [presiding]. Thank you, Mr. Gould. We are going to be asking questions as soon as we hear from Mr. Feinstein.

My sense is that directing the Board, that you basically get your cases, once they have gone through your operation, Mr. Feinstein, and that most of the employees would be found in your operation as opposed to the Board; is that correct?

Mr. FEINSTEIN. That is correct.

Mr. SHAYS. OK. Why don't you give us your testimony and then we will ask you both questions.

Mr. FEINSTEIN. Thank you, Mr. Chairman, for this opportunity to appear before the subcommittee to further elaborate a little on the question you just asked.

The NLRB's statutory functions are vested separately in a five-member Board and the general counsel. The general counsel has independent supervisory authority over the agency's regional offices which, together with the general counsel's headquarters division, comprise nearly 90 percent of the agency's staff.

Numerous commentators have recognized this unique gatekeeping function of the NLRB general counsel. Acting primarily through the regional directors and their regional staffs, the Office of General Counsel screens and thereby resolves thousands of nonmeritorious allegations each year.

This year, as in the past, more than 60 percent of the unfair labor practice charges have been dismissed or withdrawn for lack of merit, putting those disputes to rest for good in a relatively short period of time. Our time targets vary from about 45 days to 10 weeks in resolving those cases.

We have also achieved a settlement rate of over 96 percent in the remaining cases, and thereby have saved countless expense, both public and private dollars, in litigation costs. Last year, indeed, more than 90 percent of the charges filed with the agency were processed from beginning to end entirely in the field without any involvement by Washington.

This is indeed a record of efficiency that is now being tested as never before. Reductions in the agency's staffing have presented enormous challenges, notwithstanding the fact, as the chairman has indicated, that—

Mr. SHAYS. Excuse me. We are going to let you continue. We have a vote, and we will just go to it in a little bit, but why don't you finish?

Mr. FEINSTEIN. As I say, the staffing reductions have presented enormous challenges, and notwithstanding the fact that we have been taking numerous steps to stay on top of rising backlogs.

Now, when I speak of backlogs, I am speaking of field backlogs, investigation and trial backlogs, the backlogs that measure the time a case takes before it receives attention by the Board in Washington. Only about 5 percent of our cases ever make it to Board consideration, and when I am referring to backlogs, I am referring to that part of our process.

Our present staffing level of about 1,950 is the NLRB's lowest since 1962, notwithstanding the fact that our caseload in 1962 was—that our caseload now is more than 60 percent greater than it was at that time, when we had a comparable staffing level. Of

course, the NLRB is required, the general counsel's office is required to process all cases filed with the agency.

In addition to this growing number of cases per staff, the nature of the cases themselves has been growing in complexity, further adding to our workload burden. Because of all of this, I spend most of my time working with the excellent agency management and others within the agency to try to figure out how best to stretch our increasingly limited resources.

We very much understand the importance of GPRA and the development of our strategic plan in meeting this challenge. Indeed, a number of the innovations that we have implemented over the past few years, I believe, have been very much informed by and consistent with the principles of GPRA, and I want to just briefly mention some of those initiatives that we have undertaken.

We have eliminated significant layers of review within our process. We have cut back on space. That has included the closing of two offices and the cutback of more than 40 percent of the space in an additional seven offices. All 24 field locations have undergone significant space reductions, and our total field office space has been reduced by nearly 10 percent with further reductions slated in the future.

We have cut back on travel significantly. These efforts have included increasing use of telephone affidavits, the development of questionnaires, and other kinds of alternative investigative techniques that have allowed us to significantly cut back on our travel costs. We have turned back to the government nearly 70 government-furnished vehicles, and their parking spaces have been eliminated in the last few years. The regional travel expenses during fiscal year 1996 were 44 percent lower than the previous year.

We have developed a program of resident agents, which makes us more efficient and more able to get to the cases quickly. We have also been in the process of developing an extensive computerization program which has entailed, in addition to the development of software systems and hardware systems, the restructuring of our office support staff personnel, training, and other significant efforts to bring about the transition to an automated case-tracking system throughout the agency.

I might comment, Mr. Chairman on your opening statement where you spoke about these efforts. One of the fundamental principles of design of these systems is that they be flexible and open-ended precisely so that they can be made to be compatible with the developing strategies and objectives and goals required by GPRA. I recognize that we have not done an adequate job of describing that in our plan and to the GAO in assessing it. We have begun that process to better describe and communicate how that plan, we believe, is very much consistent with the dictates of GPRA.

In addition to these economizing efforts, we have also attempted to focus on operational reforms that would best allow us to carry out the agency's responsibilities in enforcing the act. We have developed a case management system called Impact Analysis, which seeks to understand the priority of each case when it is filed with the agency, and in accordance with those developing priorities, better understand the resources necessary to devote to the processing



of that case; and we have modified our time targets in the processing of those cases accordingly.

There has been a renewed emphasis on all aspects of our case processing, including the processing of elections. We have attempted to implement greater consistency and uniformity so that all parties—employers, employees, unions—understand that when a petition for an election is filed with the agency, the agency will carry out its most important function of conducting that election in a manner that is consistent and uniform.

Mr. SHAYS. Mr. Feinstein, let me just say, we have a vote in about 8 minutes. Do you think you can finish your comments in about 3?

Mr. FEINSTEIN. I certainly can.

Mr. SHAYS. And then what we will do is recess—it will probably be about 15 minutes—and then we will come right back. We have to go vote.

Mr. FEINSTEIN. Again, I will skip through these quickly, and I will be happy to discuss them further in the question period.

Other operational reforms have included the reinvention of our appeals office here in Washington, eliminating layers of review and prioritizing cases so that we have significantly cut down on the case processing time.

Each of these three initiatives that I have just mentioned have received a Hammer Award from in the Vice President's National Performance Review earlier this year.

Despite these continuing efforts to improve efficiency and effectiveness, because of the continued reduction in our staffing levels, backlogs at several stages of our case-handling pipeline have continued to grow. In April 1997, there were approximately 7,600 unfair labor practice cases pending investigation, nearly double the number of just 3 years ago, which of course is of enormous concern to us.

Our efforts over the past several years have relied very much on the principles and concepts of GPRA. In accordance with the act, we are now working on the formal development and refinement of our strategic plan, and in so doing, you certainly continue to be helpful in giving us further insight in how to approach the difficult operational issues facing the agency.

Just in the past week we have been discussing our plan with the GAO, who have offered important guidance that has already, as you have indicated, led to modifications in the plan; and we certainly continue to seek the input of the GAO in developing and refining the plan. But more importantly, of course, we recognize and welcome the consultation with Congress in the development of this plan as the chairman has indicated. We recognize that we still have a way to go in this process, and we look forward to the consultations with the Congress and others in tackling these significant operational issues that face the agency.

I thank you for the opportunity to be here today, Mr. Chairman.  
[The prepared statement of Mr. Feinstein follows:]

**STATEMENT OF**  
**GENERAL COUNSEL FRED FEINSTEIN**  
**NATIONAL LABOR RELATIONS BOARD**  
**BEFORE THE**  
**SUBCOMMITTEE ON HUMAN RESOURCES**  
**COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT**  
**HOUSE OF REPRESENTATIVES**

**July 24, 1997**

Mr. Chairman and distinguished Members of the Subcommittee:

Thank you for giving me this opportunity to appear before the Subcommittee at this hearing concerning the mission, management and performance of the NLRB and specifically its Office of the General Counsel. As you know, the Agency's statutory functions are vested separately in the five-Member Board and the General Counsel. The General Counsel has independent supervisory authority over the Agency's Regional Offices which together with the General Counsel's Headquarters divisions comprise nearly 90 percent of the Agency's staff. As one with many years of experience on the staff of a congressional committee with oversight jurisdiction, I am well aware of the important role that appropriate oversight plays in our democratic system.

Since its inception fifty years ago, the Office of the General Counsel's efficient and effective administration of the National Labor Relations Act has promptly resolved thousands of labor disputes for the benefit of the public and the nation's economy. Numerous scholars and commentators have recognized the unique and vital gatekeeping role that the General Counsel—acting primarily through the Regional Directors and their staffs—plays in screening out and thereby resolving thousands of nonmeritorious allegations each year. Indeed,

this year as in the past, more than 60 percent of all unfair labor practice (ULP) charges have been dismissed or withdrawn for lack of merit, putting those disputes to rest for good. And, in achieving a settlement rate of over 96 percent in the remaining cases, we have saved countless public and private dollars in litigation costs.

Last year, the Regional Offices received approximately 39,000 charges alleging the commission of ULPs and petitions seeking representation elections, filed by employers, employees, and unions. Over ninety percent of these cases were processed from beginning to end entirely in the field, without any involvement by Washington.

This is a record and a tradition of efficiency that has served the public well. But that record, reputation, and ability to get the job done are now being tested as never before. Reductions in Agency staffing have presented enormous challenges even as we have been taking numerous steps to stay on top of rising backlogs. Our present Full-Time Equivalent (FTE) level of 1,950 is the NLRB's lowest since 1962.

The NLRB is required to process all cases filed with it. Although intake declined in the early 1980's, it leveled off thereafter. The net effect of the steady FTE reduction, unaccompanied by a commensurate decline in case intake, has been that the casehandling burden per FTE has risen. The intake per FTE for 1996 was 28 percent higher than in 1985 and more than 50 percent higher than in 1962, the last year we had so few employees. In addition, the cases have grown in complexity in recent years, further adding to the workload burden.

Despite continuing efforts to improve efficiency, backlogs at several stages of the casehandling pipeline have grown in recent years and are now

reaching a critical mass that threatens to overwhelm our staff. At the end of April 1997 there were approximately 7,680 unfair labor practice cases pending investigation, nearly double the number three years earlier. Furthermore, case intake through April 1997 is 3.1 percent higher than the same period last year.

Additional backlogs appear at more advanced stages of the pipeline. For example, the shortage of trial attorneys in Regional Offices has meant that trial calendars in some Regions have stretched out as much as nine months. Similarly, the Board's recent success in reducing its backlog of decisions has led to a bulge of cases at the court enforcement stage. Staffing reductions in the Enforcement Division, necessitated by budgetary constraints, have limited the Agency's capacity to cope with this rush of appellate cases.

Backlogs are not only an internal, operational concern. The costs to employers and employees can be significant. Delayed cases are harder to investigate and, as investigations become more difficult, the costs of legal representation grow. The positions of the parties often harden with the passage of time, making settlement more difficult. Backpay may have built up to a point where it becomes a stumbling block to settlement. Individuals wait longer and longer to have important rights vindicated.

Since taking office a little more than three years ago, I have devoted a major portion of my time to finding ways to cut costs and to improve the Agency's efficiency in all areas within my purview. I would like to highlight several of these.

The principal cost reduction initiatives during the past year were:

*Reduction of rental space:* Last year the Agency conducted a detailed review of its total space requirements. This review resulted in space reductions in field

locations, headquarters, and the Division of Judges as well as in parking spaces for official cars. We have closed two field offices and reduced the space in eight others by nearly 50 percent. In all, 24 field locations have undergone space reductions. Total field office space has been reduced by nearly 10 percent. Further reductions are slated for the coming year. As a result, the Agency will have reduced its overall space usage by nearly eight percent since 1994.

*Reduction of travel expenses:* Through telephone affidavits, questionnaires, and summary statements of charging party evidence on lower priority cases and where practicable on those of higher priority, travel expenses for on-site interviews of witnesses have been sharply reduced. Nearly 70 government-furnished vehicles and their parking spaces have been eliminated since 1996. Regional travel expenses during Fiscal Year 1996 were 44 percent lower than the previous year.

The principal operational reforms have included the following:

*"Impact Analysis" program for managing caseload:* In order to ensure that cases receive resources at a time and in an amount appropriate to their level of impact on the public and on the core objectives of the Act, the Regional Offices, under the direction of the Office of the General Counsel, have embarked on a new case handling model known as "Impact Analysis." (IA). Under IA, newly filed charges alleging the commission of unfair labor practices (ULPs) by employers or unions are placed into one of three categories based on their likely public impact, with Category III being the most pressing cases. For Category III cases we maintain a 7-week benchmark for investigation and Regional merit determination. For the other two categories

we have lengthened our time goals to 11 weeks and 15 weeks. In addition, the investigative resources allocated to the case vary based on the category. This program has helped enable us to appropriately manage our caseload in an environment of limited resources.

*Renewed emphasis on uniform time lines for the handling of representation ("R") cases in the Regional Offices:* In order to enhance the uniformity and consistency with which the Regions carry out this important function, we have taken a number of steps. One of the Regional Offices' principal activities is the processing of representation cases ("R cases"), by which employees vote to decide whether to become or remain represented for purposes of collective bargaining. The process includes holding a hearing or working with the parties to agree on such issues as the composition of the bargaining unit; conducting the vote itself; and resolving any voter eligibility challenges or objections to conduct before or during the election. We have emphasized techniques to make the time from filing of the election petition to holding of the election predictable for all sides, regardless of whether the election is set by hearing or agreement. We are paying closer attention to cases that take longer than the benchmark times; and are exploring techniques for more prompt resolution of post-election issues.

*Reinvention of the Office of Appeals:* This office serves as a check on regional office discretion by reviewing regional dismissals of ULP charges. The office has eliminated layers of review and prioritized cases under the Impact Analysis program. Case processing times have been significantly reduced.

All three of these initiatives received Hammer Awards from the Vice President's National Performance Review earlier this year.

In sum, we in the Office of the General Counsel have taken significant steps to improve our casehandling and managerial processes, and we pledge to continue doing so.

Government Performance and Results Act (GPRA):

The NLRB has tried to be faithful to the mandates of the Government Performance and Results Act (GPRA) since its enactment. Indeed, the Agency's performance measurement system anticipated GPRA by many years.

We have submitted our initial draft plan to OMB as well as to GAO. That draft formed the basis of the comments you have heard today from Ms. Joyner. Since the preparation of that draft, we have had additional communications with GAO, have heard their critiques, and have revised the Plan in accordance with those comments. We look forward to meaningful consultation with our authorizing and oversight committees of Congress about the proposed Plan, and accordingly have forwarded our current draft to this committee and to others.

Under our draft Strategic Plan, four goals are identified which establish the framework under which we carry out our mission. These goals are:

Determine and implement through secret ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union.

Prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both.

Continue to maintain a well-trained, highly effective, productive customer-oriented workforce.

Fully integrate information resource management into its working environment in order to provide employees with automated case management data, research tools and other technological aids to enhance their ability to work effectively and efficiently and to provide

the Agency with the ability to more effectively assess and manage its workload.

We believe that the strategies described in the Plan for meeting these goals, assuming enactment of the President's request for our agency, will enable the NLRB to better serve the public.

One of our principal challenges at this time is to review the performance measures that are used to evaluate whether we as an Agency are doing the job that Congress set out for us. As you are no doubt aware, this requirement of GPRA has proven to be a challenge for many agencies—particularly those that like the NLRB are engaged in law enforcement. As I suggested earlier, we at NLRB are fortunate in that we have had numerical performance measures in place for many years. Indeed, the Office of Inspector General has reviewed our performance measures and has found that they comply with GPRA. We intend to further review these performance measures and in particular to examine the benchmarks and standards that will help tell us whether, in light of our funding levels and the external environment, we are getting the job done.

I join Chairman Gould in welcoming the views of this Committee and others having jurisdiction over the NLRB. We are committed to working with you to arrive at a Strategic Plan that complies with GPRA and meets our mutual needs and expectations, and to submitting a final plan as required by GPRA, by the close of this fiscal year.

Thank you again for this opportunity to testify before the Subcommittee. I would be happy to answer any questions.



Mr. SHAYS. Thank you, Mr. Feinstein. What we will do, Mr. Gould and Mr. Feinstein, is vote and come back, so we will recess for about 15 minutes.

[Recess.]

Mr. SHAYS. I will call the hearing back to order.

I am going to just have both of you describe to me where you interact and where your roles are clearly different. I mean, it is kind of interesting to me that you have one Results Act for the two of you, yet you are a separate Board.

You are, in a sense, almost in a prosecutorial role. You funnel things through—funnel is a bad word. You basically—it flows through your agency to the Board, some things get there and some things don't. But describe to me where you would sit down and talk together as partners and where you would basically shut the door and not have dialog.

Mr. GOULD. Well, the area, Mr. Chairman, where we would shut the door and not have dialog and where the general counsel is in an adversarial position vis-a-vis respondents. He is independent of the Board insofar as his prosecutorial function is concerned. That is to say, he has the responsibility to investigate charges which are filed with our regions and to determine whether a complaint should issue, and then he is a party litigant in that posture before us.

Once we issue an order, then his role changes. Then he becomes, and I recognize that there are some people who are puzzled about this, but this is the statutory scheme which you in Congress have created for us, he becomes our lawyer, and we consult with him, provide him with instructions on a wide variety of matters that we may want him to pursue, and he represents us in the circuit courts of appeals and in matters involving issues that might go to the U.S. Supreme Court.

He also represents us if we vote to authorize injunctive relief in a so-called section 10(j) proceeding.

So he is independent of us for the purpose of a prosecutorial function and acts as our lawyer, and we, of course, are the judicial component of the Board. It is our responsibility to interpret the statute and to provide guidance as the expert agency.

On matters involving GPRA, we would, of course, discuss these issues together. We met yesterday to talk about this hearing. There is no bar between us insofar as our responsibilities under the statute are concerned.

Mr. SHAYS. I am going to have you jump right in, but just a real quick answer. Would it be improper for you to discuss a case with Mr. Feinstein that was pending before you?

Mr. GOULD. It would be improper for me to discuss a case.

Mr. SHAYS. Or any of your staff?

Mr. GOULD. Or any of my staff, or any part of the Board, to discuss a case that is pending before us where he is the party litigant in a matter before us; and I do not and would not discuss such a matter with him.

Mr. SHAYS. I am tempted to ask who is first among equals here, because you responded first, but maybe I should already know the answer.

Mr. FEINSTEIN. Well, to further elaborate on the chairman's answer, he has described my role as prosecutor and where the divi-

sions lie, that there is a wall. It really is a two-sided, two-headed agency. That is how it has always been described in the past. The general counsel side of the agency and the Board side of the agency, and the chairman has described, in terms of case processing, how that division works.

I am one of the parties to every case, virtually every proceeding, that is before the Board, and for that reason, any communications with the Board about the case has to be in the formal proceeding. Any other kind of communication would be an *ex parte* communication. So there is a very pronounced, defined wall between the two sides of the agency for that reason.

In terms of administering the agency, managing the agency, that division is likewise carried through. I have the supervisory, managerial, administrative task of directing the general counsel side of the agency, and that is indeed, as I suggested in my testimony, what I spend a good part of my time doing, is managing the agency, the regional offices, their operations, and the headquarters staff of the general counsel.

So there is that clear separation between the general counsel's office and the Offices of the Board.

The areas, as the chairman has indicated, where we are able to discuss and work together are the general issues that affect the whole agency. One of those, for example, would be the budget, where I consult with the chairman and the Board members about budgetary issues, because we have to obviously—we are given—we are not funded separately. The agency is funded as a whole, and once we get the funding, then it is allocated between the different sides of the agency.

So there are issues that are not case issues, more of an administrative nature, where we are able to discuss and exchange thoughts about what is transpiring; and one of those issues is in the development of a strategic plan. The general counsel's office's efforts are focused on the general counsel side of the agency, which again, as I suggested, covers about 90 percent of the staff of the agency; and the chairman's efforts and the initiatives that he describes have to do with efforts and initiatives that pertain to the Board side of the agency. But there are certainly issues which overlap, and we certainly do try to work together on those issues.

Mr. SHAYS. I think this is obviously an interesting relationship.

Mr. FEINSTEIN. It is very interesting, Mr. Chairman.

Mr. GOULD. I will echo that.

Mr. SHAYS. Who decides where you have disputes, who would referee an honest disagreement among two Presidential nominees confirmed by the Senate? I mean, you both go to the Senate, correct?

Mr. GOULD. That is correct.

Mr. FEINSTEIN. Correct.

Mr. SHAYS. So you didn't hire Mr. Feinstein, he was selected by the President.

Mr. GOULD. Correct.

Mr. SHAYS. Who decides disputes between the two of you? Where do you logically—

Mr. FEINSTEIN. Well, largely, Mr. Chairman, we try to work them out. If there are issues where there is disagreement, then the Board could take a vote on it. Of course there are other—

Mr. SHAYS. Let me ask you this, though. So then the Board which you serve with, in a sense, oversees the operation?

Mr. GOULD. Well, the Board delegates this managerial responsibility to the general counsel, it is referred to the general counsel, and by virtue of its delegation, the general counsel administers the regional offices. Now, the Board has responsibility for the Board. There is no outside party that would referee a dispute between us.

Mr. SHAYS. Maybe I am on sensitive ground, because maybe this happens more by agreement than—

Mr. GOULD. It does.

Mr. SHAYS. But by law, is the counsel's office a creature of the Board?

Mr. GOULD. It is not a creature of the Board. Since the Taft-Hartley amendments to the law, the general counsel became an independent party for the purpose of his or her prosecutorial functions; and as I say, the peculiar thing—and this is the statutory scheme which Congress has created—is that once we issue an order subsequent to litigation before us, the general counsel on one side, the respondent on the other side, then the general counsel becomes our lawyer for the purpose of obtaining enforcement.

Mr. SHAYS. I understand that part.

You wanted to say something.

Mr. FEINSTEIN. Right. Just to say again, to further elaborate on what the chairman has said, the basic part of the responsibility of the general counsel is statutorily established under section 3(d) of the act which establishes this authority. There are additional responsibilities that the general counsel's office has exercised for 50 years that come through delegation from the Board.

The chairman was referring to acting as the counsel, the lawyer for the Board after the Board has made a decision, for example, and there are some others. But the basic part of the general counsel's responsibility is statutorily based.

Mr. SHAYS. I am going to have specific questions about 10(j) and I am going to have questions about how the flow comes to the Board, so I will get into some more detailed issues.

At this time I would like to recognize Mr. Towns, the ranking member.

Mr. TOWNS. Thank you, Mr. Chairman.

Let me begin with you, Mr. Feinstein. In your testimony you discuss the current backlogs at the regional level. Can you tell us how these backlogs adversely affect the employers and employees and threaten a healthy, growing economy?

Mr. FEINSTEIN. I think they adversely affect all concerned. They certainly adversely affect the parties to the dispute.

What we have found is, the quicker that we are able to get to a case to resolve the issues, to conduct an investigation, amongst other things, the better able we are to settle that dispute. The longer we have a dispute before us, the harder it is to settle it. The parties get more locked in, the differences perhaps get magnified, the liability might increase if we are talking about back pay as part of the remedy, so that one of the definite advantages of our ability to get to our cases quickly is our ability to settle them.

I think perhaps, more fundamentally, a workplace dispute that festers, a workplace dispute that lingers, is more destructive to

that workplace for both employee and employer alike. The quicker that that dispute is resolved, the quicker we are able to come to a determination, and the quicker it goes away, the quicker that a productive relationship between those involved in that dispute is able to be resumed. So I think fundamentally the benefit of our ability to process cases quickly is that we resolve those cases quickly and the workplace itself is more productive.

Mr. TOWNS. Let me ask both of you this, and I am not trying to put you on the spot, but I think that a hearing, we always want to try to learn as much as we can, and in some instances I think that we can—in terms of the Congress, can be helpful.

Can you tell us what the Congress can do or what we have done to contribute to your backlog at the regional level, and what we can do maybe to help alleviate this?

Mr. GOULD. Well, the principal—of course, the principal problem we are confronted with is our budget, and because of the slight increase that we received in the last budget, we were able to hire a number of people in the regional offices. We need people to process the cases. We need new people, that are really the lifeblood of the agency; and the inability to obtain an adequate budget is a major factor in the backlog problem.

Mr. FEINSTEIN. If I could further elaborate, as the chairman has said, our agency is people. Eighty percent of the agency budget goes to salaries and benefits, another 10 percent goes to rent, and that leaves 10 percent over. So what our budget is about is basically paying the salaries of the staff.

As I suggested in my statement, the staff of the agency now is at about the level it was in 1962 when we had a little more than half—we had a little more than half the number of cases we have now. The number of cases per staff member in just the last 8 or 9 years has increased about 30 percent.

While what we have is a situation where each person is handling more and more cases, I have to emphasize again that it is not just a question of numbers here. As GPRA keeps telling us, we have to look at quality issues and at what is actually going on in those cases; and there are numerous indications that the cases that we handle are also more complex, difficult cases for a number of reasons. We have instituted screening mechanisms, changes in the economy itself have contributed. So we have fewer people doing more cases that are more difficult.

That, I think, put very simply, is the reason that we have seen the backlogs increasing. Everything that we know about how the agency functions, while there are lots of efficiencies which we can and should and have been considering, the basic element in reducing our backlog has to do with our staffing level.

Mr. TOWNS. Thank you very much.

Let me just ask one more question, Mr. Chairman.

This happened I guess really before you got there, Mr. Gould. In 1990, GAO issued a report which found that the NLRB headquarters was slow in processing cases. Can you tell me what steps the Board has taken to address the 1990 concerns of GAO and how these concerns affect the day-to-day work of deciding cases?

Mr. GOULD. Well, we have taken a number of steps, Congressman. One of them, the first one at the Board level and in Wash-

ington was to institute a speed team procedure whereby the staff of Board members are advised to try to identify cases that are factual or involve credibility issues and either a hearing officer or an administrative law judge has already made the determination on that, and to put those cases on the fast track. We have been successful in using the speed team mechanism in connection with 30 percent of our cases, to get them out in less than a couple of months.

Second, we have instituted a so-called "superpanel system" where we have met the Board members every Tuesday and dealt with representation cases. Sometimes we are able to get those out in a matter of a week or so of the time that they come into Washington.

Third, we have made certain reforms as they relate to administrative law judges. We have authorized our administrative law judges to issue so-called "bench decisions" where the issue is factual, it is a one-issue case, or where the law is very clear. They don't need to get briefs which take up 4 months of the time of the administrative process.

We have also established time targets for our administrative law judges. We are in the process of creating time targets for the handling of representation cases after a union has been certified in a controversy, or has not been certified and a controversy arises out of the conduct of our election.

Mr. TOWNS. I am really impressed with the things that you have been able to do.

Let me ask this, Mr. Chairman. This is really my last question.

It is my understanding that there is some concern about using mail ballots in union elections. I just find that to be a little strange. I think I recall, I think it is the State of Oregon conducted a congressional election, Senate, a senatorial election as well, by mail in 1994-1995. I have not heard any allegations of any kind of widespread fraud in those elections. Can you tell me how mail ballots would be helpful and what antifraud assurances are available, if you use mail ballots?

Mr. GOULD. Yes, Congressman. We have of course as an agency used mail ballots from the beginning of the agency in the 1930's, and the National Mediation Board, functioning under the Railway Act, conducts all its ballots by mail and has done so for a decade.

When I first came to the agency, one of the first cases that I was confronted with involved an election where some of the employees were on strike. The regional director wanted to have an election in the plant. Well, there was no way that the strikers could participate in the ballot. Some of them were working out of State. So we ordered, and it had not been done so previously, a mail ballot in that situation.

Second, where employees' work schedules are irregular, where they are part-timers and they are coming in under a number of different schedules, sometimes in a number of different facilities, we have conducted mail ballots then.

Third, of course, where the strain upon our resources is considerable, where vast distances exist between the Board offices and the plant premises, that has been a factor in my judgment in which it is appropriate to conduct a mail ballot.

Now, we issued on June 20 of this year two lead decisions on this matter, and one of them was the London's Farm Dairy case, 323, NLRB No. 186, which was decided by us on June 20. We noted that under our mail ballot procedures, instructions to employees specifically state that they are to be marked in secret. They emphasize that it is important to maintain that secrecy and direct the employee not to show the ballot to anyone after it is marked. The ballots are typically mailed to an employee's home address, and in that setting, the employee has, as we said in London Dairy, ample opportunity to cast their ballots in accord with instructions and in complete privacy.

During our entire 62-year history, there has been only one situation which was brought to us involving the invasion of privacy—in that case, a decision in 1994 where we found that the employer had invaded the employee's privacy. The National Mediation Board has had only, I think, three or four cases in the entire 71-year history that it has had conducting mail ballots. Actually, their statute has been in existence for 71 years; they have only been doing this since 1934.

So I think that our procedures which we have put in place protect the employee's right to privacy, and what we have done through the mail ballot is provide an opportunity to enfranchise workers who would otherwise be disenfranchised because of their inability to participate in the process at a particular facility.

I am very proud of what we have been able to do in this regard, Congressman Towns, and I hope that we continue to use mail ballots in the circumstances that I have alluded to.

Mr. TOWNS. Thank you very much. I thank both of you for your testimony. I want you to know that I am impressed with the things that you are doing. Thank you very, very much.

Mr. SHAYS. Thank you, Mr. Towns.

Mr. SNOWBARGER.

Mr. SNOWBARGER. Thank you, Mr. Chairman. I have several different lines of questioning, so maybe I will take several rounds here or something.

First of all, I just want to try to get a handle, we have talked about the number of employees that the NLRB has, and I am trying to get a handle on how workload is distributed here. How many employees are there here in Washington?

Mr. GOULD. In Washington, there are about 600—

Mr. FEINSTEIN. It is between 600 and 700, the general counsel side of the agency and the Board side of the agency. Someone is checking to see if we have an exact figure.

Mr. SNOWBARGER. OK.

Mr. FEINSTEIN. 700 roughly in that area.

Mr. SNOWBARGER. In your testimony you indicated that there are 1,950 full-time. Was that just on general counsel side, or is that the whole agency?

Mr. GOULD. The whole agency throughout the entire United States.

Mr. SNOWBARGER. So of that 1,950, roughly 700 or maybe a little less than that are here in Washington?

Mr. GOULD. Yes.

Mr. FEINSTEIN. Right. And there are about 1,400 in the field.

Mr. SNOWBARGER. OK. I guess my concern is that in your testimony you indicated that of the 39,000 charges of unfair labor practices last year, 90 percent of the cases were resolved in the field with no Washington involvement whatsoever, and yet you have more than a third of your work force located here in Washington. Yet I hear you complaining that you don't have enough folks out in the field.

I am missing something here.

Mr. FEINSTEIN. Well, if I can, those 90 percent of our cases that are settled are the cases in which we have investigated or dismissed the case, of which 60 to 65 percent of the cases fall into that category. There are others where a determination is made to proceed, that the case has merit, and the case is settled in the field, either prior to the institution—prior even to the issuance of a complaint or after the issuance of a complaint and prior to an administrative hearing, or even during process of the administrative hearing.

Mr. SNOWBARGER. So now we are up to what, 96 percent of all cases?

Mr. FEINSTEIN. No.

Mr. SNOWBARGER. Well, 60 percent plus 96 percent of 20 percent, it gets you awful close to the mid-90's, I would think. I haven't done the math on it.

Mr. FEINSTEIN. The point I was about to make is that some of those cases that settle, there is Washington involvement. We have a Division of Advice in Washington, for example, which is the arm of the general counsel's office that is used to consider the most difficult cases, the most complex cases, the cases in which the region is not quite sure where the law stands. So those cases might get sent in and then sent back to the region for a determination.

Mr. SNOWBARGER. How many of the 700 employees would be advisors in that capacity?

Mr. FEINSTEIN. Working in our Advice Division? I think it is between 30 and 40, close to 40, counting support staff.

Mr. SNOWBARGER. And in how many regions? I apologize for my ignorance here, but how many regions does the NLRB break down into?

Mr. FEINSTEIN. We have 33 regional offices and an additional 19 subregional offices.

Mr. SNOWBARGER. And 40 advisors. It is like you could have an advisor per office out in the field and perhaps the days they weren't giving advice, they could be pursuing other things.

Mr. FEINSTEIN. Again, these are the people that are perhaps most expert in the complexities of the law, and they have the assignment of taking the most complex cases and developing the positions that the general counsel would take in those cases. It is also an office that allows us to have some uniformity and consistency in the development of approaches the general counsel's office would take.

Mr. SNOWBARGER. So normally those 40 people all work together to come up with a solution for a particular problem?

Mr. FEINSTEIN. Well, in some cases, they may confer together, but each case is assigned to an individual within that office, and they work in teams and they work together. There are other—

Mr. SNOWBARGER. That can be done by teleconferencing or something of that nature, or they need to meet together?

Mr. FEINSTEIN. As I say, it depends on the nature of the case. Each case is assigned to an individual, depending on the nature of case and the complexity of the issue—if I could proceed, others who work in Washington within the general counsel's office include an office that hears all of the appeals from the region about cases that are dismissed.

Again, according to our statute, anyone has a right to appeal the dismissal of a case, so we have a division in Washington that hears, that gives, in effect, parties a second chance to make their case before the agency that their case has merit. The case gets an independent review in that office to determine whether or not the case has merit.

This is an important aspect of the quality review, in effect, of our regional operations, and it gives us a chance to make sure that what is happening in the regions is consistent throughout the country and consistent with the perspectives of the general counsel's office.

We have another division which is our Enforcement Division. As the chairman alluded to, the general counsel serves a role that once the Board has made its decisions, none of those decisions are self-enforcing. They all have to be enforced through action in the Federal courts, and we have a Division of Enforcement which handles all of our appellate court litigation in enforcing Board orders.

We also have a special—we have a Supreme Court Division which handles appeals to the Supreme Court, and we have a division which handles other kinds of issues that might arise when the agency is involved in other kinds of legal actions. When novel things happen, we have some who work in that division as well.

We also have a division which we now call our Compliance Division, which deals with cases once they have gone through the courts and there still is a failure of compliance; we have some experts in the field seeking ultimate compliance under those circumstances.

We also have a Division of Administration which is the—we have a centralized Administration Office that does all kinds of things like procurement and personnel actions, and it also runs our entire computerization program. So there is an Administration Office as well, and that I have described as what is in the general counsel's office. There is an additional staff of about, I think 100 or 125 that are the Board staff.

Mr. SNOWBARGER. OK. I understand that you have a number of functions that you have to perform. Again, I am still perplexed, though, that we have a third of your force here in DC when, by your statistics, we have between 90 and 95 percent perhaps of all cases being settled at the field level and then a complaint that we don't have enough people in the field, when they are already doing 96 percent of the work. So I am not quite sure why we are centralizing things.

Let me—

Mr. GOULD. If I may, Congressman, our hiring since we have been in Washington has been in the field; we are decentralizing. We have hired people in the field and we have allowed our staff



in Washington to attrit, so our whole movement has been toward the field.

But I think there is another point that you must be aware of, and that is that when the case is settled or withdrawn, you are talking about a relatively abbreviated period, and—

Mr. SNOWBARGER. That depends on your perspective, I think.

Mr. GOULD. Well, that is the fact. I am saying, compared to the litigation that is involved with our administrative law judges who come from Washington or a number of other places in the country and compared to the procedures that go on thereafter.

Mr. SNOWBARGER. I understand that it can be quite an ordeal.

Mr. GOULD. So you are talking about work which is very important to our agency, but which, in terms of time, takes a relatively abbreviated period. But we are trying to put more of our resources into the field.

Mr. SNOWBARGER. With again, mid-90 percent of these things either settled or dismissed or withdrawn, why do we have such backlogs?

Mr. FEINSTEIN. If I may, when we refer to backlogs, we are referring to—we have two essential measures of backlogs: that is, how long it takes us to get to the investigation of a case and how long it takes us to get to that case. What we have—so what we are talking about, in essence, is how long it takes us to process that case. Again, we have to process every case that comes to us.

As I have suggested, the reason we have backlogs is because we have fewer people handling more cases and they are more complicated cases. It takes them longer to get to that case, to resolve that case, and that is the definition of our backlog.

Mr. GOULD. Also, Congressman, you know in the mid-1980's we did have in Washington an enormous backlog problem that was in the order, as I have indicated in my opening statement, of 1,600 cases. We have brought that down in late 1995 to the low 300's, and a historic, all-time low since 1974.

So I think that our record since our term in office has been, relatively speaking, a very good one in that regard here in Washington.

Mr. SNOWBARGER. We have a vote to get to in just a minute. Let me see if I can ask one more question.

We keep referring back to staff loads way back when; I don't remember the timeframe that you are going back to to compare staff loads and caseloads. I guess my question is, whatever this time period was that we were comparing to back there, how many of those cases were as a percentage, were deemed to lack merit or settled? Would it be roughly the same percentage?

Mr. GOULD. The merit factor and settlement factor has remained very constant throughout the history of this Board. The merit factor and the general counsel, of course, makes a determination as to whether the case is going to—unfair labor practice case is going to be prosecuted has remained around 30 percent, or the low 30's, mid-30's, in that area. The settlement rate has remained very constant.

Now, the one thing that we have done since we came here is to recognize that while we have always done a very good job in settling cases in the region, historically the agency did not do as well

once the battle lines were drawn and once the matter was about to go before an administrative law judge; and that is why we introduced the settlement judge concept, which has enjoyed a great deal of success over these past couple of years. We have used it in more than 200 cases and settled approximately 140 of them, and those would be cases which would consume weeks and, in some instances, months of both the agency's resources—the taxpayers', if you will, resources, as well as those of private parties.

So our record historically in the settlement area has been good. What we have done is improve upon it by focusing upon the need for settlement at other stages of the process where—beyond the early investigative stage.

Mr. SNOWBARGER. Is it fair to say that if the percentage of non-meritorious claims has stayed the same and yet you have had a dramatic rise in the number of cases, that means you have also had a dramatic rise in the number of nonmeritorious cases?

Mr. FEINSTEIN. No. The caseload itself, the number of charges brought before the agency, peaked in around 1980, and it came down somewhat steadily until 1985 and 1986. Since about 1988 it has stayed about level—come up a little, gone down a little, but stayed. So the number of cases brought before the agency has stayed the same.

What has changed significantly is our staffing level. That has come down, so we have less staff doing the same number of cases. But within the cases that we have, as the chairman has indicated, the merit factor has remained essentially the same, the settlement rate has remained essentially the same; and our litigation success rate has remained essentially the same. The basic indicators along those lines have all remained essentially constant.

Mr. GOULD. Our average productivity of an employee at the Board has increased in this past decade by 30 percent, and our administrative law judges who are handling this caseload, which has remained, as the general counsel indicated over this past decade constant, our staff of administrative law judges has been halved since the early 1980's. We did not hire one single administrative law judge from 1981 through 1994.

Mr. SNOWBARGER. Mr. Chairman, I have some other questions, but I think—

Mr. SHAYS. What we will do is, we have another vote and we are sorry that we have these interruptions. Some days we don't, but today we have a lot of votes, so we will recess for about 10 to 15 minutes.

[Recess.]

Mr. SNOWBARGER [presiding]. At the chairman's suggestion, we are going to go ahead and get started and try to wrap up this round of questioning. He will be back shortly. And since I am the only one here, I guess I will do the questioning.

I would like some help. Although I have been an attorney and have been in private practice, I have not handled a labor case, an NLRB case, and so I need some questions answered, kind of about the process, so that I can get a better handle on this.

How does one of these cases start? Normally a worker comes in, I presume, and files a complaint?

Mr. GOULD. Any person, any person; it could be a worker, it could be an employer. Our rules say that any person may file a charge with our agency; and it would be filed in one of the regional offices or one of the subregional or resident offices.

Mr. SNOWBARGER. I presume that person has to be aggrieved in one way or another.

Mr. GOULD. No. The rules say, relating to the filing of a charge, do not provide for any kind of standing to sue requirement. A party may file a charge and the general counsel, through the regional director, is obliged to investigate that charge and to determine whether there is cause to believe that a violation of the statute exists. That is in connection with unfair labor practice cases.

The representation cases, to which the general counsel is not a party, are filed through petitions which can be lodged by an individual employee, a union or employer, in the field offices, regional offices also.

Mr. SNOWBARGER. Well, I guess—I really didn't want to pursue this at this point, but I guess I will.

If anybody can walk in off the street and file a complaint and we are finding out that 60 percent of these are nonmeritorious claims to begin with, is there something we need to do with our labor laws that would prevent someone that does not have a legitimate grievance from filing these claims?

Mr. GOULD. Well, the difficulty, as I see it, Congressman, is that, you know, this question of who is aggrieved and who has standing to sue is really a very big area of litigation in our courts as a general matter. You know that there are many Supreme Court decisions on this issue. The whole thrust of the handling of cases at the regional level is informality, handling them in an expeditious way. We are not really involved at that stage in litigation.

Now, the general counsel becomes a party and the respondent becomes a party if the general counsel issues a complaint.

I would also point out—

Mr. SNOWBARGER. Let's go on to that next stage, though.

Mr. GOULD. Well, if I could just complete my answer, we also have in the regions an information officer, and an information program, which is designed to weed out complaints, charges that have no merit or have nothing to do with our statute.

For instance, a lot of people are under the impression that, well, if they have a grievance against their employer or if the employer is dissatisfied with his or her employees that they can lodge a claim with our agency, and we have information offices at all of our regions which are designed to weed these out.

Mr. SNOWBARGER. Is a complaint required to go through the information officer?

Mr. GOULD. There is no requirement to go through the information officer.

Mr. SNOWBARGER. So if you have already predetermined that you want to file a grievance—

Mr. FEINSTEIN. This was a program that we instituted in 1980, and I think we have had considerable success with it. It is designed to deal with the person calling for information or coming into the office wanting to know what their rights are. We get about 200,000 such inquiries a year, only 5 percent of which result in complaints.

We think that that is a significant filter of nonmeritorious or irrelevant cases, and is one of the contributing factors to the growing complexity of our cases, because these kinds of irrelevant or inappropriate charges are filtered out.

Mr. SNOWBARGER. And that is not included in the 60 percent that you talked about earlier?

Mr. FEINSTEIN. That is correct. Those are numbers that relate to charges that have been filed.

If I could amplify on one point, it seems to me that one of the key successes of our agency, unlike some other agencies, is the historic ability to get to that charge very quickly. Our historic time line has been 45 days to make that merit determination.

Now, it requires a lot of work within that 45-day period. We have—obviously the case has to be staffed and investigated. We are not doing as well as 45 days anymore because of all of the factors I have mentioned, but it is still within a 7-, 8-, 9-week period.

From the filing of that charge, the nonmeritorious charges are weeded out of the process, so that within a relatively short period of time, any charge that lacks merit is disposed of and the case is closed. And that is again—as I suggested earlier, I think one of the success stories of the agency is the ability to deal with the nonmeritorious cases quickly.

Mr. SNOWBARGER. I would agree that is probably a success story for the agency. I think it may be a terrible record for the law if we have that many people who feel that they are entitled to make claims, and it turns out that they don't have any merit.

Mr. GOULD. Well, if I could—

Mr. SNOWBARGER. Let me get some questions in on other cases. I am going to run out of time—in fact, I have, and I appreciate the extra time by the timekeeper.

Let's go on to the next step. We have a claim that has been filed. Now, can you kind of walk me through what happens then?

Mr. FEINSTEIN. Yes. It is assigned to an investigator who immediately contacts the party filing the charge to present evidence to sustain the allegations and the charge, and the parties are contacted and it is investigated. Again, we have specific time targets for the completion of that investigation, and now we also have a process of trying to prioritize that case somewhat, and the resources that we will devote immediately depends somewhat on that.

A determination is made whether or not the case has merit. There is what we call an agenda meeting, and there is a decision made, that the regional director has responsibility for, as to whether the case has merit or not. If it doesn't have merit, it is dismissed. If it does have merit, the first thing that we do is try to settle it. If we are unable to settle it, a complaint will issue alleging a violation of the act.

Mr. SNOWBARGER. How many of these are settled before the complaint is issued? Do you have any feel for that?

Mr. FEINSTEIN. I would—again, this would be a rough estimate; I don't know. Of the cases that have merit, I would say, oh, a quarter to a third perhaps are settled.

Mr. SHAYS. Let me just say, if some are here who can assist us in this, I think it might be helpful to have them testify. I mean,

these are questions that you shouldn't be surprised that would be asked, so——

Mr. FEINSTEIN. Well, we are looking for a specific number of the percent of precomplaint settlements.

Mr. SHAYS. I just want to say, there is nothing embarrassing about having other staff respond to these questions, so if there is other staff that has been sworn in that can answer these questions, I would be happy to have them come sit up here. You weren't sworn in?

Mr. SNOWBARGER. One of the few.

Mr. SHAYS. Well, let me do this. Do you have a few questions along this line?

Mr. SNOWBARGER. Well, they are actually trying to walk me through the process. It seems we get into deep holes every time we take a step.

Mr. FEINSTEIN. If I could continue, a complaint would issue, and again, settlement efforts continue, and the complaint is set for a hearing before an administrative law judge. If we are not able to settle that case before that time, the case would proceed to a full hearing before an administrative law judge in which the general counsel represents the charging party and there is a respondent to reply.

The administrative law judge hears the case and issues a decision, an administrative decision of the ALJ. That decision is appealable to the Board here in Washington. After the Board renders its decision, that decision can only be enforced through action in the Federal courts.

Mr. SNOWBARGER. OK. Now, who pays the cost of pursuing these allegations—the investigation, the complaint, pursuing it through the ALJ? Who pays the cost of those?

Mr. GOULD. Insofar as the—of course, insofar as our agency is involved, the taxpayer pays the cost of it. Insofar as private parties are concerned, they pay the cost of it.

Mr. SNOWBARGER. OK. So we have the business paying its own attorney's fees, the aggrieved party, presuming there is a valid grievance, he is having all of his expenses paid by the taxpayer.

Mr. GOULD. Let me just make two additional points. One is that, of course, given the fact that we are an administrative agency, you do not have to be a lawyer to be—to appear before the agency and frequently charging parties are represented by lay people. And the other point I would like to make is that there is a statute which allows a party to recover attorney's fees where it is found that the general counsel did not have a substantial reason for pursuing the matter in the first instance.

I would like to quote from the language of the statute, "but in a limited number of circumstances, attorney's fees where the person does use an attorney before the agency are recoverable."

Mr. SNOWBARGER. How often does that occur?

Mr. GOULD. It occurs—I don't know what the precise number of cases is. It occurs obviously in a small minority of cases, because generally the general counsel has a substantial reason for proceeding.

Mr. SHAYS. Let me do this. Mr. Sanders will be recognized, and we are just going to come back and just have you walk us through.

You will be able to finish your line of questioning. We will go back and forth.

Mr. Sanders, you have been very patient and you have as much time as you want.

Mr. SANDERS. Thank you very much, Mr. Chairman.

Gentlemen, it is my understanding that the Board has used more procedures which call for voluntary compliance. Can you tell me how encouraging voluntary compliance in settlements aids in the helping of the economy and the efficiency of the agency? In other words, what is the short-term financial benefit and what is the long-term financial benefit of encouraging voluntary settlements?

Mr. GOULD. Well, it is enormously important because what it does is move our society away from litigation and lawyers, which are time-consuming, and impose a burden both upon the taxpayers and upon private parties.

What we have done is—and we think that this is of enormous benefit to the economy. What we have done is to discourage litigation through our settlement judge initiative, through our bench decision initiative, and also through devising approaches toward the resolution of controversies which—

Mr. SANDERS. Would I be correct in assuming that expedites the process as well?

Mr. GOULD. It does expedite the process as well, Congressman, particularly the bench decision initiative that I alluded to.

Mr. FEINSTEIN. If I might add one other thing, we would be lost, really, if we did not have a settlement rate in the 90's. Each percent in our settlement rate we have estimated saves us \$2 million.

Mr. SANDERS. Is that right?

Mr. FEINSTEIN. Right. Each fluctuation up or down in our settlement rate has a \$2 million consequence, either up or down.

Mr. SANDERS. OK. Much has been made of the Board's increased use of 10(j) injunctions. Can you tell me how the issuance of a 10(j) injunction helps in resolving a labor dispute?

Mr. GOULD. Well, it helps because so many of the cases where we speak about—talk about the possibility of 10(j) result in voluntary settlements where the parties don't even have to use our normal unfair labor practice machinery, let alone the judiciary.

The rate of settlement, as well as success for the Board, in 10(j) cases in Federal district court is very high. We either win or settle in the high 80's or 90 percent of the cases in which we pursue 10(j). Of course, what 10(j) does by producing a settlement in those contexts is to really make unnecessary the very arduous and time-consuming process that otherwise needs to be pursued, which in many instances would take 3 or 4 years of litigation. 10(j) moves very quickly compared to normal litigation and thus is a savings to both the parties and the judiciary.

Mr. SANDERS. Thank you. I apologize, I have been in and out, and if you have answered this question, just tell me; all right?

It is no secret that business interests have accused you of being biased in favor of labor at the expense of business. Do you think—is it your judgment that that is a fair charge and how would you respond?

In other words, presumably your job is to be fair and you are being attacked for not being fair. Can you respond to that?

Mr. GOULD. I would say two things, Congressman. One is that, in the first instance, I don't think it is accurate to say business interests have attacked us. Some business interests, those who, I think, are recidivist employers, the rogue employers who do not believe in compliance with our statute.

Many business interests have spoken favorably, supported us in the appropriations process and have said that while they disagree with some of our approaches to the statute, they believe that we have functioned in a responsible manner. But I think that the proof of the pudding lies in the fact that we have acted as an impartial arbiter, we have reached out to representatives of both labor and management.

I mentioned my advisory panel, which is composed equally of union and employer representatives. We have facilitated cooperative initiatives through our interpretations of section 8(a)2. I think that the hallmark of my chairmanship has been a balanced approach to labor and management which takes into account the competing interests of both.

Mr. FEINSTEIN. If I may, Congressman, in terms of the operation of the general counsel's office, we have a number of means of trying to assure neutrality and evenhanded treatment of cases. We do an extensive quality review in each of our regional offices each year in which actual files are examined to see the thoroughness and the completeness of the investigations and that all of the relevant procedures and necessary procedures are employed.

The statute itself, I think, builds in some measure of neutrality, and that is that any Board decision, as I mentioned before, has to be enforced in the courts. Our success rate in the courts has held steady. It is consistent with past success rates, another measure, I believe, of the evenhanded record of the current administration of the agency.

We also have an appeals process whereby the decisions of the regional offices are appealable to Washington for further or second level of review, if the party so desires it. Our rate of appeals, of the acceptance of appeals, has also stayed consistent.

Mr. SANDERS. Do you think the evidence is pretty clear that based on the work that you have done and what you have accomplished, you are not being prejudiced?

Mr. FEINSTEIN. Yes. I just wanted to note these specific measures and what we have to gauge them.

Mr. SANDERS. Let me just ask another question, and I should give you a little background and tell you that I am very unhappy with the current state of labor law in America. I think it—and that is obviously not your problem. Your problem and your job is to enforce the existing law.

I think, in fact—in terms of the needs of working people in this country who want to join unions, it is in fact very difficult for them to do so. Maybe you would comment on this scenario.

I have talked to workers who have been active in trying to form a union, and they tell us that the people who are working hard to form a union are fired. They tell us that sometimes after they negotiate a first contract, the company refuses to sit down and in good faith negotiate, and people then give up in a year or two. And there are some people who are now telling me that in order to form a

union, they don't even want to go through the NLRB process because it just takes so long, that you are understaffed, and they think that all of the appeals that the well-funded companies have make it almost impossible, if you can believe this, in the United States of America to form a union.

You know, for example, in Canada, if 50 percent of the workers in a shop, plus one, sign a card wanting a union, they have a union. That is the end of the process. And it is my understanding that labor law in the United States is far more backward, far more antiworker than it is in any country, compared to any country in Europe or Canada.

Do some of those workers have a concern?

Mr. GOULD. Well, I think that since the 1970's, deficiencies in our labor law, as written, have become more apparent. The ability to delay our processes exists in the procedures. The main tool in appropriate circumstances that we have is section 10(j) where, in appropriate circumstances, we can effectively combat the problem of delay. But the situations that you refer to—the dismissal of employees, the inability to negotiate a collective bargaining agreement in a fledgling relationship—is a very difficult one and one which in some instances highlights the deficiencies of our law. I have long advocated reform of our statute, which would overcome some of these problems.

Mr. SANDERS. Mr. Snowbarger, a moment ago, wanted you to run through a scenario, and that is not a bad way to learn information, but let me pose another problem. Let us just say Mr. Snowbarger was a militant worker who wanted to form a union.

Mr. SNOWBARGER. We do have fantasies around here, don't we?

Mr. SANDLER. And I was an employer who had a lot of money, was prepared to pay big bucks for some antilabor consultant, which is going on all over the country, and I fired him, and his union said that was unfair. How long could I stall that out to get him his job back and get him his compensation if he did what an American citizen has the constitutional right to do?

Mr. GOULD. Well, on the order of 3 years or more, it takes—we have described the various steps of this process. You file a charge, you investigate it, you issue a complaint, you hold a hearing, you take an appeal from the decision by the administrative law judge, you come here to Washington a year or so, or a couple of years later, and then you go to the circuit courts of appeals. Then a petition for—

Mr. SANDERS. So if Mr. Snowbarger is a worker earning \$7 or \$8 an hour and he forms a union, or tries to, and he is fired, it could take—and I have all kinds of resources and lawyers behind me—it could take him 3 years before he got his job back or was compensated?

Mr. SNOWBARGER. Will the gentleman yield? Who would be paying my legal costs at that point in time?

Mr. GOULD. You would not need to, if you were a worker, you—

Mr. SNOWBARGER. So what we have is this rigid—

Mr. SANDERS. Let him answer the question.

Mr. SHAYS. Gentlemen, gentlemen, excuse me, excuse me. This committee has always allowed everyone to ask questions and al-



ways allowed witnesses to answer. You are on your 11th minute and we have to go through 15.

I do think he should answer the question, but I will take control.

So the question you asked was—

Mr. SNOWBARGER. Well, we have talked about the large company with the large legal budget and all of this kind of thing. Who is paying my costs as the supposedly aggrieved employee?

Mr. GOULD. You would be responsible for your costs, or if you had a union that was willing to take up your cause, it might pay for the cost. It would depend on the individual circumstances.

Mr. SNOWBARGER. OK.

Mr. SANDERS. All right. But my only point was that if you have somebody who is trying to get by on \$7 or \$8 an hour, who loses his or her job for a period of years, that person is at a real disadvantage; and every employer knows it. I mean, I have seen, I have heard of cases where even after a worker has actually managed to form a union, the company refuses to negotiate with them, and workers get beaten down and they finally give up.

So I would say that it seems to me, based on my knowledge of the situation, that we need sweeping labor law reform. My impression is that Mr. Gould and Mr. Feinstein and the others are doing the best they can with the existing law, but the truth of the matter is, the law, in my view, is very prejudiced toward workers in this country, very much in favor of those people who have the resources, the financial resources, who are antiunion; and the result—the proof is in the pudding, the proof is that time after time, workers who are trying to form unions are unable to do so. Hopefully, we are seeing some changes in that regard.

Mr. GOULD. If I may, just in response to Congressman Snowbarger again, the—I said that you would pay your own costs and fees, and you would if you had your own lawyer or if the union became your lawyer. If the general counsel issues a complaint on behalf of a union or an employer, the general counsel proceeds with the matter; and the charging party, be it an employer or a union, would have to find some way, if they wanted to use counsel, to pay their own costs.

Mr. FEINSTEIN. I want to mention that about one-quarter of the cases before the agency are cases that are initiated by employers, where the employer is the charging party.

Mr. SANDERS. So here I am, Mr. Snowbarger, trying to protect your rights to go out and form a union as the low-wage worker. You may lose the next election, so you should be more sympathetic with what we are trying to do.

Mr. SNOWBARGER. Very frankly, to the gentleman from Vermont, I find it easier to get a job in a right-to-work State than I do in a labor State anyway, so I will stay in Kansas.

Mr. SANDERS. Some of us will try to make legislation available so you do have the right to do that.

Mr. SNOWBARGER. I do agree with the gentleman that we need major revisions in the labor law.

Mr. SANDERS. But you are not going to support my legislation probably. OK, thank you very much.

Mr. SHAYS. Mr. Barrett, do you have any questions?

Mr. BARRETT. No questions, Mr. Chairman.

Mr. SHAYS. OK. I have a general bias that when Republicans are in control, we walk in the moccasins of people who are trying to run a business and trying to—trying to make a payroll, and so we tend to be a little more sympathetic to that view, because those are the moccasins we walk in; and when Democrats were in control, they just seemed to have a little more sense of what some workers, particularly in some areas, they have really struggled in.

And so I tend to think, when Republicans are in, they have a slant one way, and when Democrats are in, they have a slant the other way. I think that is unavoidable, based on the experiences we have in our lifetime.

Mr. Feinstein, how do you—let me back up and say, you have immense powers, because those cases you choose not to move as quickly on, those cases you choose not to prosecute, you in a sense have become a judge, as most prosecutors have, so I know you know that is an immense power.

How do you get to make sure that you are trying to walk in someone else's moccasins and be as fair as possible? What process do you try to instill in your staff?

Mr. FEINSTEIN. Well, I think that is obviously an important question, and I know the agency has historically—the general counsels through the years have taken very seriously, for exactly the reason you have suggested, that the—that responsibility to make that initial determination as to whether a case has merit or not.

We have, as I began to suggest, very just processes, systems, if you will, within the agency to try to assure the quality of that decision, to try to assure the consistency and that that decision is based on all of the available facts, and that that decision is indeed the right decision. We have a process of reviewing files in all of our regional offices on an annual basis.

Mr. SHAYS. How many regional offices do you have?

Mr. FEINSTEIN. Thirty-three regional offices and subregional offices. Some of those have satellite offices so that there is a total of 52. We have random audits of files conducted by people who have expertise in that area in each of these offices to get a sense of what is happening in those cases and to make sure that the offices are following—

Mr. SHAYS. If you reject a case, dismiss a case, then that can go directly to the courts?

Mr. FEINSTEIN. No. If an individual case is dismissed—and that was going to be the next thing I mentioned—there is a right of appeal to our Office of Appeals here in Washington and that case gets a *de novo* review. We have people who have developed expertise in that area.

Mr. SHAYS. And your offices are out of—

Mr. FEINSTEIN. The general counsel's office gives a thorough review of that case and makes a determination either to sustain the decision in the region, to dismiss the charge, or they can overturn the decision in the region. As I say, we consistently have from 3 to 5 percent reversal rate in that appeals process.

We also, again, as I have suggested, have another significant check on the agency's deliberations: how we fare in litigation both before administrative law judges and ultimately in the courts. If the Board has had to decide the case, that case is appealable, in

effect, into the Federal courts, and our success rate in that litigation, I think is another important of the ability that we have to oversee the efficacy, the appropriateness of the decisions that are being made.

We also—as you alluded to, we measure the number of cases where there is merit and where there isn't merit to get some sense of the consistency of those kinds of determinations.

All of these suggest different ways that we have tried to do the best we possibly can to assure that that original decision on whether or not to go on a case is the right decision, is the appropriate decision.

Mr. SHAYS. Now, when you take over from a previous administration that happens to have been the other party—in this case, it would have been the Bush administration, they probably had an emphasis that went in one direction.

Where did you wanted to see move more quickly and those that you didn't?

Mr. FEINSTEIN. First of all, the terms of general counsels don't directly coincide with administrations. We serve a fixed 4-year term, so the previous general counsel, who was nominated by President Bush, served a year-and-a-half into the—

Mr. SHAYS. But then there was a change?

Mr. FEINSTEIN. Right. And I am sure that there are differences in approach. Every general counsel brings—

Mr. SHAYS. There was criticism by labor that certain cases weren't moving along. I have to believe that—were you the next appointment from the Bush administration?

Mr. FEINSTEIN. I was appointed by President Clinton.

Mr. SHAYS. Right. So you were the first appointment done by the Clinton administration?

Mr. FEINSTEIN. Yes.

Mr. SHAYS. So you were from this direction to this direction, but, there is nothing wrong with that. I just want to know, when you came in, did you agree with certain criticisms that said, yes, we weren't paying enough attention here and we should do something here; or did you just carry on just like the previous administration had done?

Mr. FEINSTEIN. Well, my emphasis was certain areas of priority concern. The first one was to be more consistent in our ability to get to an election after the filing of a petition so that we would have a more uniform record in that area. Another area of priority concern was the uniform deployment of appropriate injunctive relief.

What we had found—one of the things that really stood out to me—is that in seeking injunctive relief about a quarter of our offices, maybe eight or nine of our regional offices, were doing 70 or 80 percent of the injunction cases, while the rest of the offices were doing little, if any, injunction work.

So we decided—we determined that there was a lack of consistency among the offices, and so what we did was, we put together a manual based on documents that had long been the documents that were informing or processing in this area. We did training, we restructured our offices a little to make sure that injunctive relief

was being considered in all of the regions, not just in a few; and that, I think, is the reason that we sought increased utilization.

What happened was not so much a change of approach, it was the fact, in terms of the standards under which we would seek injunctive relief, but we had offices that for various reasons had not been considering that.

We also made an emphasis on quality, what could we do to improve quality?

Finally, we implemented the program of impact analysis, but that was a response to the funding situation. As our backlogs were going up, we got concerned.

Mr. SHAYS. Let me get to that point. When you have a lead case—you basically have like seven or eight cases that are similar, you are not quite sure of the outcome—do you take one of those cases and move it forward to the Board—tell me what a “lead case” means.

Mr. FEINSTEIN. I am not sure what you are referring to.

Mr. GOULD. Mr. Chairman, you are confusing his role with mine.

Mr. SHAYS. OK. Let me say this—I don’t want you to answer yet. Just describe to me the whole issue—I am going to make an assumption, Mr. Gould, that you have a number of cases that are the same, and you group them together; but I will come back and have you explain if that is right or not. Just explain to me what “impact analysis” actually is.

Mr. FEINSTEIN. Impact analysis was largely a response to the growing backlogs. We wanted to make sure—we wanted to make sure that the cases that were taking longer than the target time for that case were the cases that were perhaps the least time sensitive. Impact analysis is an effort to say, there are some cases, clearly, where timeliness is of greater importance than others; let us make sure we are focusing resources that accomplish a more timely result in those kinds of cases.

There are certain cases which affect far more people than other cases. There are certain cases that are much more critical to the process of collective bargaining itself than others.

Mr. SHAYS. Those would set trends for other decisions?

Mr. FEINSTEIN. No, not necessarily set trends. There is more a notion of the effect, the real-world effect, if you will, of the case. We could have a case in which the determination of the case determines the rights of 1,000 employees or more.

Mr. SHAYS. Do you have categories 1, 2 and 3?

Mr. FEINSTEIN. Right.

Mr. SHAYS. Now, which gets the highest priority?

Mr. FEINSTEIN. Category 3.

Mr. SHAYS. And tell me what fits into 3.

Mr. FEINSTEIN. Well, they are cases generally that have—that affect the most people, that are most central to the process. An example, as I started to say, might be a case in which the rights of 1,000 people are at stake; or it might be a violence case in which there is some violence on a picket line that is occurring, and a determination is made. It is important that we get to this case before we get to a case, for example, where there is collective bargaining ongoing, and someone is seeking information, and one party feels that they haven’t been provided enough information. Rather than saying, we

are going to get to both of those cases at the same time, we are going to say, no, we need to get to the former case more quickly.

It took us about a year for a task force of career people throughout the agency making a determination as to what were the kinds of decisions to go into making these kinds of priority assessments, and then once the assessment was made, how we could focus the resources.

Another point to this process is, there are certain kinds of cases where we wanted to utilize different kinds of investigative techniques, questionnaires or telephone affidavits or other investigative techniques that might be appropriate to a case of that nature, but not all cases. So we wanted to be able to make those kinds of differentiations between cases as well.

Mr. SHAYS. I am going to finish with just these two questions, but just a quick answer to this.

A timely case is a category three still? Does category three get your highest attention?

Mr. FEINSTEIN. What we have done is adjusted the time target. The time target for a category three case is 7 weeks; the time target for a category two case is 11 weeks, and the time target for a category one case is 15 weeks.

Mr. SHAYS. So whether it is for when you render a decision to bring it to an administrative judge—

Mr. FEINSTEIN. No, to the time we complete the investigation and make the determination as to whether the case has merit and to issue a complaint, if appropriate, or to dismiss.

Mr. SHAYS. OK. Just since I raised it, the whole issue of the lead case, and then I am going to—Mr. Kucinich, do you have questions that you would like to ask? We are going to move on to the next panel, if we don't, in just a second.

Mr. Barrett, just 1 second.

Since I threw out "lead case" as an issue, tell me the concept of "lead case."

Mr. GOULD. Mr. Chairman, what we try to do where there are a number of cases congregated on a particular issue, we try to select a case or a few cases which we think, when we get the answer to it, will govern a number of other cases that are pending with us, and that is "lead case."

Mr. SHAYS. OK. What would be the basis on how you would select the criteria of what makes—how do you group it together? What would be the basis for that?

Mr. GOULD. You would group it together where the case involved a theory that was very closely related or a charge that was very closely related subject matter-wise.

Mr. SHAYS. How would you decide which case to take?

Mr. GOULD. Which case you would take as a lead case?

Mr. SHAYS. Yes, of the seven or six or five?

Mr. GOULD. Well, I think the one that would probably present the full array of issues which would govern the cases that will follow.

You might have—for instance, we have had these Beck cases and there are a number of issues that are posed in these cases, and what you would try to do is try to find a case that would raise most or all of the important issues, and you would look at—you would

survey when other cases were pending with you. You might pick one or two or three or four cases that would—the resolution of which would spring all of these other cases loose automatically. You would know, once you have the answer to this one case, or two or three, that you would have the answer in connection with a wide variety of others that would follow in its wake.

Mr. SHAYS. Thank you.

Let me tell you the Chair's intention. We are already at 1:35. I am going to go to Mr. Barrett. I know that Mr. Snowbarger has a number of questions, and I am happy to have that proceed, walking us through this issue. But then I want to feel that we then come to the other side and have some dialog there.

We do have two other panels, and I am getting a little concerned about that, so I would just share that with the Members. Mr. Snowbarger has been here the whole time, so obviously he has been asking more questions.

Mr. Barrett.

Mr. BARRETT. Thank you, Mr. Chairman. I apologize to the panel for missing the testimony and not hearing some of the issues that have been touched on.

I would like to get a better feel for the usefulness of the 10(j) proceeding and how it is helpful. I know it has been under some criticism, but how does it help and if you didn't have that, too, what would be left for the parties?

Mr. GOULD. Well, the classic kinds of cases that 10(j) would be applicable to—and this is not an example which is exclusive—would be where an employer has dismissed a large number of employees or has acted in—has engaged in misconduct toward those employees, where a union has engaged in violent conduct or other forms of misconduct vis-a-vis, the employer. And where a violation could be established, we could say that there is reasonable cause to believe, as most of the circuits have said, that there is a violation and where the passage of time through our normal administrative process would erode the fashioning of an effective remedy.

In the case of employees who are dismissed, if we go through this process, which we described earlier, where a charge is filed, a complaint is issued and so forth and so on, when you get to the end of the hearing, it might be difficult to even find the employees who are entitled to recover under the status, let alone to compensate them.

So what you are able to do, through section 10(j), which again is applicable to both union and employer misconduct, is to get into Federal district court and obtain temporary injunctive relief while the administrative process proceeds.

Now, the other, I think, major point that has to be made is that in many of these cases where 10(j) is used or there exists the prospect of 10(j), what we have done is to enhance our processes where the parties are more likely and more able to voluntarily resolve their differences with one another. We have had settlements in a very high number of instances, a substantial number of instances where we have resorted to 10(j) in the Federal courts. And the reason is reported to me, as I go around the country, that the prospect of 10(j) has produced the same result in many instances.

So two major results: expediting the process, and making it more likely a voluntary resolution without the resort which would otherwise lead to arduous, time-consuming, expensive litigation.

Mr. BARRETT. In a typical case, does the party seeking the relief come to you, or is it something that you typically would say it is appropriate?

Mr. GOULD. Well, generally what happens is that the charge is filed in the region and the regional director, usually as a result of a request by a charging party, but it need not be that way, makes a recommendation to the general counsel. The general counsel then determines whether the general counsel will make a recommendation to us, and then on the basis of the papers submitted by the general counsel and by the other parties, the Board votes as to whether the Board will authorize the general counsel to go into Federal district court to obtain injunctive relief.

Mr. FEINSTEIN. It can happen, and it typically does happen, either way. The parties can request it, but that is not necessarily the only circumstance. There are many instances in which the parties request it, and it is our view that injunctive relief is not appropriate. There are other instances in which the parties do not request it, but in our analysis of the case, we make a determination that injunctive relief would be appropriate.

Mr. GOULD. As you point out, Congressman, this is the way the practice has evolved over the years long before we got to Washington. You won't find this process described in section 10(j) itself.

Mr. BARRETT. I am assuming that it is used more often on behalf of employees; is that correct?

Mr. GOULD. That is correct.

Mr. FEINSTEIN. I might add, we have another provision in the act, which is section 10(l), in which there is no discretion. If there is a certain kind of a violation alleged, then we are required to seek injunctive relief, and those are instances where employers have been charged. They largely have to do with a secondary pressure, inappropriate pressures being brought by unions in a labor dispute.

Mr. BARRETT. I know there has been some criticism about the backlogs at the regional level. How has Congress contributed to this? Is there something that we can do to help with this?

Mr. GOULD. Well, I think that the major thing that Congress can do to help the problem of the backlog at the regional level is to provide us with an adequate budget along the lines of what the President has requested. Most of our work is staff work, it is employees. We need people to be able to investigate and, where necessary, where settlement or withdrawal doesn't come about, or where we don't find merit, to litigate. And in order to have people, we must have an adequate budget, and I think that that is the major way in which the Congress can be of help in connection with the backlog in the field.

Mr. BARRETT. What about the case tracking, automatic case tracking? Is that helping, or is that helping to reduce the backlog, or what is the purpose of that?

Mr. GOULD. The case tracking system is designed to allow us to be able to identify particular kinds of cases, to know what it is that we have before us. We really, at this stage, don't know whether a particular case involves, as it might, an employee protest over

working conditions, or whether it might involve alleged discrimination of union activity. We can, I think more effectively, discharge our responsibilities if we know what is coming, what is coming before us.

Mr. FEINSTEIN. If I could add to that as well, I think the short answer is yes. The case tracking system that we are seeking to implement to automate our case tracking process will, in addition to what the chairman has indicated, affect the thoroughness of our processing; it will also make us more efficient. It is a more efficient way of processing cases. So that too could indeed contribute to getting our case handling load down.

Mr. BARRETT. You have not had an automatic tracking system before now?

Mr. FEINSTEIN. We do have one, but it is one that was established 15 or 20 years ago that is quite antiquated by today's standards. We have significantly upgraded, of course; we have become computerized, and we are now into the second or third year of a process of switching over to a new automated case tracking system which will be light-years ahead of the system that we currently employ.

Mr. BARRETT. No further questions.

Mr. SHAYS. Mr. Kucinich, do you have any questions?

Mr. KUCINICH. No questions.

Mr. SHAYS. We are going to have a vote fairly soon. We have 10 minutes, and then being that you have been a faithful person here the whole time, you have 10 minutes, if you want to go.

Mr. SNOWBARGER. Thank you, Mr. Chairman. With the help of the panel, we will get through this quickly, if you could keep your answers relatively brief.

Going back to the process here, I presume that once a case has been completed, the administrative law judge makes his decision and then there are consequences, presuming that the person that you have—who had the complaint filed against them, I presume there are consequences, I presume back wages to employees?

Mr. GOULD. There is no immediate consequence of the administrative law judge decision unless the parties agree to be bound by the decision at that particular point. The law has an obligation to fashion a decision in accordance with the law as it is written and to provide recommended relief. But the order is not self-enforcing, nor is our order self-enforcing.

Mr. SNOWBARGER. What you mean is that they would always have the right to appeal that decision?

Mr. GOULD. That is correct.

Mr. SNOWBARGER. But if they presumed that they wanted to stop at a certain—at your level, then there are some—

Mr. GOULD. In 30 percent of the cases, exceptions are not taken to administrative law judge decisions. The parties decide right then and there to either abide by the decision or resolve their differences in some other way.

Mr. SNOWBARGER. Again, typical of the decision, what are the consequences?

Mr. FEINSTEIN. Well, of course it depends on the nature of the case. If what the case is about is that some unfair bargaining tactics have been employed and one party has not been bargaining



fairly, the remedy would be an order to the recalcitrant party to commence bargaining fairly. So some of the remedies are in the nature of an order to simply stop doing what you are doing and do it correctly.

There are situations in which discrimination has been alleged where the remedy would be to cease the discrimination and to compensate—not to punish, but to compensate—to punish the wrongdoer, but to compensate the person who has been wronged for that wrongdoing. Typically, if a person, for example, is unlawfully discharged, then they would be entitled to back pay, offset by any earnings that they have had in the meantime to compensate that person.

Mr. GOULD. Or that they would have obtained with reasonable diligence; both interim earnings and that which they would have obtained with reasonable diligence are deducted from the back pay.

Mr. SNOWBARGER. All right. Let us take that as an example. I realize that we can't get into all of the examples or all the different kinds of remedies.

Let us say that we have a case where someone says they have been wrongfully discharged—and we have talked about what the consequences are to the employer if that turns out to be the case. What are the consequences to the employee if it is determined that the employer was within his rights to fire in that situation?

Mr. GOULD. The employee—if the case is dismissed, the employee will not be able to obtain any form of relief requested.

Mr. SNOWBARGER. But is there any consequence to it for putting an employer through a claim that was not meritorious?

Mr. GOULD. Well, if the general counsel determines to issue a complaint, there is a statute; and we made some brief reference to this before, the Equal Access to Justice Act, which allows a party to recover against us, the U.S. Government, if it has been determined that the general counsel undertook the case without a reasonable basis for so doing.

Mr. SNOWBARGER. Is that something that the ALJ can take up on their own, or does that have to be brought before them by one of the parties?

Mr. GOULD. That would be brought before them by one of the parties. There have been 278 instances of that since this was enacted in the early 1980's, and 100 applications of those cases have come before the Court of Appeals. And these applications before the Board have resulted in awards totaling \$897,000, and those before the courts have resulted in 16 awards, totaling \$390,000.

Mr. FEINSTEIN. That is over the last 17 or 18 years.

Mr. SNOWBARGER. Let me shift the line of questioning.

Are you familiar with the term "salting"?

Mr. GOULD. Yes.

Mr. SNOWBARGER. Could you just again briefly tell me what your understanding is of that term?

Mr. GOULD. Well, "salting" is generally applied—and I must say it is a modern term; it is a concept that has existed for many years, but it is a modern term because it appears as though some unions are using this technique with greater frequency. It involves the attempt by the union to use somebody who is paid by them, or assisted by them in some cases, inside a particular establishment, to

recruit employees and to get them to affiliate in the union so that there will be a collective bargaining relationship.

Mr. SNOWBARGER. I would agree. That is my understanding of what the concept means.

In the context of backlogs, insufficient staff to handle all the workload, 60 percent of these cases being nonmeritorious, these being all of your cases, not just the ones that might be salting—well, maybe I ought to ask. What percentage of your cases would fall in that category?

Mr. FEINSTEIN. What percent fall within the salting category?

Mr. SNOWBARGER. Right.

Mr. FEINSTEIN. We are not able with our current tracking system to differentiate cases by allegation. Also, most salting cases are not pure salting cases; there are always ones that are mixed. Under our new tracking system, that is precisely the kind of determination that we will be able to make.

Mr. GOULD. We are able to give you an answer to that from the Board's perspective.

Mr. FEINSTEIN. And we have surveyed the regions in terms of trying to get some sense of it, and there are certain regions where we have seen hundreds of such cases. The percentage. Nationwide I don't think we have ever been able to get.

Mr. SNOWBARGER. Let me followup on that. You say that this perhaps is a regional phenomenon?

Mr. FEINSTEIN. We certainly have seen more of the salting kinds of cases in certain regions than others, but I would say it is probably—there are probably some salting cases in every region, but there is certainly a stronger concentration in some than in others.

Mr. GOULD. In fiscal year 1995, according to our operations management department, 358 cases were filed in the region; in fiscal year 1996, 578 cases were filed in the region; and in fiscal year 1997, up to June 6 of this year, 406 cases were filed in the region. That is a total of 1,342 cases.

We, I think, had filed with us during that time about 120,000 charges, so that is 1,342, of about 120,000. In Washington we see about 1,000 cases a year, a little under 1,000 cases a year. We have had 75 salting cases in Washington that we have been able to identify; 44 have issued as Board decisions, 41 unfair labor practice cases, 3 representation cases. I think that that is over approximately a 4- to 5-year period.

There are 24 salting cases pending before our agency now.

Mr. SNOWBARGER. Before the Board?

Mr. GOULD. Before the Board. Before the Board in Washington.

Mr. SNOWBARGER. Let me just make a couple of observations and ask you to respond.

No. 1, the figures that you just gave me—358 in 1995, 578 in 1996, and in the first 8 months or something of that fiscal year, or even—are we doing that by fiscal year?

Mr. GOULD. Yes.

Mr. SNOWBARGER. So the first 8 months of this year, we have 406, so we are probably up around 700 or something of that nature. I mean, I know they don't fall in any given year all the way through.

Mr. GOULD. With about 4 months to go in the year—

Mr. SNOWBARGER. But, in theory, we have another increase, a significant increase in that kind of case.

Mr. GOULD. I am not a mathematician, but it looks as though we will come out along the lines of what we came out with in fiscal year 1996.

Mr. FEINSTEIN. If I may add, too, these figures are based on a survey that we have done basically in response to congressional inquiries; and I just want to—

Mr. SNOWBARGER. My other observation is this, and I would ask your reflections on this.

I was given a statement that was entered into the record earlier that just talked about six different companies, and I only have these figures that I am going to give you for three of those six companies. One of the companies had 14 unfair labor charges filed against it; in other words, they were either dismissed or they won it at the ALJ or whatever. Another company is 47 out of 48. Another company was 80 out of 80.

As you were tracking these cases, does it begin to look suspicious that some of these companies may be targeted for these charges and unfairly targeted?

Mr. FEINSTEIN. Well, again, our tracking system hopefully will get more sophisticated.

Mr. SNOWBARGER. Well, certainly you would have it by companies—I mean, by—

Mr. FEINSTEIN. Right. Let me suggest that these cases of course are investigated region by region. If the region has reason to suggest that charges that are being filed are frivolous, that they are based on perjured testimony, that they are unreliable in any way, shape or form, that certainly is accounted for in the investigation. Indeed, if we have good evidence of perjury or malicious prosecution, we can and have, in certain instances, referred that to the Justice Department for appropriate action.

It is not a perfect system, but in these kinds of repeated filings of charges that are frivolous, that are totally without merit, that are baseless, there are ways in which the regions can and do account for that in their investigation of the cases. The bottom line is, we are required by statute to take each and every one of those charges and investigate them and make the merit determination. We don't really have an alternative. We can't simply say, we are tired of these kinds of cases; we are not going to investigate them anymore, we are not going to consider them. That would require an act of Congress.

Mr. SNOWBARGER. Should you have that authority?

Mr. FEINSTEIN. Should we have the authority not to investigate a case?

Mr. SNOWBARGER. Yes.

Mr. FEINSTEIN. You are asking me a policy question?

Mr. SNOWBARGER. Well, you just said that you would need a law to change your responsibilities. I am asking, should you have that authority to make the decision if you want to pursue a certain number of cases, and perhaps these are cases that you don't want to pursue.

Mr. FEINSTEIN. Right. Well, what I tend to say when asked a policy question is that for 17 long, wonderful years I worked here at

Congress, and it was my job to help answer those kinds of questions. But, since I have become an enforcer, I try to shy away from those kinds of policy issues.

I would simply suggest—

Mr. SNOWBARGER. Well, then let me ask Mr. Gould, because I notice in several pieces of information I have had from him he says, “such as I have advocated,” and on and on.

Mr. FEINSTEIN. I am sure that the chairman would have something to say. But I would suggest that in any kind of situation like that, many of these salting cases are merit cases. They are cases in which the rights of employees are being denied because of their union affiliation; and any kind of an adjustment would have to, in my view, acknowledge the fact that in any kind of a statutory scheme you are going to have meritorious cases and nonmeritorious cases, and you have to have some means of being able to separate the two.

Mr. SNOWBARGER. Sure. I understand that, and I guess what I am trying to suggest in my line of questioning is that when there is a meritorious case, there are consequences to that case, to the person who brought it or to the person who is charged.

When there is a nonmeritorious case that is pursued and the aggrieved party is the loser, there is no consequence to that party; and perhaps there ought to be a way to weed those cases out, either changing your authority or changing the consequences to those who file nonmeritorious cases.

Thank you, Mr. Chairman.

Mr. SHAYS. We are going to go to the next panel. We think we are going to have a vote right away, and I was just thinking that we might just have a break, because we are going to have two votes at once.

Let me conclude by saying, Mr. Gould and Mr. Feinstein, is there any point that you want to make before we go to the next panel?

Mr. GOULD. Well, the only point I would like to make, Mr. Chairman, is one of the points that I started with, and that is, we have taken—we have read your statement about our work on GPRA and we regard this as a work in progress. We are really learning, and we want to consult with you, learn from you, and work with you toward providing a more effective statement.

I think that we have undertaken a wide variety of initiatives that are designed to make our agency a more effective one. I am very proud of the record that we have obtained over these past 3½ years as an impartial, neutral and effective agency in this world of labor law.

We look forward to working with you and to devising a more effective statement to bring ourselves into full compliance with what you deem to be the requirements of the statute; and I thank you very much, Mr. Chairman, for the opportunity to be here.

Mr. SHAYS. Let me just say, it is good to have you here. We really haven't had enough interaction with your agency in particular and labor issues in general. We have been focused on HHS and Education and Labor and HUD issues, so it is important that we get a little more involved. Some of our questions were a little more generic; it is good to have you here.

We also are learning how we make the Results Act work, but it is more than just a statement, it is really a whole way of evaluating your operation; it is helpful to you and it will be helpful to us.

Mr. GOULD. I recognize that, and I hope you will also recognize how active we have been in employing strategies which are designed to make our agency effective and efficient and to accomplish our objective, because I think in this regard, no Board has undertaken more and more that is effective in this regard than what we have done these past 3½ years.

Mr. SHAYS. We have seen that, and we do appreciate it. Thank you for it.

Mr. FEINSTEIN. Mr. Chairman, I would just simply add, I hear the bells, simply associate myself with the comments of the chairman. We do find this a very useful process. We believe in the GPRA, and we certainly understand the need and the benefit that we can get through consultation with you all and GAO and others who are interested, and we certainly look forward to that process.

Mr. SHAYS. I thank you both very much, as well as your support staff.

I am going to say to the next panel, we have two votes. I have been here 10 years and we have five lights, and I finally figured out we have more than one vote. My understanding is we have two votes, a 15-minute and a 5-minute, but they will leave the machine open, so I suspect we are not going to be starting until 2:30.

We will see you back here at 2:30, God willing. Thank you very much.

[Recess.]

Mr. SHAYS. I would like to call this hearing to order and to welcome testimony from Robert Allen, who is the inspector general, National Labor Relations Board, and Ms. Carlotta Joyner, who is Director of Education and Employment Issues for the U.S. General Accounting Office.

And I believe that, Mr. Allen, you are accompanied by Mr. Michael Griffith and Mr. John Zielinski. Do I say that—

Mr. ALLEN. That is correct.

Mr. SHAYS. OK. What we do is, first we owe you, obviously, an apology that we've gone so long. And I apologize that you've had to wait so long. But we do need to swear you in, as we swear in even our Members of Congress when they come before us.

[Witnesses sworn.]

Mr. SHAYS. Thank you.

For the record, all four witnesses have responded in the affirmative. We have testimony from two of them, Mr. Allen, inspector general, and Ms. Joyner as well.

So, Mr. Allen.

**STATEMENTS OF ROBERT E. ALLEN, INSPECTOR GENERAL,  
NATIONAL LABOR RELATIONS BOARD, ACCOMPANIED BY  
JOHN ZIELINSKI AND MICHAEL GRIFFITH; AND CARLOTTA  
JOYNER, DIRECTOR OF EDUCATION AND EMPLOYMENT IS-  
SUES, U.S. GENERAL ACCOUNTING OFFICE**

Mr. ALLEN. Thank you for the—

Mr. SHAYS. I'm going to ask you to pull that mic a little closer. I'm going to have you put it on the other side of that sign, if you

can, because you're going to be looking toward me. So lift it up a little bit. OK.

Mr. ALLEN. I appreciate the opportunity to appear here.

Can you hear me?

Mr. SHAYS. Yes, I can. I'm going to have you just lower the mic a little bit. You know, and my esthetic sense bothers me. I'm sorry. My wife complains. Can you take that name tag and put it back up there.

Thank you.

Mr. ALLEN. I've seen it all too much.

Mr. SHAYS. OK. Well, thank you, Mr. Allen. Happy to hear your testimony.

Mr. ALLEN. I'm the inspector general for the National Labor Relations Board. I've been so since September of last year. And before that, I served approximately 30, 35 years with the Board in various capacities, and it's been said I've had every job that they offer there. I do bring to the office a background of the experience to the Labor Board that probably most inspector generals do not have with their agency.

We have a small staff. We have three auditors and two investigators. The chief auditor is here, and counsel in chief investigator is here. We carry, or are carrying right now, 40 cases, open cases. And I came into this position with the grand idea of engaging in a program of what I call preventive medicine, because I believe it's better through education and information to forestall or the happening of bad events than try to cure them after they happen. Unfortunately, the press of time and the case load has just not allowed me to do that.

We are simply flooded with cases. You have our last two semi-annual reports. And I think our cases run pretty much the gamut of what you find at any inspector general. As far as the auditing goes, we are nearing the end of—or will in a couple of months—of our financial audit of the 1996 appropriations. We are in the middle of doing an audit and several investigations into contract performance by one of our largest contracts that we have led. And we, as soon as time permits, plan to review the procurement functions through an audit review and possibly investigation, and our property control, and the back pay procedures used by the agency.

In June 1996, before I came upon this job, my predecessor was John Higgins. He issued a report which the committee has and which reviews the agency's process for measuring and reporting on his performance.

I had nothing to do with that report. I only read it this week. The supervisor auditor here today did. And so between us, we can address it to you.

I would only initially say that, in my opinion, in 30 years, one thing that the Labor Board does good—and I can't imagine anybody disagreeing—is that they do know how to measure. And I'd invite anybody over to look at the chart room. I've never seen any

agency or any business measure that works as well. And in the way Mr. Higgins describes, it comports with my 30 to 35 years experience.

And with that, if you have any questions, I'll be glad to address them.

[The prepared statement of Mr. Allen follows:]

**STATEMENT OF ROBERT E. ALLEN  
INSPECTOR GENERAL OF THE NATIONAL LABOR RELATIONS BOARD  
BEFORE THE  
SUBCOMMITTEE ON HUMAN RESOURCES AND  
INTERGOVERNMENTAL RELATIONS OF THE COMMITTEE ON  
GOVERNMENT REFORM  
JULY 24, 1997**

Good morning. My name is Robert E. Allen and I serve as the Inspector General of the National Labor Relations Board. Accompanying me are Michael Griffith, Supervisory Auditor, and John D. Zielinski, Counsel to the Inspector General and the primary investigator assigned to the office. The Inspector General's Office also has an additional criminal investigator, two auditors, and a staff assistant.

**Investigations**

The Inspector General Act provides for the Inspector General to prevent and investigate fraud, waste and abuse, and also to promote economy and efficiency.

The investigative operations of the office are supported by myself, the counsel and a newly hired criminal investigator. The office currently has an open caseload of 40 cases. As you are aware, the Inspector General Act provides jurisdiction for the investigation of criminal and administrative offenses. We do have available to us, and we do utilize, subpoena duces tecum power. Regrettably, the Act does not provide for personal subpoena jurisdiction, although it is my understanding that this is an issue under study by the Congress. I would urge your prompt and positive consideration of such authority. The NLRB has promulgated a regulation to require cooperation of Agency employees in our investigations, but, except for



the authority to compel the production of documents, we are without power to compel cooperation of persons outside the Agency's employ.

I have previously submitted to you the last two Inspector General Semiannual Reports to the Congress. The latest represents the operations of the office during my tenure, commencing in September of 1996. While I submitted the previous report, it was the work product of then Acting Inspector General John Higgins.

In 1994 the office undertook a proactive investigative review of the Agency's handling of claims submitted by employees under the Federal Employees Compensation Act. Such claims are decided by the Department of Labor's Office of Workers Compensation, but paid directly out of NLRB operating funds. The OIG found a number of areas of concern that resulted in recommendations being made to the Agency for improvement. This is an area where the Agency has taken our recommendations and improved the system.

Similarly, an investigation into potential abuse of government paid parking spaces in a field office lead to the OIG recommending to the Agency that it conduct a review of its allocation of such resources. The Agency's review subsequently lead to a concurrent review of the quantity and usage of GSA vehicles. The outcome of this joint effort was a substantial savings.

A review of our overall caseload indicates a wide area of concerns being addressed. Regrettably, travel fraud remains a continuing problem which consumes both a high level of our resources and impacts more personnel in the Agency than I would view as appropriate to our size. We have increasingly focused upon integrity violations -- both criminal violations, as well as those cases where we find substantial allegations of potential misconduct in casehandling.

I came to the Office of Inspector General with the stated intent of launching a campaign of "preventive medicine" because, in my opinion, it is a far more effective implementation of the IG Act to prevent, through an affirmative educational/information program, the commission of offenses rather than to have to deal with the consequences of offenses. Unfortunately, time has not permitted me to implement this policy because our case load is so heavy that it requires me to spend most of my time in the performance of investigations on a solo basis.

Well over a year ago my predecessor recognized a growing caseload within the office, and developed a strategic plan which placed great emphasis upon joint investigations with other agencies as a resource multiplier. This strategy has worked well, and over a quarter of our cases are conducted in conjunction with other law enforcement agencies, ranging from other Inspectors General, to the FBI, to the Secret Service.

**Audit Activities**

September 1997 is the estimated completion date for our "Financial Audit of the NLRB's Fiscal Year 1996 Appropriation." Our audit objectives are to determine if:

- financial reports and statements accurately presented the activities of the Agency;
- transactions were in conformance with laws and regulations;
- there was Agency accountability over assets; and
- internal controls, including time and attendance procedures, were effective.

We issued a draft report regarding the Agency's computer maintenance contract for Fiscal Year 1996. The OIG was provided documentary materials which asserted that the Agency paid over a million dollars to a contractor for services which were not performed satisfactorily or were not performed at all. A draft report has been completed and management's comments setting forth certain new procedures have been received. Our final report will not issue until the completion of a parallel investigation into these allegations, as well as several other companion investigations.

Prior to my incumbency, the OIG, on June 27, 1996, issued an audit report regarding the Agency's process for measuring and reporting on its performance. This review assessed the collection and processing of casehandling data. Casehandling data relates directly to the NLRB's mission which is to (1) prevent and remedy unfair labor practices by employers or unions and (2) conduct elections to determine whether or not employees wish to be

represented by a union. The audit also reviewed the Agency's progress in implementing the Government Performance and Results Act (GPRA) which requires Federal Agencies to:

- develop Strategic Plans prior to Fiscal Year 1998;
- prepare Annual Plans setting performance goals beginning with Fiscal Year 1999; and
- report annually on actual performance compared to goals.

The NLRB has a long history of using performance data to manage workload, to evaluate employees, and to report on Agency operations. Time objectives usually in the form of medians were established for various stages of casehandling and performance was measured by the amount of time it took an office or the Agency to complete particular stages. The objectives were based on the time it was expected to process the particular function in a typical or average case. Some of the time factors included complaint processing and issuing election decisions. In addition to time measurement, the Agency also measured certain program activities such as the percentage of cases settled and litigation success. Performance information appeared in the NLRB Annual Report, the General Counsel's Summary of Operations, and in budget documents sent to the Office of Management and Budget and to the Congress. NLRB's performance data was based on outputs e.g., number of cases closed, service levels e.g., time to process cases at various stages, and on outcomes e.g., number of employees offered reinstatement or the amount of backpay awarded discriminatees.

The OIG assessed manual and electronic systems used to collect and compile performance data. The audit ascertained that effective controls were in place and functioning as management intended. The OIG tested the casehandling database and determined that the Agency was accurately reporting on its performance and was of the view that the Agency was approaching the GPRA and its future requirements in an appropriate manner. The NLRB coordinated with recognized experts in the field and with employees at all levels. Agency efforts began with defining a common performance measurement language and a framework for developing a Strategic Plan.

The Agency has undertaken a multi-year initiative intended to automate a unified information system which would replace the multiple systems currently in use. The Case Activity Tracking System (CATS) will be expected to: track the progress of every case in the NLRB pipeline; provide employees with access to databases that enhance legal research efforts; and economize word processing applications through the use of electronic forms and document sharing.

The OIG had five observations regarding performance management at the NLRB. These observations related to issues which the Agency may want to consider during the implementation of the GPRA including the adoption of a unified approach which would meet the annual reporting requirements of the GPRA, budget formulation and the National Labor Relations Act.

On September 26, 1996, we issued an Audit Report entitled "Review of Employee Appraisal Process." This review determined that individual performance plans: accurately stated the tasks being performed by Agency employees; and, set forth specific duties and responsibilities which reflected the mission of employees' offices. Appraisal systems covering positions at the NLRB had been established and employees were being evaluated against the criteria set forth in their individual performance plans. Incentive and performance awards paid to employees were administered in accordance with applicable regulations.

The following describes the next three audits we plan to initiate.

- 1) Review the procurement function at the Agency and determine if:
  - needs were clearly identified;
  - actions conformed with laws and regulations;
  - purchases were competitively priced;
  - there was timely delivery and the acquired items were acceptable to users.
  
- 2) Evaluate property controls and ascertain whether the Agency is safeguarding ADP resources, business machines and communications equipment.
  
- 3) Assess the Agency's procedures for computing and distributing backpay. Regional Offices receive unfair labor practice charges, investigate them, determine merit, and settle or prosecute

those cases deemed meritorious. In some instances employees are awarded backpay or other reimbursements.

Mr. SHAYS. OK.

Ms. Joyner.

Ms. JOYNER. Mr. Chairman, I'm very pleased to be here today to talk about the National Labor Relations Board's strategic plan required by the Government Performance and Results Act. My written statement focuses primarily on NLRB's July 8, 1997, draft strategic plan. As you requested, we determined whether the draft plan complied with the Results Act and the guidance on developing strategic plans from OMB. To judge the overall quality of the plan and its components, we use GAO's May 1997 guidance for congressional review of the plans.

Agency strategic plans are to provide the framework for implementing all the other pieces of the Results Act and a key part of improving performance. But the act anticipated that it might take several planning cycles to perfect the process.

Agencies, as you know, are not required to submit their plans to Congress until September 30, 1997. So we knew when we reviewed the draft plan that it would probably be revised before submission to Congress. In fact, as you have noted before, it was revised, and we got a revised version on Tuesday of this week, on the 22nd. We've reviewed that plan as well.

In summary, the draft plan of July 8 has deficiencies in several critical areas and often omits important information required by the act.

The Results Act requires the strategic plan to have six specific elements. Regarding the first two of those, mission and the goals and the objective, the first draft that we reviewed, the July 8 draft, did not articulate well the mission and the goals and objectives and how the various functions were going to carry out the mission of the NLRB.

It also listed strategies but did not describe them. And it entirely omitted three of the basic elements of a strategic plan. Those elements are the relationship of the long-term goals to performance goals that will be in the annual performance plan that's due to the Congress in February of next year; a discussion of external factors that could affect achieving the goals; and a discussion of how pertinent evaluations were used in establishing the goals and a schedule of future evaluations.

We did find that the plan recognized some of the key challenges facing the agency, including managing a large case load and improving, with acknowledging to be deficiencies in their information management system, the management information systems.

But with respect to the management system, as you noted in your opening statement, there were several important omissions as well. One that you also noted that I would like to reinforce is the idea that they are moving ahead with improving their case activity tracking system, but they have not yet finalized, as we understand it, what measures they are actually going to be using in their annual performance plan. So there is a serious concern that those not being linked may lead to significant rework in the tracking system that they are developing.

As I said, they produced a new plan after we discussed with them our concerns about their other plan, and it is attached, as you



know, to the chairman's statement. This plan, in our opinion, is a significant improvement over the previous plan.

With respect to the six required elements, the mission statement focuses more on why the agency exists, its purpose, and the issues that the agency is charged to address. The goals and objectives move to progressively more detailed focus on what they hope to achieve. For example, the plan moves logically from mission, "encouraging and promoting stable and productive labor management relations," down to a goal, "preventing and remedying unfair labor practices." And that one, you can see, is further broken down into one objective about doing so expeditiously and another objective about doing it effectively—which they think of as quality and thoroughness as well as ensuring compliance. So there is a logical flow. And the strategies are presented. This time, unlike before, they're clearly linked to the goals and objectives. However, there is not very much discussion, as there ought to be, of what resources will be needed and how the strategies will be carried out.

Another problem with that portion of their strategic plan—the mission goals, objectives, and the strategies—is, what's missing is any sense of how they're going to communicate this process, these goals and objectives, throughout the agency, including across, as you spoke of earlier, the two compartments, if you will, of the agency and who—how responsibility will be assigned to accountability to managers and staff for achieving the objectives.

The other three requirements are included in the revised draft plan, but they need to be more fully developed, especially the relationship between the long-term goals and the annual performance goals.

For example, NLRB, we believe, should not have a false sense of confidence that the work to develop an adequate set of performance measures, which links to their strategic goals—that that work is all done.

Assessing whether a set of performance measures is consistent with the Results Act, we believe, can only be done after the other elements of a strategic plan have been defined, and NLRB has now made substantial progress toward defining those other elements, such as the mission, goals, and objectives.

I'll be glad to answer any questions that you might have.

[The prepared statement of Ms. Joyner follows:]

Mr. Chairman and Members of the Subcommittee:

We are pleased to be here today to discuss the National Labor Relations Board's (NLRB) strategic plan required by the Government Performance and Results Act of 1993 (the Results Act).

NLRB is an independent agency created by the National Labor Relations Act of 1935. As amended, the act provides the basic framework for relations between labor and businesses engaged in interstate commerce. It defines and protects rights of employees and employers, encourages collective bargaining, and seeks to eliminate certain unfair labor practices that could interrupt commerce. The act covers both profit and nonprofit firms. Major exemptions include agricultural laborers, supervisors, and public employees.

My comments today will focus primarily on NLRB's July 8, 1997, draft strategic plan. As you requested, we determined whether the draft plan complied with the requirements of the Results Act and the Office of Management and Budget's (OMB) guidance on developing strategic plans (Circular A-11, Part 2). To judge the overall quality of the plan and its components, we used our May 1997 guidance for congressional review of the plans (GAO/GGD-10.1.16, May 1997).<sup>1</sup> We also relied on previous reviews we have conducted on the Results Act and at NLRB. A list of related GAO products appears at the end of this testimony.

Agency strategic plans are to provide the framework for implementing all other parts of the Results Act, and they are a key part of improving performance. The act anticipated that it might take several planning cycles to perfect the process, however, and that the final plan would be continually refined as future planning cycles occur. Agencies are not required by the Results Act to have final strategic plans until September 30, 1997. We recognize that developing a strategic plan is a dynamic process and that the draft plan we reviewed will be further revised before NLRB submits its final plan to the Congress in September 1997.

In summary, although NLRB's plan is a work in progress, the July 8 version has deficiencies in several critical areas and often omits important information required by the act. For example, the plan's mission statement clearly articulates neither the purpose of NLRB's various functions nor how it performs its work. Moreover, although the plan's long-term goals are linked to its mission statement, its goals and objectives are neither results oriented nor measurable as stated. The agency has consulted with key stakeholder groups, such as unions, employers, and the agency's employees; however, it has not yet consulted with the Congress. Finally, NLRB's draft plan includes no description of the strategies or initiatives that will be used to achieve the plan's strategic

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<sup>1</sup>Agencies' Strategic Plans Under GPRA: Key Questions to Facilitate Congressional Review (GAO/GGD-10.1.16, May 1997).

goals, has no information on the time schedule or resources required by key actions associated with the plan's progress, and omits three of the six basic elements required by the Results Act. NLRB officials have acknowledged these deficiencies and are further revising the plan.

#### BACKGROUND

The purpose of the National Labor Relations Act is to encourage collective bargaining and to protect workers exercising their freedom of association to negotiate the terms and conditions of their employment. To carry out this responsibility, NLRB performs electoral, investigative, prosecutorial, and judicial functions. These functions are divided between its Office of General Counsel and a five-member Board appointed by the President with Senate approval.

NLRB's Office of General Counsel, organized into 52 field offices in 33 regions, conducts representation elections,<sup>2</sup> investigates and resolves cases involving disagreements about elections, and investigates and prosecutes cases involving unfair labor practices. All cases originate in one of the regional offices, either with a party filing a charge alleging an unfair labor practice or with a party filing a petition for an election. At the regional level, parties to the case either settle informally—the case is withdrawn, dismissed, or settled—or pursue litigation. Cases that the Office of General Counsel's regional staff determine have merit as an unfair labor practice usually involve a hearing before an administrative law judge (ALJ) in the region, who decides the case. Litigation in representation cases usually involves a hearing before a hearing officer, followed by a regional director's decision. If the parties to a case concur with the ALJ or regional director decision, this decision becomes the NLRB decision.

If parties contest the regional decision, the five-member Board at NLRB headquarters reviews the case and decides to affirm, modify, or reverse the regional decision. For decision-making purposes, the Board organizes itself into five three-member panels. One Board member serves as the head of each panel, is assigned the case, and drafts the Board's decision. Most Board decisions are made by the three-member panels rather than by the entire five-member Board. Parties (except for the General Counsel) who disagree with the Board's decision may appeal unfair labor practice cases, but generally not representation cases, to a U.S. circuit court of appeals and, in turn, to the Supreme Court.

In fiscal year 1997, NLRB's budget of about \$175 million authorized 1,950 full-time-equivalent positions in its Washington headquarters and field offices. In addition to 200,000 inquiries a year from the public, NLRB receives for investigation about 40,000

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<sup>2</sup>Representation elections are elections conducted among workers to determine whether they wish to be represented by a union.

cases a year filed by individuals, employers, or unions. The vast majority of all cases filed with NLRB are resolved informally at the regional level, and most of these are resolved without going to an ALJ or the regional director for a decision. The remaining cases are forwarded for review to the five-member Board at NLRB headquarters.

Results Act Requirements for  
Preparing Agency Strategic Plans

The Results Act requires that agencies clearly define their missions and articulate comprehensive mission statement that covers the agency's major functions and operations. It also requires that they establish long-term strategic goals, as well as annual goals linked to them. Agencies must then measure their performance in meeting the goals they have set and report publicly on their progress. In addition to monitoring ongoing performance, agencies are expected to perform discrete evaluations of their programs and to use information from these evaluations to improve the programs.

The Results Act requires agency strategic plans to include the following six elements:

- Mission statement: A comprehensive mission statement covering the major functions and operations of the agency.
- Strategic goals: A description of general goals and objectives for the major functions and operations of the agency.
- Strategies to meet goals: A discussion of the approaches (or strategies) to achieve the goals and objectives and the resources needed.
- Relationship of strategic goals to performance goals: A description of the relationship between the general goals and objectives in the strategic plan and the performance goals in the annual performance plan.
- External constraints: A discussion of key factors external to the agency that could significantly affect achieving the strategic goals.
- Program evaluations: A description of program evaluations used to establish or revise strategic goals and objectives and a schedule for future evaluations.

The plan is to cover a period of not less than 5 years and is to be updated every years. The act requires agencies, as they develop their strategic plans, to consult with Congress and solicit the views of other key stakeholders.

OMB Circular A-11 provides guidance to agencies on preparing strategic plans, including a description of individual components to be included in such plans. In

addition, the circular provides information on developing annual performance plans and the schedule by which all plans must be completed and sent to OMB and the Congress.

STRATEGIC PLAN'S MISSION STATEMENT COULD BE STRENGTHENED

According to OMB Circular A-11, the mission statement in a strategic plan should be brief, defining the basic purpose of the agency, with particular focus on its core programs and activities. High-quality mission statements often explain why the agency exists, what it does, and how it performs its work.

NLRB's stated mission in its draft strategic plan is to "(a) determine and implement through secret ballot elections, the free democratic choice by employees as to whether they wish to be represented by a union in dealing with their employers and, if so, by which union; (b) prevent and remedy unlawful acts, called unfair labor practices, by either employers or unions or both; and (c) insure that the process of collective bargaining is available and unimpeded."

Although the statement accurately itemizes the functions required by the statute, it does not clearly articulate what those functions are intended to achieve. For example, the statement does not focus on the results expected from activities, such as conducting secret ballot elections, that is, how workplaces would be different if such elections occurred freely. In addition, a statement about ensuring that the process of collective bargaining is available and unimpeded is vague without further clarification of which NLRB activities would address this part of its mission and what would result from achieving this. Similarly, the statement says that NLRB will prevent and remedy unlawful acts but does not convey which agency activities would perform this function.

STRATEGIC PLAN'S GOALS LINKED TO AGENCY'S MISSION BUT NOT RESULTS ORIENTED

The plan's long-term goals are generally linked logically to its mission statement. For example, the first three of the plan's five goals concern the expeditious and effective resolution of representation questions and unfair labor practices and vigorous pursuit of court orders and judgments to obtain redress. All of these are logically linked to a mission statement aimed at facilitating employees' free choice in determining union representation, preventing and remedying unfair labor practices and ensuring that the collective bargaining process is available and unimpeded. The remaining goals concern the agency's desire to implement effective management practices—maintaining a well-trained workforce and providing it the technological capabilities to ensure productivity that would help achieve its mission.

Unfortunately, the objectives associated with each of the goals are simply extended restatements of the strategic goals, rather than more specific explanations of what the goals are intended to accomplish. For example, one of the plan's goals is that "the NLRB will resolve questions concerning representation expeditiously and effectively." The associated objective states that "the NLRB seeks to effectively protect the rights of employees to select or reject a labor organization as their collective bargaining representative. To this end, it is essential that the NLRB resolve all questions concerning representation and conduct representation elections fairly and as expeditiously as possible." In addition, the goals and objectives as stated are generally neither results oriented nor measurable. For example, the goals tend to focus on the process, such as resolving questions, and how it will be done, that is, expeditiously and effectively, rather than on the result, such as workplaces where the free and democratic choice of employees can be expressed. In addition, the goals are not readily measurable without clarification of the meaning of terms, such as "effective."

**STRATEGIES TO ACHIEVE GOALS  
ARE IDENTIFIED BUT NOT DESCRIBED**

The Results Act specifies that agencies describe the means by which they will achieve the general goals and objectives and the various resources needed. This can include operational processes, skills, technologies, and other resources. The current version of the NLRB strategic plan mentions proposed strategies to achieve each objective but does not describe them nor articulate the linkage between the strategy and the particular goal and in one instance does not even identify a strategy. For example, it lists strategies such as "super panels" to achieve the goal concerning representation elections without describing them or their relevance.<sup>3</sup> Earlier versions of the agency's strategic plan had more detail on the agency's proposed strategies, and agency officials have told us that they are continuing to develop this area internally.

In addition, OMB Circular A-11 requires that agencies include schedules and the levels of resources necessary to complete key actions. The current agency plan, however, has no information on the time schedule or resources required by key actions associated with the plan's progress, for example, the development or use of "case management data research tools" or the resources associated with the completion of its case activity tracking system, which is discussed later in my statement.

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<sup>3</sup>Under a super panel procedure, a panel of three Board members meets each week to hear cases that involve issues that lend themselves to quick resolution without written analyses by each Board member's staff.

PLAN OMITTS THREE  
REQUIRED COMPONENTS :

NLRB's draft strategic plan omits three of the six components required by the Results Act and OMB Circular A-11. More specifically, the plan does not discuss (1) the relationship between its long-term goals and annual performance goals, (2) outside factors or external constraints that could hinder or affect the agency's efforts to achieve its goal and (3) role of program evaluation in developing the plan or establishing goals.

The Results Act requires agencies to establish annual performance goals linked to the plan's long-term strategic goals. These annual goals are to appear in an annual performance plan that the agencies must prepare beginning in February 1998 and submit to the Congress. OMB Circular A-11 notes that the agency strategic plan should include the type and nature of the goals to be included in the annual plan, the relationship between the annual plan goals and the general goals and objectives of the strategic plan, and the relevance of the annual goals in reaching the overall goals and objectives. Agencies must then measure their performance toward the goals they have set and report publicly, in subsequent years, on their progress. Results-oriented annual performance goals can enable the agency to track its progress closely and adjust the strategic plan when necessary. NLRB officials are currently revising the performance measures proposed in an earlier draft, they said, and anticipate addressing this issue in future versions of the agency's strategic plan.

In addition, NLRB's strategic plan does not discuss external factors that affect the agency's ability to achieve its objectives. OMB Circular A-11 notes that strategic plans should briefly describe key external factors, indicate their link with particular goals, and describe the factors' effect on meeting that goal. Identifying and assessing such key factors would have particular relevance for NLRB, an agency whose workload is influenced by general economic conditions; changes in the nature of work and workforce demographics; and the needs of stakeholders such as workers, unions, and employers.

Finally, one of the purposes of the Results Act is to improve decision-making by providing reliable information on the extent to which programs are fulfilling their statutory responsibilities. Program evaluations can be an important source of information for ensuring the validity and reasonableness of goals. Evaluation information can also be useful in explaining results in the agency's annual performance reports, including, when applicable, the reasons annual goals were not met and identifying appropriate strategies to meet unmet goals. According to the Results Act, an agency's strategic plan should describe the program evaluations used in establishing or revising goals and objectives and include a schedule for future program evaluations. NLRB's strategic plan neither describes the program evaluations used in preparing the strategic plan nor includes a schedule for future program evaluations.

CONSULTATION WITH  
KEY STAKEHOLDERS HAS  
NOT INCLUDED THE CONGRESS

In developing a strategic plan, the Results Act requires that agencies consult with the Congress and solicit and consider the views and input from other key stakeholders. NLRB's strategic plan does describe the agency's efforts to obtain information from its stakeholders (unions and employers) to determine their satisfaction with its services. The agency has also obtained input from regular meetings with labor-management advisory panels, which are composed of labor and management practitioners who appear before the agency and use the agency's services, on changes in agency procedures that could expedite case processing and improve agency services. Finally, the agency plan acknowledges valuable input from regular consultations with the labor organizations that represent its own employees as well as with its managers and supervisors on improvements in work process, including issues of quality. The plan, however, provides no indication that NLRB has consulted with the Congress in its development, and agency officials said that they have not yet done so.

STRATEGIC PLAN RECOGNIZES MANAGEMENT  
CHALLENGES FACING THE AGENCY

NLRB's strategic plan does identify several key challenges facing the agency, including difficulties in managing a large caseload and weaknesses in its management information systems. However, regarding its management information system, the plan does not link the development of performance measures with the development of a new management information system. The result is that potential incompatibilities between the two could impede accurately measuring progress toward the strategic goals. The plan could also be improved by acknowledging several additional issues: the year 2000 computer problem, computer security, and financial management.

Caseload Management

NLRB's strategic plan recognizes that combining timeliness in reducing caseload backlog with fairness and quality continues to be one of the main challenges facing the agency. Our past work on NLRB's case management supports this.<sup>1</sup> In 1991, we reported that NLRB's regional offices resolved the vast majority of cases within 1 year. During the mid- and late-1980s, the five-member Board decided about 67 percent of the 5,000 cases forwarded to it within 1 year from the date a case was assigned to a Board member. About 10 percent of the cases decided by the Board, however, took from about 3 to 7 years to decide. We recommended in January 1991 that to help improve the timeliness of

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National Labor Relations Board: Action Needed to Improve Case-Processing Time at Headquarters (GAO/HRD-91-29, Jan. 7, 1991).



its case processing, NLRB should (1) establish standards for the total length of time a case should be at the Board and a time for each decision stage at headquarters that, when exceeded, requires corrective action<sup>5</sup> and (2) specify the corrective actions that Board members and staff should take when those targets are exceeded.

In response to our recommendations, the Board set 2 years as a benchmark as the outside limit for issuing a decision at the Board and 6 months as the maximum time for each decision stage. Also, the Board revised its case management procedures to directly involve all Board members in matters that may be emerging as problem cases at the Board level requiring special attention. According to Board officials, these actions, together with other factors, resulted in significantly reducing the number and percent of Board-decided cases that were more than 2 years old. At the end of fiscal year 1991, 7 cases—2 percent of all cases—were pending before the Board for more than 2 years compared with 60 cases—16 percent of all cases—that were pending at the end of fiscal year 1989. At the end of fiscal years 1992 and 1993, the percent of unfair labor practice cases pending at the Board for more than 2 years was 3 and 4 percent, respectively, and the percent of representation cases was 1 and 3 percent, respectively.

Although processing times for representation cases at the Board level and in the regions have remained stable, NLRB has not sustained its improved case-processing times for unfair labor practice cases. At the Board, the percent of unfair labor practice cases pending for more than 2 years at the end of fiscal year 1994 rose to 8 percent and, at the end of fiscal year 1996, to 15 percent—to a level almost as high as in fiscal year 1989. At the regional level, the number of unfair labor practice cases awaiting preliminary investigation to determine whether a case had merit increased from 3,555 cases at the end of fiscal year 1991 to 5,219 cases at the end of fiscal year 1995. Almost one-half of the 5,219 cases exceeded NLRB's 45-day benchmark for preliminary investigations to take place. The median processing time in the regions for closing unfair labor practice cases increased from 58 days from filing to closing in fiscal year 1990 to 72 days in fiscal year 1995.

In 1996, we found that NLRB had initiated additional efforts to improve its performance.<sup>6</sup> For example, at the regional level, NLRB consulted with an advisory panel of management and labor attorneys to discuss possible actions for expediting cases, used

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<sup>5</sup>To decide cases, the five-member Board uses a three-step process. The Board refers to the steps as stages I, II, and III. In stage I, a preliminary decision is reached on whether to accept, modify, or reject the regional decision. In stage II, Board staff draft the proposed Board decision. In stage III, the draft decision circulates to the Board members who approve, modify, or dissent to the proposed decision.

<sup>6</sup>We obtained this information for an informal briefing for the staff of a congressional committee.

impact analysis to allocate resources to cases with the greatest scope and effect, and developed efforts, such as alternative investigative techniques, to lighten the regional workload. At the Board level, NLRB focused on lead cases<sup>7</sup> to reduce the backlog of related cases and implemented "speed teams" to expedite Board decisions on easier cases.<sup>8</sup>

#### Information Systems

Regarding its management information systems, the plan acknowledges the management challenge posed by NLRB's weak systems, noting that its multiple, independent systems do not adequately support the agency's need for prompt and accurate information to effectively manage its caseload. NLRB has several systems that enable tracking cases at different stages of processing. No single system, however, can track all cases from the initial charge until their final resolution. A single unified system could facilitate efficiencies in tracking cases and in resolving cases quickly. The plan notes that the agency is continuing to develop the case activity tracking system that is expected to be completed in 2 years, pending resource availability. This system is expected to facilitate case-related research and make it possible to conduct other important aspects of case processing with greater efficiency, increasing productivity.

In recognition of the need for information management improvements, NLRB's plan includes a strategic goal to integrate information resource management into the working environment to more efficiently and effectively meet NLRB's core missions. As discussed earlier, however, while proposed strategies to reach this goal are mentioned in the plan, these strategies are not described. An additional problem is that the plan does not indicate any coordination between developing its case activity tracking system and creating well-defined, results-oriented performance measures. To the extent that the measures developed by the agency as part of its strategic plan and annual performance plans are inconsistent with the data collected by its new information system, that system would have to be retrofitted to allow measuring progress toward the agency's strategic goals. Finally, the plan also omits strategies to address other important information management challenges, such as changing computer systems to accommodate dates beyond the year 1999—called the year 2000 problem—as well as any significant information security weaknesses—two issues that we have identified as high risk governmentwide.<sup>9</sup>

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<sup>7</sup>When several undecided cases deal with the same issue, the Board selects one case to serve as the principal or lead case and suspends further processing on all related cases until the lead case is decided.

<sup>8</sup>For cases involving straightforward issues, the three-member panel to which the case is assigned for drafting the Board's decision may agree to draft and circulate the proposed decision without preparing the detailed documentation that typically is required.

<sup>9</sup>GAO High-Risk Series (GAO/HR-97-20, Feb. 1997).

Finally, although NLRB is not required by law to prepare financial statements and have them audited, preliminary work from our governmentwide audit effort has determined that the agency would profit from a single, integrated financial management system instead of the five systems the agency currently uses. Such a system would enable NLRB to collect reliable and timely information on the full cost of its programs and activities. Because NLRB's strategic plan does not detail the range of data to be collected in its case activity tracking system, we cannot say whether an improved cost accounting system should be part of that initiative, but it may be useful for the agency to consider such integration as it reviews its management information systems generally.

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As I previously stated, NLRB's strategic plan is a work in progress. We discussed our observations with Board officials in preparing for this hearing, and they agreed on the need for improvements in the draft plan we reviewed. The officials said they are continuing to revise the draft plan so that it will conform with the Results Act and OMB Circular A-11 requirements.

Mr. Chairman, this concludes my prepared statement. I will be happy to answer any questions that you or members of the Subcommittee may have.

Related GAO Products

The Government Performance and Results Act: 1997 Governmentwide Implementation Will Be Uneven (GAO/GGD-97-109, June 2, 1997).

Agencies' Strategic Plans Under GPRA: Key Questions to Facilitate Congressional Review (GAO/GGD-10.1.16, May 1997).

Executive Guide: Effectively Implementing the Government Performance and Results Act (GAO/GGD-96-118, June 1996).

Managing for Results: Achieving GPRA's Objectives Requires Strong Congressional Role (GAO/T-GGD-96-79, Mar. 6, 1996).

National Labor Relations Board: Action Needed to Improve Case-Processing Time at Headquarters (GAO/HRD-91-29, Jan. 7, 1991).

Actions Needed to Improve Case Processing Time at National Labor Relations Board Headquarters (GAO/T-HRD-91-1, Oct. 3, 1990).

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Mr. SHAYS. Thank you.

Mr. Allen, I'm not clear where you see trouble areas in the Department. Where do you see trouble areas? Where are the areas that concern you most in the NLRB?

Mr. ALLEN. I think if we're talking systemic matters, I think the workman compensation claims is certainly a problem, and we have engaged in a program to improve that. And we have even referred some cases to the U.S. attorneys.

But as you know, the Department of Labor makes the ruling on that, but the various agencies pay for it. So there's not, in my view, a lot of incentive for the Department of Labor to deny them. And the agency ends up with a bill in it—and I forget what it is, but it is substantial in my—that's one area.

And we have done—well, actually Mr. Higgins, my predecessor, started the program, and it's been continued.

I think maybe the other area that there may be some concerns is in the performance by outside contractors and possibly procurement problems. I won't—I really won't know the answer to those questions until we complete ongoing investigations that are going on now.

We also investigate—the question of bias came up and how to—how does the agency control bias investigations and determination of cases. We do have some investigations going on on that. They're isolated, of course.

Now, one thing we do not do, whatever the—we do not second-guess the case decisions of the general counsel of the Board or regional directors. That's not within the jurisdiction of an IG. There's a fine distinction, because we had a lot of complaints. People, say, hey, you know, this case is not decided right, and we have to tell them this. But then if they go further and make some showing, well, maybe it wasn't decided right because it's a misconduct, and maybe bias so blatant that it rendered the investigation or the decision, it tainted it.

Mr. SHAYS. With the Department, you said the workers compensation is one concern, out contractors.

How much progress do you believe the NLRB has made in establishing the whole issue of objectives in establishing performance goals and performance measurements as required by the Results Act?

Mr. ALLEN. Well, the IG's office has not looked into that. We've had no input into it, and we've not participated in it, other than for the June report of John Higgins. And, as I said, I wasn't present then, but the last thing that the Office of the Inspector General did was that report. And of course I preceded the strategic plan and everything that followed.

Mr. SHAYS. OK. I just have to tell you, it leaves me uneasy that you, as inspector general, can't tell me how you think the Department is doing with the Results Act.

Mr. ALLEN. I think if we're forced to tell you that, we're going to have to make a review or investigation on audit, and we have simply not done that yet. It is certainly—it is certainly something that we can do.

And, Mike, would you address that?

Mr. GRIFFITH. Mr. Allen mentioned that we did issue a report back in June 1996. And that did include the agency's progress in terms of meeting GPRA.

At that time, it was our assessment that the agency was moving forward appropriately. We have not, as he indicated, done any audit work or review work since that time until this week when I did look at the agency's most recent strategic plan, and, like GAO, I saw the need for improvement in that.

As the chairman indicated this morning, the agency is making considerable improvements in that strategic plan to meet the provisions of the law, but they still have a lot to go. And as GAO mentioned, one of the big things would be the performance measures, before they get too along in their information system.

So we are looking at it, we just have not done extensive audit work since that time.

Mr. SHAYS. Could you, Mr. Allen, give me a sense of why the agency paid \$1 million to a contractor for services which were not performed satisfactorily or were not performed at all?

Mr. ALLEN. That's the allegation that's in—that's noted.

Mr. SHAYS. Allegation that's what?

Mr. ALLEN. That is an allegation that has been made and is the subject of an investigation.

Mr. SHAYS. Right.

Mr. ALLEN. I—

Mr. SHAYS. Has the IG yet responded to that? Isn't there some documentation?

Mr. ALLEN. We issued a draft audit. The inquiry since then has expanded substantially. We're investigating it. We have approximately three or four maybe—yes, four, at least, related cases which we have grown out of it which we're investigating.

I cannot—I'll be glad to share the report with you, of course, once we're finished. I do not think that it would be appropriate at this time to get into it, because, as you make your report, you interview your witnesses—for example, I've subpoenaed over 1,000 documents, pages of documents, also that—

Mr. SHAYS. How many work in your office?

Mr. ALLEN. There's myself, there's my chief counsel, one investigator and three auditors.

Mr. SHAYS. That's it?

Mr. ALLEN. And an assistant secretary. Yes, that's it.

Mr. SHAYS. So you have not had a preliminary finding that there was misuse of this money? There wasn't—

Mr. ALLEN. I—I have not made any finding.

Mr. SHAYS. OK.

Mr. ALLEN. That is correct.

Mr. SHAYS. Would you explain to me what we call the CATS, the Case Activity Tracking System. Explain to me what this system is supposed to do.

Mr. ALLEN. Well, that—once again, we have not made a review of that. It is a new system to case tracking to replace the old system which functioned for years. But we haven't—the agency has more needs now, and such has been explained. You can—under CATS, you'll be able to track a case from its beginning to its end,

and you can arrange it by subject matter, which, for example, you cannot do now.

The part of our investigations that are going on now do not involve the CATS matter. It involves other matters in computer and computer maintenance, but it does not involve the——

Mr. SHAYS. Well, let me just say to you, though, that the thing that concerns me is, if we have a problem with \$1 million, we're going to at least be uneasy if the—the CATS system is going to cost how much?

Mr. ALLEN. It's going to be more than that.

Mr. SHAYS. No; that's an understatement.

Mr. ALLEN. I'm sorry, I don't know.

Do you know, Mike?

Mr. GRIFFITH. Well, a good bit of CATS expenditures has been the actual PC, the hardware, that type of thing, and it's several million dollars.

Mr. SHAYS. Have they spent 10 already?

Mr. GRIFFITH. It will approach 10 certainly, once it's all completed.

Mr. SHAYS. OK. Well, I have a little bit of discomfort, if we're concerned how \$1 million is spent, how they're going to do with \$10 million.

Mr. ALLEN. Well, you'll notice, Congressman, that we do have an inquiry planned, complete audit review on our procurement practices, and largely the concern growing out of the investigations we're doing now, and that will be accomplished as soon as our small staff can do it.

But we do have—one thing we do have, and I point out in my report, we do have the power of subpoena *duces tecum*, which I have used extensively for this for outside parties.

You know, inside the agencies, everybody is required to produce documents and to cooperate. But when you have to go out to, say, outside contractors, the only power you've got or witnesses who may know something is your power to subpoena documents. And I have subpoenaed——

Mr. SHAYS. Power to what?

Mr. ALLEN. To subpoena documents.

Mr. SHAYS. The other power is, you have the power to——

Mr. ALLEN. Well, within the agency, I have the power to interview people, take affidavits, personal interviews, which we have done, but I do not have the power—the Inspector General Act does not give us the power to subpoena testimony.

Mr. SHAYS. But let me ask you this. You can take testimony. But if you're the inspector general and you have an outside contractor supplying a good or a service to a Department, the mere fact that you have concerns, it seems to me, you would get tremendous cooperation. If you didn't get cooperation, I would think you would recommend that they discontinue the contract.

Is this a contract that's already been completed?

Mr. ALLEN. The—the one we're investigating is, yes.

Mr. SHAYS. It's——

Mr. ALLEN. It's been renewed.

Mr. SHAYS. It's what?

Mr. ALLEN. It's been renewed, yes. It's a 1996 computer maintenance contract.

Mr. SHAYS. If you think you have any trouble getting documents, I would like to know.

Mr. ALLEN. I have no trouble getting documents.

Mr. SHAYS. Do you have any trouble getting cooperation or testimony?

I don't understand. If I had a contract and that contract meant something to me and I had an inspector general come in and ask questions, I would throw open my books to you in any way possible. I realize you've got few people, and that's certainly a restraint, but you have a tremendous power.

Mr. ALLEN. Well, in the beginning we did not have that problem. I just had a subpoena returned with a letter from an attorney which says, hey, we don't give this; it's irrelevant. Now I fight that battle next week.

Mr. SHAYS. Well, you know, I have to be careful that I don't, you know, interpret your nice kind of western southern drawl as being an easy kind of guy, because I hope that when you get that kind of reaction, that you are loaded for bear here.

Mr. ALLEN. Well, I think we are loaded for bear, and—

Mr. SHAYS. Well, this is what we're going to do. I'm going to ask my staff to personally inquire about this case and to followup with you. And if we have to get the contractor before this committee, we'll do it. We will get the contractor before this committee if you don't get the cooperation. And we want some answers pretty quick on it.

Mr. ALLEN. I expect the report on this—

Mr. SHAYS. Will be due when?

Mr. ALLEN. Certainly within weeks. Personally, if I can get 5 days away from the other cases, I can finish it, if you want to have a specific answer.

Mr. SHAYS. We'll look to see some answers to this case.

Mr. ALLEN. In a few weeks, yes.

Mr. SHAYS. In September or a little earlier, I guess. But I'll just leave it up to you discussing with our staff.

Mr. ALLEN. Sure.

Mr. SHAYS. We're happy to followup. And we're happy to—if you do not get cooperation from an organization that's doing business with the Government, we're very happy to have them explain to us why they're not cooperating with the inspector general of the United States overseeing a very important Department.

Ms. Joyner, how do you think the NLRB is progressing in linking its strategic plan annual performance goals to the activities and operations that are in the budget?

I mean, how well are they—how well are they coordinating what are strategic plans and so on with their—and their annual performance goals to the activities and operations of the budget?

Ms. JOYNER. Well, in this most recent plan that we saw, they have made some progress toward that, in that this time what they present is what they call performance measures, which we take to mean their statement of the kind of performance goals.

As you know, they're called upon now to have their strategic goals laid out and, in fact, to go ahead and describe the specific



performance goals that they'll be submitting along with their budget, which in fact need to go to OMB for review in September. So it's not way off in the future in terms of getting clear on that.

So they do list some performance measures. The measures seem to be well-linked, and they seem to be ones that probably would provide some useful information.

My concern is about the set of overall performance measures. It's not that I would be critical of any one of the measures that they provide, but what's missing seems to be a comprehensive look at the goal and the objective and then delineation of the whole range of measures that would give me some sense that I'm accomplishing these.

So whereas they have lots of measures—they have several in the plan, and I understand they have many, many more—they have lots of numbers and lots of measures.

For example, they've got a timeliness. They can talk about timeliness and various segments and various goals, that that part of their—their mission and their goals and objectives that relates to the effect, the result, of what they've done and, as they call it, even the quality of the decision.

To go back to the example I gave before on unfair labor practices, what's missing in that set of performance measures is any assessment of the effect of their enhanced compliance efforts. So the biggest problem is the gap, the gap in the kinds of measures that they're presenting.

Mr. SHAYS. OK. In terms of—I'm uneasy about the whole Case Activity Tracking System. Is my uneasiness justified?

Ms. JOYNER. On the basis of what's in the strategic plan, I would say that this uneasiness is well-justified. There may be more information than either of us has about the planning that has gone into that.

Mr. SHAYS. Are you saying—

Ms. JOYNER. But it's not in the plan. It is not written for us to know about.

Mr. SHAYS. So are you saying in terms of the Results Act, the whole CATS operation is not part of that Results Act? I mean, you don't see it connecting between the two?

Ms. JOYNER. What's missing right now is a delineation of what measures they need to be able to demonstrate to themselves and to the Congress that they've met the goals and objectives that they've laid out.

Until they've decided what measures they need—and essentially we talked with you about those, talked with you about those measures in their consultation process and received agreement that if we use these measures and perform according to the standards we've set, we will be demonstrating success.

Until they've done that, they don't know what they need to put in their Case Assignment Tracking System. They don't know all the things that they need to have in there. So our concern is that if they step back and say, "we've been measuring lots of things for 40 years but maybe we haven't measured all of the right things and now we need to design some new measures," if they were to do that, as the strategic process calls for, then they would perhaps

need to build into their tracking system something that they're not currently planning to build in.

So until they've looked at the measures in the context of what they're trying to achieve, they won't know that they have all the right measures.

Mr. SHAYS. I'm going to ask in a second the staff to ask a question, too, if we need to.

But, Mr. Allen, when you started out, you made reference to measurements, and you said that the NLRB knows how to measure, if anything knows how to measure. I lost the beginning of it, so I didn't quite get your point.

Mr. ALLEN. The point—that's the point my predecessor makes in this memorandum and I was trying to say.

Mr. SHAYS. His point was?

Mr. ALLEN. That historically going back to 1960—

Mr. SHAYS. Yes?

Mr. ALLEN. As a matter of fact, the NLRB has an impressive measuring system. Now that's not to say that it meets the requirements of the Results Act. I didn't mean to indicate that. I'm just saying, historically, I agree with John Higgins that I don't know of any agency or personally of any business where you can walk in one room and it's charted all the way around on any—on any single case activity will tell you exactly where the performance is.

Mr. SHAYS. Well, I'm wondering if they can tell you, you know, how many and what they've done. The question is, can they answer the questions of why and—

Mr. ALLEN. No.

Mr. SHAYS [continuing]. And how well. You know, those are the measurements that you know we're going to need to get into.

Mr. ALLEN. I understand that the Results Act does require additional—additional measurements.

I might add, you were asking—you know, the IG really hadn't been in on this. The IG Act does provide, in addition to all wastes and abuse, that we should be in on the agency programs on the economy and efficiency of it, and I assume that's what you're referring to. The problem being the NLRB—our staff has—has been so small, we have never, never been involved in—for example, on the planning of—of how you—of how you made a strategic plan or GPRA.

Now what happens, we will review it later at times, but as far as being in up front—

Mr. SHAYS. Let me just ask you up front about this.

Mr. ALLEN. Yes.

Mr. SHAYS. What I think I hear you saying is, you're a small office.

Mr. ALLEN. Yes.

Mr. SHAYS. And I would be the first to acknowledge that the Government has required GPRA Results Act performance measurements and so on.

And are you saying that even within your own office, you have limited ability to determine a good plan and so on? I mean, that would be a fair statement to say. And one very—

Mr. ALLEN. That wasn't what I was saying, though.

Mr. SHAYS. Does that happen to be true, though?

Mr. ALLEN. That happens to be true, yes.

Mr. ALLEN. But what I was saying is, looking at the National Labor Relations Board, just not the inspector general part of it, the IG Act provides that we should be in up front on planning and function in such things as the strategic plan. We have never, never to my knowledge, been able to do that, either me or my predecessors, because of the smallness of the staff.

Mr. SHAYS. Yes. Fair enough.

Mr. GRIFFITH. Mr. Chairman, may I make a comment?

Mr. SHAYS. Sure.

Mr. GRIFFITH. Just in regards what you're talking about, we did go in, as I said, 15 months ago and assess where the agency was on its strategic plan and meeting the various provisions of GPRA as part of the overall review of measuring its ability to fulfill its mission.

At that time, we made the assessment that they were moving forward in an appropriate fashion. But they at that point did not have a strategic plan finalized that we could actually review.

What they had done, that we were able to confirm, is they're dealing with theoretical experts in the area, quizzing their employees, this type of thing. And they were also establishing data bases by which they could compile their information.

Mr. SHAYS. What I'm trying to get at is if you know, if I had to come and set up a performance program in my own office, as we try to do, we're pretty elementary in doing it; we don't have someone who's going to graduate school with how you do performance measurements. I have a graduate degree, and I've had some background in this.

But I guess the point I'm trying to say is, this is new territory for a lot of us, including the committee. I'm trying to have a little sympathy for a small office that may not have the expertise, because it's clear to me this isn't a primary focus of your unit right now, and my first reaction is to think this is really terrible, and then I'm thinking, wait a second, we've got a small group of people.

Were you given any training yourselves in how to set up such a process? Did you hire someone new to—

Mr. ALLEN. We did not.

Mr. SHAYS. Exactly. And so I'm just trying to sort it out a bit here.

One last question. Then I am going to get to staff. The Board is five members; correct? And, NLRB has only three members sitting?

Mr. ALLEN. Three members sitting.

Mr. SHAYS. And only three members sitting for how long now?

Mr. GRIFFITH. Since this past—let's see here.

Mr. ZIELINSKI. Remember, Browning died.

Mr. SHAYS. February. A few months ago.

Has the administration brought forward any appointments yet or nominations?

Mr. ALLEN. Not that I know of.

Of course, two of them sitting are not—you know, are not confirmed members.

Mr. SHAYS. So we only have one confirmed member.

Mr. ALLEN. Yes. That's the chairman.

Mr. SHAYS. We have two that aren't confirmed, and we have two vacancies.

Mr. ALLEN. Yes.

Mr. SHAYS. That's a pretty pathetic situation. I was going to get into that, but we have so many other questions. That's pretty pathetic.

What is the impact of having the three-member Board and two of the three not permanent members?

Mr. ALLEN. Well, I think—of course, the chairman addressed that. In my view, based on my experience of the agency as IG, it means that I think some of the probably more difficult cases do not get out, more important cases, in my view, because you would want—you would want a bona fide five-member Board to rule on those matters, and I think—I think it was—I think that would be one of the biggest drawbacks.

Mr. SHAYS. Well, I'm going to talk with Mr. Towns about the value of our weighing in on this, because, casting no aspersions, it just simply needs to happen.

Ms. Joyner, any response to a three-member Board of which only one is a permanent member?

Ms. JOYNER. I really wouldn't have any basis to respond on that.

Mr. SHAYS. OK. You haven't looked at that?

Ms. JOYNER. No.

Mr. SHAYS. OK. Let me do this.

Ms. JOYNER. We've not looked at this issue recently. We did—back when we did a study in 1990, we issued a report in 1991. We talked about the high turnover in Board members as being a problem contributing to some of the backlogs at the Board level.

And, in fact, related to that, if I might expand on a discussion that occurred earlier today, is that the backlog after at the Board level—after decisions get up to that point when we based on data from the end of 1996, it's now as bad as it was back when we did this study, 1989; 16 percent of the cases that reach the five-member Board stay there for over 2 years.

Mr. SHAYS. OK.

Ms. JOYNER. And that was the—

Mr. SHAYS. Say that again now.

Ms. JOYNER. After we—

Mr. SHAYS. Say exactly what you said again.

Ms. JOYNER. Sixteen percent of the cases after they reach the state of the five-member Board decisionmaking are there over 2 years.

Mr. SHAYS. OK.

Ms. JOYNER. And that's what they had set as, after we did our work in 1991. And we looked at the backlog just at that—at that level, at the Board level. We recommended that they set some clear criteria for how long was too long and some processes in order to make sure that they don't exceed that. And that's what they said. And it did get better.

Mr. SHAYS. OK.

Ms. JOYNER. But in the last few years it got worse again.

Mr. SHAYS. The committee needs to look at that again. I'm going to work with my ranking member to see if we can make an effort to encourage the administration to move forward.

At this time I would ask Cherri Branson if she has any questions.

Ms. BRANSON. Yes, we have just a few questions for Ms. Joyner.

Ms. JOYNER. Yes.

Ms. BRANSON. First of all, GPRA requires that all the agencies submit their plans by September 30, 1997.

Ms. JOYNER. Yes.

Ms. BRANSON. What does the law provide if that doesn't happen and if the agency fails to submit their plan?

Mr. SHAYS. I didn't notice that southern accent until we had Mr. Allen.

Ms. BRANSON. I've had it for quite some time.

Mr. SHAYS. OK.

Ms. JOYNER. We have to be careful, or mine will start coming out too. That's what happens when I'm around it.

Mr. ALLEN. If you get two of us together, it will happen every time.

Ms. JOYNER. What happens if agencies don't submit their plans? I have to admit, I really don't know. I'm not—I have not heard any discussion of the consequences. I'm not sure what there might be in the way of penalties for an agency that does not submit their plan by then.

Ms. BRANSON. If the act doesn't have any penalties, then what do you think may happen?

Ms. JOYNER. I think that all the agencies will submit something, and they will be quite variable in their quality.

OMB, of course, is a control point for this, agencies are required to submit their plans to OMB first. I believe they're due there no later than August 15. And then there—with the feedback they get from OMB, they are to submit them to Congress.

So I think the administration does take very seriously the fact that they're a control point and they're supposed to get some plans submitted. GAO has—on the basis of some earlier work—looked at the progress agencies were making and issued a report saying that, really, we do feel they're going to be a very uneven quality.

Ms. BRANSON. Has GAO—is GAO working on a report now that discusses overall GPRA compliance?

Ms. JOYNER. One thing we're doing right now, upon request from several Members of the House leadership, is we are—we have reviewed the draft strategic plans for the 25 major agencies. And this was a joint request from the House leadership. And we have gone in using the same criteria that I described earlier—in fact, that we used with the NLRB's strategic plan. And we have reported in correspondence on each agency as we got them finished.

I was responsible, for example, for the ones on education and on the Department of Labor. And there will be a product that pulls together what we found across those. And I think the deadline for issuing that will be sometime in August that we'll be issuing a report, if you will, what we call correspondence, probably, that reflects our observations over these.

Again, these are the draft plans, and we recognize and we try to be sensitive to the fact that the agencies have more time to improve them. But—but we will be issuing some comment about where they looked at least at that draft stage.

Ms. BRANSON. And it's my understanding that you have reviewed, in preparation for this hearing, at least two reports, draft reports, for the NLRB.

Ms. JOYNER. Yes.

Ms. BRANSON. And then you stated there is a significant difference between the first report and the second report.

Ms. JOYNER. That's right.

Ms. BRANSON. So have you had—would you describe their attitude as cooperative and—and willing to make change?

Ms. JOYNER. They were very cooperative and interested in what insight we could give them on ways to improve. They repeatedly said, "tell us what we need to do and we'll try to do it." And they were receptive to the comments that we offered.

Ms. BRANSON. OK. Can I just ask one more?

Mr. SHAYS. Sure.

Ms. BRANSON. Mr. Allen, does the NLRB have a chief information officer?

Mr. ALLEN. The—we do have information officers, yes.

Ms. BRANSON. I mean under the CIO Act as—in addition to the CFO Act.

Under the CFO Act—

Mr. ALLEN. I don't think so.

Ms. BRANSON [continuing]. All the agencies have to have a chief financial officer. Under the CIO, they have to have chief information officers who are responsible for the computer systems.

Do you know whether the NLRB has a CIO?

Mr. GRIFFITH. We do not have a CIO. We do not, I believe. We can check on that.

Ms. BRANSON. Some of the problems you describe with the CATS system could—do you believe they could be addressed if there was a CIO?

Mr. GRIFFITH. The—what's been discussed thus far in terms of the CATS problem is that perhaps the agency needs to rethink its performance measures to build into the data base so that when it starts getting its information down the line, it will be able to conform better with the requirements of GPRA, and perhaps a chief information officer could help in that regard.

As far as some of the other issues that have been brought up, the year 2000 problem, integrated accounting systems and that type of thing—I don't believe that we have that issue at the NLRB, and I don't think a CIO would have made any difference.

Ms. BRANSON. Thank you, Mr. Chairman.

Mr. SHAYS. I thank you for the very good questions you asked.

What we're going to do is, I'm going to go vote and we're going to come back. And then Mr. Yager, Mr. Joseph, and Mr. Hiatt will be asked to come.

And let me just ask, is there anything that any you would like to—any point you want to make?

Mr. Zielinski, you haven't responded or answered any of my questions. Is there any point you want to make given what you've heard, the questions?

Mr. ZIELINSKI. Yes, I would just like to—in partial response to the staff question with regards to the CIO, I'm not entirely sure NLRB is covered under the CFO Act because of its size. The agency

has, in the wake of problems with the computer system, brought in a new director of management information systems branch who just came on board in the last 2 weeks, who was a deputy CIO at GSA, in fact. I think that may well address the question. I'm not sure if GAO is even aware of that. They are attempting, I think, to tighten up in the management information system area.

The other thing is I—I think perhaps to relieve the chairman's concerns about our perspective on the complaining and so forth, I can tell you that that has been an element within the inspector general's office.

Mr. SHAYS. That's been a what? I'm sorry.

Mr. ZIELINSKI. An element within the inspector general's office. And we've had, I guess for 2 years now, a strategic plan both for the audit side and the investigative side of the office. And that's something under review at this time to update.

So it's not necessarily a lack of cognizance, but it's kind of like rowing in the rowboat upstream against the current with the size of the staff and amount of issues that are there.

Mr. SHAYS. OK. Thank you.

Any comments, Ms. Joyner or Mr. Allen?

Ms. JOYNER. I would just like to reiterate that I think what this strategic plan exercise provides the NLRB is an opportunity to look beyond what they've done, possibly quite well in terms of tracking what they have been doing and how fast, and to focus on the results and why they exist and what ought to be different in the workplaces out there as a result of their actions.

Mr. SHAYS. OK. All set, Mr. Allen?

Mr. ALLEN. Yes.

Mr. SHAYS. OK. Let me just recess and apologize to the third panel, but we'll be back very quickly.

Mr. ALLEN. Thank you.

[Recess.]

Mr. SHAYS. Stay standing, and we will swear you.

We call this hearing to order and invite Mr. Daniel Yager, vice president and general counsel, Labor Policy Association; Mr. Jeffrey Joseph, vice president of domestic policy, U.S. Chamber of Commerce; and Mr. Jon Hiatt, general counsel, AFL-CIO.

And we are happy to have you here. Raise your right hands.

[Witnesses sworn.]

Mr. SHAYS. Thank you.

This has been a long day, and you are probably saying, why did I get here so early? Maybe you were smart enough not to get here so early. I do appreciate you being here. All three of you have very important testimony. I think you will probably want to express some views that we haven't yet heard, and we welcome that.

We will start as I called you and begin with you, Mr. Yager, and then go to you, Mr. Joseph, and then Mr. Hiatt.

**STATEMENTS OF DANIEL V. YAGER, VICE PRESIDENT AND GENERAL COUNSEL, LABOR POLICY ASSOCIATION; JEFFREY H. JOSEPH, VICE PRESIDENT FOR DOMESTIC POLICY, U.S. CHAMBER OF COMMERCE; AND JONATHAN P. HIATT, GENERAL COUNSEL, AFL-CIO**

Mr. YAGER. Thank you, Mr. Chairman.

Mr. SHAYS. Thank you very much.

Mr. YAGER. My name is Dan Yager. I am general counsel for the Labor Policy Association. This is an organization representing the senior human resources executives of over 250 major corporations. We appreciate——

Mr. SHAYS. Can you move the mic down just a little speck?

Mr. YAGER. Am I too loud?

Mr. SHAYS. No, no, you're not loud enough. It's a little far away from you——

Mr. YAGER. That's new. That's the first time anybody has complained of that, Mr. Chairman. Usually, people tell me to tone it down.

Mr. SHAYS. Maybe what you say, they tell you to tone it down.

Mr. YAGER. Content? No, I can't agree with you there.

I appreciate the opportunity to appear before the committee. I think even more so, our organization appreciates this committee focusing on this agency, because I think our concern, a lot of it, is that over the last several years, and not just the current regime, there really has been a lack of public or congressional attention to this agency. And in part because of that, and because of a number of other factors, we really feel like the agency has, to a large extent, degenerated. It has become viewed by many parties as really a political agency, and there is a feeling that to actually get justice, if you can afford it, you just sort of wait out the Board's process and then get the case into the Federal courts where you are more likely to get some consistency, some reasonableness. And, as you might imagine, only people who can afford to do that are actually able to do that. And for the little employer, that doesn't help too much.

Obviously I don't have enough time today to go through all the cases that we have described to document our concerns. Earlier this year, we published a monograph, "NLRB: Agency in Crisis," which I believe we sent to you. In our testimony, we primarily focused on updating that and not going back and reiterating those cases but using some of the new cases.

We have a number of concerns. I will just throw out one example: the perception that when there is an election, and the union loses, the Board will very often use any minor transgression by the employer to call another election and give the union another bite at the apple.

On the other hand, when the shoe is on the other foot, we don't always see that to be the case, and there are a couple of recent cases that have even gone so far as to say that where there are allegations that the union or somebody actually forged union authorization cards—those are the cards that a union will use to get the employees to sign to show the Board that there is enough interest to have an election. There have been allegations in a couple of cases where those were forged. This was after the election.

The Board actually took the position that those allegations were irrelevant, that in fact once the employees had voted on whether to have a union or not, alleged forgeries of authorization cards were irrelevant.

Now, from my point of view, if I was an employee and I had just voted for a union and had later found out that they had actually



been fabricating signatures on official legal documents, I might want to have another chance to vote on that union.

That's one example. There are numerous other examples.

Mr. Snowbarger went through a number of complaints about all the numerous baseless charges that are filed, and these are frequently part of what is called a corporate campaign which is designed to harass an employer and cause it to expend precious resources litigating matters that really don't have any merit. While the Board continues to allow that sort of thing, in a couple of recent cases they have actually moved against employers who, in State court, have attempted to defend their own legal interests.

For example, Beverly Enterprises had been subjected to some libelous activity by the SEIU on the picket line. They sued SEIU in State court, and, in turn, the Board went after them and in fact even tried to get an injunction to stop Beverly from defending its own interest in State courts completely outside of the labor laws.

So, while at the same time they are allowing unions to harass employers, they are taking away a lot of the employers' defenses.

I think a lot of the problem we see today is that the Board, I think, to some extent, has outlived its usefulness at least in the adjudication of unfair labor practices. I think there is still a need for the Board to administer elections. You need a neutral party to do that sort of sensitive issue. But in the adjudication of unfair labor practices, I think the concept in the thirties was that we have got this broad new law that we are passing and it is going to apply to all of these industries; we need some expertise from those industries and some workplace experts to help translate that law into the various instances that it will apply to.

Well, it has been 60 years. The law has pretty much been fleshed out. We are down to nuances now, and what we have seen for the last 15 or 20 years is really just nuances and a shifting of policy depending on whether it happens to be a Republican Board or a Democratic Board.

In the meantime, what is happening to the parties—and we even heard this this morning—is a long, lengthy process to get a case through the Board which can take anywhere from 1 year or 2 to sometimes 5 or 6 years. We give an example in our testimony that is 8 years and counting and still hasn't been resolved.

We would query, wouldn't it perhaps make more sense to go right into Federal court? The Federal courts—

Mr. SHAYS. May I interrupt you, since I am the only person here. They don't have the ability right now if it is a long case to just go directly to the courts?

Mr. YAGER. Well, they can try an injunction, Congressman, and in fact—

Mr. SHAYS. I am talking about the two parties.

Mr. YAGER. Oh, no; you have to go through the NLRB for most cases. There is a very narrow range of cases dealing with secondary activity.

Mr. SHAYS. That might be something all three of us can talk about, and if I forget to ask, I'd love you to respond to it.

I'm sorry to interrupt.

Mr. YAGER. Actually, we would be very interested in pursuing this with you, Congressman, because if you look at all the other

cases that the courts now deal with in the employment area—Americans with Disabilities, complicated cases in the antitrust area—I don't think the courts necessarily need a panel of experts any more to filter through these various cases. It may make more sense and it may make for quicker relief and quicker resolution of the issues to go right to Federal district court and have the trial there.

One possibility would be to retain the general counsel function. There's pros and cons both ways on that. But I think where you need to get past and where most of the really bad delays occur are after you have had the trial, the fact-finding process by the administrative law judge. The matter then sits before the court—before the Board for, even under a good Board, a year and a half. I am not sure what the exact averages are or the mean, but I know it's at least somewhere in the 9 months to a year case. But it is certainly not unusual for a case to sit there for a year and a half or 2 years. And then if you wind up going to the courts anyway, what did you gain by having that case sitting before the Board?

I also think that the Board, in the recent seeking of the injunction against the Detroit newspapers to which we are strongly opposed, it is interesting because Chairman Gould—and I believe he included this in his testimony—wrote a rare decision as to why he was agreeing to authorize the 10(j) injunction. A large part of his reason for authorizing it—and I think he more or less said that this morning—was to avoid the lengthy delays that further adjudication by the Board would accomplish.

Well, to me, that is an admission, what possible purpose is the Board serving here?

I might add as an aside that that case sat before the Board for 2 years before it even did get to an administrative law judge decision, and the general counsel never sought expeditious review by the administrative law judge and didn't seek an expeditious review by the Board, which makes it puzzling as to why 2 years later, all of a sudden, it would be all that urgent that they would proceed with a 10(j) injunction.

And on that, I think I'm—in the interest of time, I think I will go ahead and finish before my regular time is over.

Mr. SHAYS. Actually, we extended. Your regular time is 5 minutes, but we are giving witnesses 10. Since you waited so long, you deserve that at the very least.

Mr. YAGER. I believe I've said everything that I need to. I appreciate the opportunity to appear, and I will be happy to answer any questions.

[The prepared statement of Mr. Yager follows:]

## MR. CHAIRMAN AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

My name is Daniel V. Yager. I serve as the Vice President and General Counsel of the Labor Policy Association.<sup>1</sup> LPA is a Washington, DC-based public policy advocacy organization of senior human resource executives representing over 250 major corporations. LPA's purpose is to ensure that U.S. employment policy supports the competitive goals of its member companies and their employees. The total number of persons employed by LPA companies in the United States is 12,286,436, or 12 percent of the private sector workforce.

The National Labor Relations Board is an agency in crisis and in dire need of reform. The Labor Policy Association welcomes this committee's interest in the federal agency that has such tremendous power over the American workplace because we believe the NLRB is exercising that power in a manner at sharp odds with its mandate prescribed by the Labor-Management Relations Act. LPA believes that Congress should begin immediately to consider fundamental reforms in the way the National Labor Relations Act is enforced and administered.

The purpose of our nation's organizing and collective bargaining law is "to prescribe the legitimate rights of both employees and employers in their relations affecting commerce, to provide orderly and peaceful procedures for preventing the interference by either with the legitimate rights of the other ..." and "to protect the rights of individual employees in their relations with labor organizations whose activities affect commerce..." among other important objectives. The National Labor Relations Board of 1997, however, is in pursuit of a substantially different set of objectives.

What makes understanding the Board's condition difficult is that its health has been undermined by a host of small wounds inflicted by the current managers of the Board. For example, the Board of today rules in one case that a captain of a maritime vessel responsible for the protection and safe handling of ships carrying people and millions of dollars of cargo is not a supervisor, but is simply one more member of the crew. The Board of today spends thousands of dollars and hundreds of hours of management's time litigating cases to make sure that if during a strike a company gives pizzas to those at work, the strikers on the picket line should get a few slices as well. The Board of today believes that if a union has no interest in forming the employees of a particular company into a union, but is only interested in destroying that company, the act of destruction should be considered an activity protected by the National Labor Relations Act. The Board of today believes that sexual harassment and other outrageous conduct that is in clear violation of Title VII of the Civil Rights Act should be given complete license if it occurs on a picket line. The Board of today wants to eliminate the use of secret ballot elections in determining whether employees desire to be represented by a labor union because employees in more than 50 percent of representation elections vote against third-party representation. When employees do vote overwhelmingly against union representation, the Board of today seeks federal court injunctions ordering the company to recognize the rejected union as the employees' exclusive representative and to bargain with it. The Board of today

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<sup>1</sup> The Labor Policy Association receives no federal grants and is not a party to any federal contract.

finds nothing wrong when union organizers forge authorization cards and will conduct representation elections without first doing a proper investigation to determine whether authorization cards have been forged.

Because of the NLRB's intense bias favoring union interests over those of employers and employees, companies attacked by the NLRB operate on the basis that the chance of their views being given a fair hearing before the General Counsel and the Board are slim at best and that their case will probably have to be taken to the federal courts of appeals for a proper ruling. The Board of today is routinely taken to task by the federal courts of appeals for failing to interpret and apply the National Labor Relations Act properly. Large companies have the resources to challenge a federal agency that has an operating budget exceeding \$170 million annually, and they often take cases all the way to the courts of appeals in order to obtain justice because that forum is far less political than the NLRB. The tragedy here is that smaller companies do not have such resources, and they are repeatedly forced to settle cases when the law and the facts are clearly on their side.

The National Labor Relations Board was set up to be the referee in labor-management disputes. To have the faith and respect of parties subject to this process of refereeing, the Board must conduct itself in a fair and impartial manner. Because labor disputes can become highly contentious, the Board has traditionally functioned as a quasi-judicial agency, deciding issues on a case-by-case basis as they come before the Board. During the past few decades, however, the Board is perceived by the parties as anything but fair. During Republican administrations, organized labor complains about the fairness of the NLRB, and the same is true of the employer community during Democratic administrations. The credibility of the Board in recent months has never been at a lower ebb. The agency has become so politicized that, since 1980, of the 21 Board seats that have been filled during that time, 11 of those serving have served all or part of their tenure as a recess appointee. [See Chart 1.] And today we find the five-member panel with only a single member confirmed by the Senate. The NLRB of today has two vacancies and two members serving under recess appointments whose terms will expire by year end. Why are these seats not being filled in the manner prescribed by the statute? Because the NLRB is no longer an independent agency, it is a political institution.

We believe there is a solution to this crisis. We believe that this Committee should give serious consideration to transferring the NLRB's power to adjudicate unfair labor practices under the National Labor Relations Act to the federal district courts. We see no reason why this single area of federal labor and employment law—the National Labor Relations Act—should continue to be enforced through an administrative process. Wage-hour cases are decided by district courts, as are Title VII cases, Americans with Disabilities Act cases, Equal Pay Act cases, Age Discrimination in Employment Act cases, and many others.

The following provides a detailed explanation of the views of our Association. For a more thorough discussion, we would call the Subcommittee's attention to *NLRB: Agency in Crisis*, an LPA monograph that provides an extensive discussion of each of the areas of

concern regarding the NLRB. Most of the examples we provide in this testimony involve incidents that have occurred since the monograph was published.

### **Orchestrating Election Rules to Assist Union Victories**

The most essential function performed by the NLRB is the establishment of ground rules and supervision of union representation elections. The NLRB takes considerable pride in its handling of this function. One long-time NLRB veteran recently labeled NLRB-supervised elections as “the crown jewel of the Board’s accomplishments.”<sup>2</sup>

Historically, we believe the Board has generally done a commendable job in exercising this function in a timely and fair manner and would strongly support the continuation of this service notwithstanding any other changes in the Board’s role that Congress may consider. However, a number of recent cases have raised serious questions about the current Board’s willingness to bend the rules to accommodate the organizing interests of unions at the expense of employee choice.

**Gerrymandering** As a member of Congress, imagine how secure you would be if you were able to draw your own district lines *after* polling the voters. Yet that is exactly what the NLRB is letting the Teamsters do as they seek elections at various facilities of Overnite Transportation throughout the country.

In each facility, the targeted workforce is the Overnite dockworkers, drivers, and mechanics. The mechanics tend to vary the most from facility to facility in their level of support for the Teamsters. Thus, even though the functions of these various positions are by and large the same from one Overnite facility to another, the union sometimes seeks a unit that includes the mechanics and other times excludes them, depending on whether the mechanics support the union at the particular facility.<sup>3</sup>

While the union can be expected to play these games, the NLRB is supposed to be the neutral arbiter in the matter to ensure consistency in the application of the law. Indeed, the Gould Board has been consistent in the Overnite cases—it has uniformly voted in favor of the unit requested by the union. In accordance with the Teamsters’ demands, the Board has excluded mechanics from the Overnite facilities in Lexington, KY; Columbus, OH; Moonachie, NJ; Richfield, OH; and Cincinnati, OH, while including mechanics in Memphis, TN; South Bend, IN; Landover, MD; and Norfolk/Chesapeake, VA.

<sup>2</sup> *London’s Dairy Farm, Inc.* 323 NLRB No. 186, slip op. at 4 (June 20, 1997) (Member Higgins, dissenting).

<sup>3</sup> When a union seeks to organize a workforce, one of the most critical issues the NLRB must resolve is which group of employees will vote on whether to be represented by the union. If the union wins the election, this group of employees will become the “bargaining unit.” This issue is generally resolved by determining which employees share a “community of interest” in their employment situation. This decision determines for whom the union will speak, which employees will be bound by the terms of the collective bargaining agreement, and who is eligible to vote.

The company finally found an unbiased Board official in Buffalo, where the regional director (RD) rejected the Teamsters' position and included the mechanics. The union sought review of the RD's decision by the National Labor Relations Board chaired by William Gould, and, true to form, Gould *et al.* reversed the RD.<sup>4</sup>

The Board has engaged in this politicking despite a prohibition in the NLRA against allowing the unit determination to be "controlled" by the union's request.<sup>5</sup> A similar violation of this same provision recently prompted the Fourth Circuit, in *NLRB v. Lundy Packing Co.*, 68 F.3d 1577 (1995), to refuse to defer to the Board, finding that the "boundaries of the Act [were] plainly breached."

The Fourth Circuit's rebuke, apparently, fell upon deaf ears.

**Forged Authorization Cards** One of the most disturbing trends displayed by the current Board is its willingness to overlook the most outrageous union conduct in deciding whether to certify a union election victory. In contrast, minor, technical violations by an employer are generally found sufficient to overturn a union election loss and hold another election.

The most contemptible example of this permissiveness towards unions has occurred in the Board's willingness to ignore allegations of forgeries committed by certain unions in attempting to secure enough union authorization cards to hold a union representation election.<sup>6</sup> In two recent cases, the Board has asserted that allegations that cards were forged are "irrelevant" once the representation election has been held since the cards do not "purport to be the definitive measure of the level of support" for the union.<sup>7</sup>

The Board feels so strongly about this that, in a case involving a Perdue Farms facility in Lewiston, NC, the Board fought all the way to the Fourth Circuit Court of Appeals in order to resist having to conduct an investigation of allegations of 400 forged cards. The allegations were made by the union's own organizers and, despite those allegations, the Board ordered two representation elections at the facility, both of which were lost by the union. Before the Fourth Circuit, the Board was able to defeat an injunction against holding a third election after providing assurances to the court the forgeries would finally be investigated.<sup>8</sup>

The Board's rationale in ignoring these forgeries appears to be that, once the workers have elected a union, it doesn't really matter whether they were genuinely interested in having one at the outset. Yet one would think that those same employees, having elected the union,

<sup>4</sup> *Overnite Transportation Co.*, 322 NLRB No. 122 (Dec. 13, 1996).

<sup>5</sup> Section 9(c)(5), NLRA (29 U.S.C. § 159(c)(5)).

<sup>6</sup> The election process is initiated by the union filing a petition with the Board that demonstrates that at least 30% of the employees in a unit support the holding of an election. Evidence of this support is provided through authorization cards which are typically signed by an employee in the presence of a union organizer.

<sup>7</sup> *Crystal Art Gallery*, 323 NLRB No. 34 (Mar. 11, 1997); *See also Findlay Industries, Inc.*, 323 NLRB No. 139 (May 22, 1997).

<sup>8</sup> *Perdue Farms, Inc. v. NLRB*, 108 F.3d 519 (4th Cir. 1997).

might want to reconsider their decision if it turns out that the union that purports to speak for them is willing to fabricate their signatures to achieve its goals.

Congress should be enraged by this position taken by the Board. You should also be aware that our attempts to educate Congress have met with threats from the United Food & Commercial Workers (UFCW) who have threatened LPA with a lawsuit if we continue to provide information to Congress regarding the Perdue case. Attached to our testimony is correspondence we exchanged with UFCW Local 204 on the eve of our testimony before the Senate Labor and Human Resources Committee last September. The letter from Local 204 was obviously intended to prevent us from merely presenting the facts in the Perdue case (based entirely upon public documents) to the Committee. We believe this raises serious questions of a potential violation of the prohibition against intentionally harassing a witness in a proceeding before Congress (18 U.S.C. § 1512(c)) as well as obstruction of federal proceedings (18 U.S.C. § 1505), and we would encourage your Committee to investigate this matter.

**Replacing Secret Ballot Elections With Mail Ballots** Another area where the Board has tampered with its "crown jewel" involves its willingness to substitute mail ballots for the tried-and-true method of secret ballot elections conducted in a Board-supervised location. One of the most compelling reasons for not substituting mail ballots for worksite elections is that it generally results in a lower participation rate. According to the Board, manual elections in fiscal year 1993 enjoyed an 87.9 percent participation rate compared to a 72 percent rate for mail ballot elections.<sup>9</sup>

More importantly, the National Labor Relations Act provides that "the Board shall take a *secret ballot* of the employees in such unit and certify the results thereof."<sup>10</sup> NLRB agents virtually always administer secret ballot elections at special polling places (usually the worksite) because of a belief that the question of whether to vote for union representation should be an individual decision and not one determined by peer pressure. Accordingly, the Board's *Casehandling Manual* specifies that mail balloting is appropriate only where long distances are involved or where eligible voters are scattered because of their duties. Even then, if *any* party is not agreeable to the use of mail balloting, it should be limited to those circumstances that clearly indicate the unfeasibility of a manual election.<sup>11</sup>

Yet Chairman Gould has never been an enthusiastic supporter of the secret ballot process for determining union representation, even though, as previously noted, he has acknowledged that union authorization cards alone do not "purport to be the definitive measure of the level of support" for the union.<sup>12</sup> In his book, *Agenda For Reform*, then-Professor Gould admitted that "peer pressure can serve as a basis for inducing the employee to sign" authorization cards. Nevertheless, he argued that secret ballot elections are not necessary if more than 50 percent of the employees sign authorization cards.<sup>13</sup> In explaining his lack of fondness for secret ballot elections of unions, Gould has testified before Congress that "the subordinate and unequal position in which most employees find themselves renders the political analogy irrelevant" and

<sup>9</sup> Memorandum from Fred Feinstein to William B. Gould IV 1-2 (June 2, 1994).

<sup>10</sup> Section 9(e)(1), National Labor Relations Act (29 U.S.C. 159(e)(1) (emphasis added).

<sup>11</sup> *NLRB Casehandling Manual* § 11336.

<sup>12</sup> *Crystal Art Gallery*, supra note 7.

<sup>13</sup> William B. Gould IV, *Agenda for Reform: The Future of Employment Relationships and the Law* 177 (1993).

herefore the secret-ballot process cannot “adequately test employee free choice in the industrial context.”<sup>14</sup> The logic of this argument escapes us.

The Board’s attempt to replace ballot boxes with mail boxes has already drawn a severe reprimand from the D.C. Circuit which, in *Shepard Convention Services, Inc. v. NLRB*, 85 F.3d 71 (D.C. Cir. June 11, 1996), refused to enforce the Board’s order requiring Shepard to bargain with the union. In *Shepard*, the union sought to represent the “non-regular” employees of a company that installs, maintains, and dismantles trade show and convention displays. The union asked that, since many of those voting were on-call workers, the election be conducted with mail ballots rather than the usual secret ballot at the site of employment. The Regional Director ruled strictly by the book and refused the union’s request for a mail ballot. As the D.C. Circuit later observed, “That should have been the end of it.” Nevertheless, the Board ruled that the Regional Director’s decision was “clearly erroneous” and ordered the election to be conducted by mail ballot.

When the election was held, the participation was even lower than usual for a mail ballot. Out of 438 eligible voters, only 77 cast ballots, with 40 cast for the union, 23 cast for a different union, and 5 voting for no union at all.<sup>15</sup> Thus, with only 17.5 percent of the employees voting, the union was elected by 9 percent of the unit. One would think that this fact alone would give the Board pause, but the Board ordered the company to bargain with the union anyway. In doing so, the Board received a strong rebuke from the D.C. Circuit, which observed:

Had the Board left the [Regional Director’s] decision intact, voter turnout might well have been higher. It could hardly have been lower.<sup>16</sup>

Three months after this embarrassing defeat, Chairman Gould proudly informed the Senate Labor and Human Resources Committee that the agency had doubled the number of mail ballot elections and explained that it was primarily being used in situations where it would result in higher employee participation. There was no mention of the *Shepard* case in his testimony. Instead, he informed the Committee: “The Agency’s use of mail ballots has been approved by the courts in several cases.”<sup>17</sup>

Just recently, the Gould Board has reaffirmed its commitment to expanding the use of mail ballots in two cases where previous Boards would not have ordered mail ballots. In *Reynolds Wheels International*, 323 NLRB No. 187 (June 20, 1997), and *London’s Dairy Farm, Inc.*, 323 NLRB No. 186 (June 20, 1997), the Board approved the use of mail ballots where additional NLRB-supervised manual balloting clearly could have been conducted. Even member John Higgins, who has voted with the Gould Board majority 97 percent of the time,

<sup>14</sup> Oversight Hearings on the Subject “Has Labor Failed?” Before the Subcomm. on Labor-Management Relations of the House Committee on Education and Labor, 98th Cong., 2d Sess. 84 (1984) (statement of William F. Gould IV).

<sup>15</sup> Nine of the ballots were challenged by one of the parties but were never counted because they would not have affected the outcome.

<sup>16</sup> 85 F.3d at 675 (citation omitted).

<sup>17</sup> Statement of William F. Gould IV, NLRB Chairman, before the Senate Labor and Human Resources Committee (Sept. 17, 1996), reprinted in *Daily Lab. Rep.* (BNA) No. 181 E-4, 6 (Sept. 18, 1996).



issued a strong dissent and observed that the cases are a departure from “the Agency’s wise tradition favoring manual balloting.”

In *Reynolds Wheels* (an aluminum wheel manufacturer), the Board would have been inconvenienced by having to conduct the balloting over a three-day period in order to allow all of the plant’s shifts to vote. In *London’s Dairy Farm* (a food processor), even though four sites were involved, the employer agreed to mail ballots at two of them and was willing to make scheduling changes at the other two sites in order to minimize the time needed for balloting for all shifts. In both cases, manual balloting was clearly feasible and thus, using the *Casehandling Manual* standards, should never have resulted in mail ballots being used.

**Ignoring the Supervisor Exemption** A critical role for the NLRB is determining which employees meet the Act’s various exemptions. This is yet another area where the Board is often out of touch with reality in its efforts to assist union organizing and bargaining goals.

Under the National Labor Relations Act, supervisors are specifically excluded from the Act’s definition of “employee.”<sup>18</sup> This means that, when the Board makes a determination as to which employees will vote on union representation (*i.e.*, the “appropriate unit”), supervisors are excluded from the unit.<sup>19</sup> We readily acknowledge that supervisor cases are often very fact-specific, and, particularly in today’s complex workplace, it is not always an easy call even for an objective Board. Yet there are some instances where even the most elementary understanding of the workplace should make the decision obvious.

Thus, in *Spentonbush/Red Star Cos. v. NLRB*, 106 F.3d 484 (2d Cir. 1997), we would have expected any schoolchild to recognize that the captain of the boat is the boss. Yet the Board in that case went along with the union and ruled that tugboat captains were not supervisors, provoking the following response from the circuit court:

The deference owed by the judiciary to the decisions of the Board has been stated on numerous occasions and need not now be reiterated here. However, the Board’s biased mishandling of cases involving supervisors increasingly has called into question our obeisance to the Board’s decisions in this area. . . . [T]he Board’s manipulation of the definition of supervisor has reduced the deference that would otherwise be accorded its holdings.<sup>20</sup>

**Ordering Bargaining When the Union Loses (Gissel Orders)** If all else fails and the union is simply unable to secure an election victory, there is one other recourse available which essentially ignores the results of the balloting. A so-called *Gissel* order, named after *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969), is one in which the Board orders an employer

<sup>18</sup> The rationale for this exclusion is to avoid putting these individuals in positions of a conflict of interest between their duty to carry out the employer’s policies and activities of the union which may be detrimental to those policies.

<sup>19</sup> It also means that any activities of those employees may be attributable to the employer and result in a finding that the employer committed an unfair labor practice.

<sup>20</sup> 106 F.3d at 492.

to bargain with a union where either the union has been rejected by a majority of the employees or no election has been held. The order is supposed to be used only where an employer's unfair labor practices are so pervasive that a fair election is impossible. A *Gissel* order can only be granted where, at some point, the union has been supported by a majority of the workers, as evidenced by union authorization cards.

Not surprisingly, *Gissel* orders, which have never been specifically authorized by Congress, are a very controversial remedy even when judiciously applied, because they renounce the policy of determining employee sentiment by a secret ballot election. Needless to say, if *Gissel* orders are to be part of the NLR enforcement scheme, they should be applied sparingly. As noted by the Second Circuit:

This preference [*i.e.*, for elections over *Gissel* orders] reflects the important policy that employees not have union representation forced upon them when, by exercise of their free will, they might choose otherwise.<sup>21</sup>

While *Gissel* orders are only supposed to be issued where serious unfair labor practices have occurred, the General Counsel is not averse to seeking such an order on the basis of routine (or even borderline) unfair labor practices. In *Newark Paperboard Products*, JD(SF)-58-97 (June 16, 1997), the General Counsel sought a *Gissel* order based on the following employer actions, all of which were eventually determined by an administrative law judge to be lawful:

- informing employees of their right to revoke union authorization cards;
- responding to an employee's inquiry about his wife's eligibility for benefits and telling him "the matter would be straightened out";
- asking a group of employees for the name and phone number of a union officer who had accompanied those employees to the employer's office seeking recognition of the union;
- instructing a union agent to leave the premises because he was disrupting operations; and
- enforcing existing attendance rules.

The ALJ's rejection of a *Gissel* order in *Newark Paperboard* will likely be reviewed by the Board, which, even under previous regimes, has been more inclined to agree with the General Counsel. For example, in *Gardner Mechanical Services, Inc.; Gardner Engineering, Inc. v. NLRB*, Nos. 94-70192/70262, 1997 U.S. App. LEXIS 11610 (9th Cir. May 15, 1997), the ALJ had agreed with the General Counsel that the employer had committed unfair labor practices prior to a union representation election. Yet the ALJ did reject the request for a *Gissel* order. The Board reversed the ALJ and issued one anyway, a ruling that drew criticism from the Ninth Circuit, which chastised the Board for "ma[king] no findings whatsoever as to the necessity of a bargaining order, or the propriety of any other, less drastic remedies."

<sup>21</sup> *NLRB v. Marion Rohr Corp.*, 714 F.2d 228, 230 (2d Cir. 1983)(citations omitted).

Even under previous Boards, the courts have been highly critical of the NLRB's licentiousness in ignoring employee choice and seeking *Gissel* orders. It is therefore not surprising to see the current Board continuing this trend with even less restraint.

#### **Treating Destruction of Companies as a Protected Activity (Corporate Campaigns)**

As organized labor's credibility and support among American workers have waned, labor has dramatically altered its tactics in attempting to organize workers and, once organized, achieve the union's goals at the bargaining table. Historically, these goals were achieved by marshaling the hearts and minds of the workers to help the union achieve those goals in the election booth and on the picket line. In today's workplace, the unions are having much tougher sledding in getting workers to go along with these tactics.

Thus, labor has turned to other weapons that are less reliant on worker support. These widely varied tactics generally fall within an overall approach that has been labeled by the unions as a "corporate campaign strategy." This strategy has been described by D.C. Circuit Judge Patricia Wald as follows:

[A] wide and indefinite range of legal and potentially illegal tactics used by unions to exert pressure on an employer. These tactics may include, *but are not limited to*, litigation, political appeals, requests that regulatory agencies investigate and pursue employer violations of state or federal law, and negative publicity campaigns aimed at reducing the employer's goodwill with employees, investors or the general public.<sup>22</sup>

The strategy has been defined in more graphic terms by AFL-CIO Secretary-Treasurer Rich Trumka:

[C]orporate campaigns swarm the target employer from every angle, great and small, with an eye toward inflicting upon the employer the death of a thousand cuts rather than a single blow.<sup>23</sup>

Corporate campaigns are frequently conducted against employers whom the union has absolutely no interest in organizing. Thus, Food Lion has been subjected to a decade-long corporate campaign aimed, not at organizing Food Lion's employees, but at deterring the nonunion grocery chain from moving into geographic areas where the unions enjoy a virtual monopoly of the grocery workforce.

While corporate campaign strategies are generally pursued outside the collective bargaining laws, the NLRB can still play a critical role in helping the union achieve its ends. This is particularly the case with a Board like the present one which is so strongly biased in

<sup>22</sup> *Food Lion v. UFCW*, 100 F.3d 1007, 1014 (D.C. Cir. 1997).

<sup>23</sup> "Union Officials Stress International Scope of Organizing, Bargaining Campaigns," *Daily Lab. Rep.* (BNA) No. 221, A-5 (Nov. 16, 1992).

favor of organized labor. This Board has exalted corporate campaigns—and their intent upon destroying their targets—to a protected activity in and of itself.

**Caterpillar Cases** The Gould-Feinstein Board's willingness to assist organized labor's goals has perhaps been nowhere better demonstrated than in the NLRB litigation involving Caterpillar Inc. Caterpillar has been a target of labor's wrath since the United Auto Workers strike in 1991 when the company refused a pattern agreement that had been signed by various agricultural implement companies. Because of substantial differences in Caterpillar's own situation, particularly in international exports, Caterpillar insisted on an agreement that addressed its own situation as a global manufacturer/distributor of earthmoving, construction, and mining equipment and diesel engines.

By Caterpillar's own accounts, the vast majority of its employees—union and non-union—are sincere, honest, and hardworking. But in the last five years the UAW has pursued a relentless campaign to encourage a small but disruptive minority to practice in-plant tactics designed to interfere with orderly operations and harass those who will not go along with their efforts to disrupt its operations. They have played the spoiler role simply because the UAW's two long strikes have not succeeded in forcing Caterpillar to agree to their pattern demands.

Despite the fact that these tactics are obviously intended to impede production and disrupt operations, they have enjoyed virtually the full support of the Gould-Feinstein Board through the constant issuance of complaints and the pursuit of legal proceedings. The key tactics used by the UAW in the campaign are best described in organized labor's blueprint for corporate campaigns, *A Troublemaker's Handbook: How to Fight Back Where You Work—and Win!*<sup>24</sup>

- **Work to Rule:** "In a work to rule workers meticulously abide by the contract and any written company rules and work procedures which may apply. Workers take no short cuts, show no initiative in solving problems, and if any difficulty presents itself ask management for instruction."<sup>25</sup>
- **Grievances:** "Grievances must of course be filed but they should also be fought for by:
  - Making them **visible and public**, so that the members are aware of what is taking place.
  - Making them **collective, group grievances** involving as many members as possible.
  - Making them **active**, involving the members themselves in various actions.
  - Making them **confrontational**, so that members are mobilized to face the company officials who are causing

<sup>24</sup> Authored by Dan La Botz (Labor Notes 1991).

<sup>25</sup> *Id.* at 16.

their problems and who have the power to resolve them."<sup>26</sup>

A common component of all corporate campaigns is the use of the regulatory machinery of government to bring additional pressure on the employer, as described in a corporate campaign handbook published by the Service Employees International Union when AFL-CIO President John Sweeney headed the organization:

Employers are required to obey a variety of laws and government regulations. . . . Management officials may find that, because union members have started looking for employer abuses, the employer now is facing. . . .

- Extra expenses to meet regulatory requirements or qualify for necessary permits or licenses.
- Costly delays in operations while those requirements are met.
- Fines or other penalties for violating legal obligations.
- Damage to the employer's public image, which could jeopardize political or community support, which in turn could mean less business or public funding.<sup>27</sup>

In the Caterpillar situation, the UAW has had the full support and assistance of the Gould-Feinstein Board to devise a synthesis of all these ploys. Grievances, work-to-rule, and other in-plant strategies are taken to the extreme, where management has no choice but to institute discipline in order to maintain a productive workplace. When that discipline is ordered, a charge is filed with the NLRB which, under General Counsel Frederick L. Feinstein and Regional Director Glenn Zipp, has been quick to respond in favor of the UAW.

These disruptions, exemplified by the following, are of a nature that no employer can afford to sit by and expect to have a productive operation:

- in-plant rallies during working hours with noise levels of over 110 decibels (exceeding the OSHA standard of 90), making it impossible for employees in adjoining areas to carry on conversations;
- the filing of 1,600 grievances in one quarter at one facility over a single issue affecting four employees, resulting in 1,300 hours of lost production;
- countless grievances filed over absurd issues such as the amount of white rock in the parking lot and "offensive shrubbery";

<sup>26</sup> *Id.* at 11 (emphasis original).

<sup>27</sup> Service Employees International Union, *Contract Campaign Manual* 3-21 (1988).

- numerous buttons, T-shirts, posters, and hats displaying inflammatory slogans and epithets, such as “CAT Buster,” “SCAB,” and “Are you pissed off yet?”; and
- chanting and yelling of racial and ethnic slurs while potential customers are visiting the plant.<sup>28</sup>

Caterpillar has always attempted to walk the fine line between maintaining discipline and respecting the employees’ rights to express themselves. Until the Gould-Feinstein Board, it had virtually no problems with the NLRB. In fact, in the decade preceding the strike, the company had only three complaints issued against it by the Board, all of which had been settled amicably. Under NLRB General Counsel Jerry Hunter, the General Counsel’s office did not pander to the UAW and support all of its attempts to thwart discipline by filing NLRB charges.<sup>29</sup>

All of this changed dramatically when General Counsel Feinstein took office in March 1994. The NLRB was suddenly more responsive to the UAW’s campaign and, over the next 15 months, issued 165 complaints, primarily against Caterpillar’s disciplinary efforts.<sup>30</sup> One of these resulted in an attempt by the Gould-Feinstein Board to secure a 10(j) injunction to reinstate an employee who had been terminated by the company after an altercation with a supervisor.<sup>31</sup> The 10(j) injunction request was denied by an Illinois federal court,<sup>32</sup> and the company’s dismissal of the employee was subsequently determined by an NLRB administrative law judge to have been lawful.<sup>33</sup>

Another example of Feinstein’s constant interference was his attempt to thwart the issuance of rules of conduct. On December 8, 1995, with Administrative Law Judge approval, Caterpillar issued Standards of Conduct which involved such obvious restrictions as prohibiting “defamatory,” “obscene,” or “highly derogatory” apparel and “unbusinesslike decorations,” and requiring a “full work effort” for “full pay.” Employees were told they must treat each other with “courtesy” and maintain “a professional atmosphere.” Within days of the settlement’s approval by the ALJ, Feinstein issued a complaint demanding that the rules be rescinded because about 100 employees (80 suspensions, 21 discharges) out of almost 14,000 had been disciplined.<sup>34</sup>

Perhaps the most absurd example of the Board’s vendetta against Caterpillar occurred last December when the General Counsel issued a complaint against the company for providing

<sup>28</sup> *Oversight of the National Labor Relations Board: Hearing Before the Subcomm. on Oversight and Investigations of the House Comm. on Economic and Educational Opportunities*, 104th Cong., 1st Sess. 103-116 (1995) (statement of Wayne M. Zimmerman, Vice President, Human Services Division, Caterpillar, Inc.).

<sup>29</sup> *Id.* at 112.

<sup>30</sup> *Id.* at 113.

<sup>31</sup> As was later determined by ALJ James Rose, the employee had engaged in physical contact with his supervisor and threatened him by saying “I’ll deal with you on the outside.”

<sup>32</sup> *Zipp v. Caterpillar, Inc.*, 858 F. Supp. 794 (C.D. Ill. 1994).

<sup>33</sup> This finding characteristically was reversed by the Gould Board in *Caterpillar, Inc.*, 322 NLRB No. 115 (1996).

<sup>34</sup> NLRB Case Nos. 33-CA-11594 *et al.*

certain “perks” to individuals who chose to work during the UAW’s failed strike.<sup>35</sup> These “perks” included picnics, ice cream, popcorn, baked goods, and, at one plant, free flu shots. In issuing the complaint, the General Counsel found that these benefits had the effect of “restraining and coercing” the strikers. We would think that any strike that may lose its steam over ice cream and popcorn already must be on fairly weak legs.

The numerous complaints against Caterpillar are in various stages of the adjudication process, but, based on recent Gould Board decisions, it appears likely that Caterpillar repeatedly will have to go to the federal courts to achieve a fair hearing. In those decisions, the ALJ had found for Caterpillar on some allegations and against Caterpillar on some others. The Gould Board was quick to affirm the ALJ on almost every finding against Caterpillar but *reversed* the ALJ on virtually every count in which he found for Caterpillar.<sup>36</sup> Indeed, in one of the reversals, Gould claimed that Caterpillar’s statement about a plant closing was indicative of bad faith bargaining when the ALJ had found that it was the UAW that “adamantly refus[ed] to consider” a separate contract to keep the plant open.<sup>37</sup>

Ultimately, one must question the use of government resources to continue to litigate the hundreds of complaints issued against Caterpillar when their true genesis is an inability of the parties to reach agreement at the bargaining table. As noted by Administrative Law Judge Rose who has issued 11 decisions, heard more than 21,000 pages of testimony and reviewed hundreds of documents: “None of the cases tried before me seems to have advanced resolution of the real dispute between the parties, namely, their failure to reach a mutually acceptable collective bargaining agreement to replace the one which expired five and one-half years ago.”<sup>38</sup>

We believe that a major source of the problem in the Caterpillar situation has been the conduct of Regional Director Glenn Zipp, whose conduct has demonstrated an overt bias against the company. As a result, we recently sent a letter to General Counsel Feinstein urging the reassignment of Mr. Zipp to a different region (copy attached). Other business organizations sent similar letters. Our request was rejected.

**Extinguishing Employer Defenses** While supporting corporate campaign tactics in cases like Caterpillar, the Board is moving to prevent employers from exercising their legal right to defend themselves. Because one of organized labor’s favorite corporate campaign tactics is the filing of lawsuits, one would expect that employers would have similar weapons at their disposal.

Yet General Counsel Feinstein is trying to shut off this right by stretching a rule under existing law whereby it is an unfair labor practice for an employer to file a lawsuit that is motivated by retaliation for union activity, unless there is “a reasonable basis” for the suit.<sup>39</sup> It appears to be General Counsel Feinstein’s view that employer lawsuits against unions are

<sup>35</sup> “Perks Offered to Replacement Workers Violate Laws, NLRB Alleges in Complaint,” *Daily Lab. Rep.* (BNA) No. 249 A-7 (Dec. 30, 1996).

<sup>36</sup> *Caterpillar, Inc.*, 321 NLRB No. 152 (Aug. 27, 1996); *Caterpillar, Inc.*, 321 NLRB No. 163 (Aug. 27, 1996); *Caterpillar, Inc.*, 322 Nos. 115 & 116 (Dec. 10, 1996).

<sup>37</sup> 321 NLRB No. 163, slip op. at 4, 19.

<sup>38</sup> *Caterpillar, Inc.*, JD-65-97, slip op. at 3 (Apr. 14, 1997).

<sup>39</sup> *Bill Johnson’s Restaurants v. NLRB*, 461 U.S. 731 (1983).

herently unreasonable. In *Beverly Health and Rehabilitation Services, Inc.*, JD-87-97 (May 19, 1997), the Service Employees International Union and the General Counsel attempted to stop Beverly from pursuing a defamation case filed in state court against the union. The case arose from a corporate campaign which has been waged by the SEIU against Beverly, a nursing home chain, since the early 1980s attempting to force Beverly to recognize the union at its various facilities without having a secret ballot election among the Beverly workers.

A familiar tactic used by SEIU against Beverly has been to provoke fears among the public about the health and safety of the nursing home facilities. The defamation case filed by Beverly was based upon handbills and radio ads intended to scare potential patients and their families away from the company's nursing homes. For example, one handbill stated "Beware—You May Be Entering a Hazardous Area" and claimed with no factual basis that the hot water in the kitchen and laundry was not hot enough to kill bacteria.

The General Counsel issued a complaint against Beverly based on the lawsuit, and the Gould Board authorized the General Counsel to seek a 10(j) injunction against the lawsuit in federal court before the unfair labor practice was even adjudicated by the Board. In May, Administrative Law Judge Martin J. Linsky refused to rule that the Beverly lawsuit was an unfair labor practice, at least until the defamation case had been tried in state court.<sup>40</sup> When Linsky's decision is considered by the Gould Board, it will be worth watching to see whether the Board is also willing to give the employer its day in court.

Meanwhile, the General Counsel has recently moved against another employer who filed suit as a defense against a corporate campaign. Albertson's, Inc., a grocery chain, has been subjected to several class action wage-hour claims as part of the United Food and Commercial Worker's corporate campaign against the company. Albertson's filed suit in federal court in Idaho seeking a declaratory judgment that the claims should be handled through the grievance processes established by Albertson's collective bargaining agreement with the UFCW. Soon after the court ruled against Albertson's,<sup>41</sup> General Counsel Feinstein issued a complaint against Albertson's claiming the suit was retaliation against protected activity.<sup>42</sup>

At the same time the Gould-Feinstein Board has moved to shut off employers' right to sue, it has expanded the ability of unions to do so. In *Novotel New York*, 321 NLRB No. 93 (1996), the Board ruled that a union's filing of a class action on behalf of employees, involving legal costs of about \$160 per employee, on the eve of a representation election did not interfere with a "fair and free" election. After the class action was filed, the union won the election, 70 to 36. The *Novotel* decision flies in the face of a long-standing Board policy where, in the critical period immediately before a union representation election, the Board has imposed strict

<sup>40</sup> *Beverly Health & Rehabilitation Services, Inc.*, JD-87-97 (May 19, 1997). As noted by Linsky, "There is a genuine issue of fact to be decided in the state court." The 10(j) request was still pending in federal court at the time of Linsky's ruling and, with the ruling by Linsky in favor of Beverly, the injunction request was withdrawn.

<sup>41</sup> *Albertson's, Inc. v. United Food & Commercial Workers*, 1997 U.S. Dist. LEXIS 4554 (D. Idaho Mar. 10, 1997). Albertson's is appealing the district court's decision.

<sup>42</sup> *Albertson's, Inc. & United Food & Commercial Workers International Union*, NLRB Region 19, Case No. 19-2A-24776 (June 30, 1997).



limitations on campaigning by employers and unions to ensure that voting is not influenced by gifts or other inducements.

The NLRB's actions in these cases clearly demonstrate that recent complaints by organized labor about the "irrelevance" of the NLRB are belied by the facts.

### **Depriving Parties of Due Process to Serve Union Goals**

In its quasi-judicial role of adjudicating alleged violations of the statute, it goes without saying that the Board is expected to lend those charged with unfair labor practices the presumption of innocence accorded the accused throughout our legal system. Yet, for employers, this presumption has all but vanished under the National Labor Relations Act.

Scoring a victory over an employer in an unfair labor practice case can advance a number of tactical goals of a union. In a corporate campaign aimed at applying pressure on an employer to recognize a union without an election or agree to a union's bargaining table demands, engaging the employer in costly and visible unfair labor practice litigation before the Board can apply financial and public relations pressures upon that employer that it knows it can only avoid by caving in to the union's demands. In an organizing effort, the union can appear to be an avenging champion to the employees if it can use the Board to reinstate employees terminated by an employer, regardless of whether the termination had anything to do with that employee's union support or activities. As noted previously, the union that has lost an election may be able to have the election rerun or even obtain a *Gissel* bargaining order with no new election if the Board finds that the election was tainted by the employer's unfair labor practices.

Where an employer is accorded the presumption of innocence, these tactics are generally unsuccessful when the employer's actions were legitimate. However, the Gould Board and General Counsel Feinstein all too frequently accept without question the union's word that any action taken against an employee who has even the most remote linkage to a union is motivated by antiunion animus.

**Discharge Cases** We will not attempt here to catalogue the vast number of cases over the past three years involving attempts by the Board to reinstate discharged employees under the most outrageous circumstances. The following is only a partial listing of the most recent cases.

In *Syncor International Corp.*, JD(NY)-15-97 (Feb. 28, 1997), the General Counsel contended that Syncor, which provides radioactive pharmaceuticals to hospitals, had fired a delivery employee for union activity. The ALJ found there was absolutely no evidence to support this claim and that the employee had actually been fired for leaving used radioactive syringes behind in the hospitals.

In *Senior Citizen Coordinating Council of Co-Op City*, JD(NY)-69-96 (Sept. 23, 1996), the General Counsel attempted to punish the company for disciplining three employees who wrote a letter complaining about the appointment of their acting department head. The General Counsel issued a complaint saying they were engaging in protected activity. The ALJ disagreed because: 1) the letter said nothing about their terms and conditions of employment (a necessary

element for activity to be protected under the NLRA); and 2) the real reason for the letter was to help promote one of the employees' boyfriends to the position.

In *L.S.F. Trucking, Inc.*, JD-160-96 (Nov. 11, 1996), the company was ordered to reinstate a number of terminated or disciplined employees, including: 1) a truck driver who violated a rule against carrying an unauthorized passenger by taking along his dog, who bit a customer during a delivery; 2) a truck driver who received a speeding ticket on the job after having to take a breathalyzer test which registered .009% (below the legal limit but still evidence of alcohol consumption); and 3) a truck driver placed on medical leave who in the past had suffered a seizure while on the job and was showing signs of a recurrence.<sup>43</sup>

The Board even has infringed on employer efforts to protect other employees from sexual harassment by their co-employees. In *NMC Finishing, Inc.*, 317 NLRB No. 116 (1995), the Gould Board affirmed an administrative law judge's decision holding that an employer violated the NLRA by refusing to reinstate an individual at the conclusion of a strike. The employer had denied Cleata Draper reinstatement because during the strike she carried a picket sign that read "Who Is Rhonda F [with an X through the F] Sucking Today?" The sign made reference to Rhonda Yarborough, an employee who had chosen to cross the picket line and work during the strike.

The Board found that Ms. Draper intended the sign to have a sexual connotation and that the sign was "clearly offensive." Nevertheless, the Board ruled that Draper's carrying of the sign was a protected activity under the National Labor Relations Act and NMC's refusal to reinstate her at the end of the strike was an unfair labor practice.<sup>44</sup>

Meanwhile, the General Counsel also seems to be stuck in a different era when it comes to workplace sexual harassment issues. NAPA Ambulance Service Inc. thought it was doing the right thing when it terminated an employee who made repeated unwelcome advances towards a co-employee and commented about her physical attributes in the presence of other employees.<sup>45</sup> Contending that the employee was really fired for engaging in union activity, the General Counsel condoned the employee's behavior by claiming that it occurred in a "MASH-like atmosphere" that prevailed at the employer's operations. The ALJ ruled in favor of the company, and it will be worth watching to see how the Gould Board rules.

**Denial of Equal Access to Justice (EAJA)** In theory, small businesses that are subjected to unreasonable actions by the federal government are supposed to be protected by the Equal Access to Justice Act (EAJA).<sup>46</sup> Under EAJA, a small business that litigates the matter and ultimately prevails may attempt to recover attorneys' fees and other litigation expenses

<sup>43</sup> The ALJ did not dispute any of these occurrences but found that the company had delayed so long in taking action that the real reason could only be retaliation for union activity.

<sup>44</sup> The AFL-CIO has defended the Board's ruling by asserting that the sign was only carried for five minutes and that Ms. Yarborough didn't see the sign at the time. We assume the AFL-CIO has its own internal policies regarding sexual harassment (most businesses do these days) and would caution the Federation that such a *de minimus* approach is not likely to keep it out of court.

<sup>45</sup> "[Y]ou mean you need a life vest? [T]hose things [referring to her breasts] don't keep you afloat?" *NAPA Ambulance Service Inc.*, JD(SF)-30-97, slip op. at 14 (Apr. 15, 1997).

<sup>46</sup> 5 U.S.C. § 504.

under the Equal Access to Justice Act if the government's actions were not "substantially justified."

The need for EAJA relief takes on additional significance under the NLRA since, even under the most impartial Board, the NLRB acts as a "legal aid society" for unions. To press its claim, the union need only file a charge with the Board and then let Uncle Sam pick up the costs of prosecuting the case while the accused spends hundreds of thousands of dollars defending the action.

The inadequacy of EAJA relief against the NLRB is best illustrated in *Nyeholt Steel, Inc.*, 322 NLRB No. 64 (Apr. 10, 1997). In this case, the General Counsel issued a complaint alleging that five of Nyeholt's employees had been discharged for union activity. When the case was finally tried, the administrative law judge found that, not only had the employees not been discharged for union activity, but, in fact, they had not even been discharged at all. They had quit! When the judge learned that the General Counsel had not even interviewed all five employees but had simply taken the union's word on the matter, he ordered that the employer be reimbursed for its legal expenses under the Equal Access to Justice Act (EAJA).

Unfortunately, the ALJ's decision was subject to review by the Board itself, which would have to foot the bill for reimbursing Nyeholt's legal costs out of the NLRB budget. Not surprisingly, the Board reversed the ALJ and now, to obtain the relief, the company has to incur even more expenses to take its case before the federal courts and hope that the court doesn't defer to the Board.

We strongly recommend that Congress amend the EAJA to provide a more workable mechanism for providing EAJA relief in NLRB cases. This could be done by taking the Board itself out of the decision-making process regarding EAJA relief by providing a "loser pays" standard so that whenever a small business prevails, the NLRB and/or the union is required to reimburse its legal costs.

**Detroit Newspapers 10(j) Injunction** Some of the most egregious incursions into employer due process rights have occurred with the current Board's willingness to short circuit its own procedures and seek an injunction under Section 10(j) of the Act. Section 10(j) authorizes the Board to petition federal district courts for preliminary injunctions in cases where unfair labor practice complaints have been issued by the Board against either an employer or a union. The injunction remedy under Section 10(j) is intended to be available only for extraordinary situations, since the party charged with the violation has not yet had a chance to prove his or her innocence. Thus, it can only be used to prevent "irreparable harm" where there is "reasonable cause" that a violation has occurred.

As was stated by the late Frank W. McCulloch, NLRB Chairman during the Kennedy-Johnson years, an injunction should be used

not as a broad sword, but as a scalpel, ever mindful of the dangers in conducting labor management relations by way of injunction.<sup>47</sup>

A recent decision by the Board to seek an injunction against The Detroit Newspapers et al., demonstrates the Board's cavalier attitude in seeking a 10(j) injunction where it may serve the objectives of the union. On July 1, 1997, the Board decided to seek an injunction ordering The Detroit Newspapers, The Detroit News, the Detroit Free Press, and the Detroit Newspaper Agency to fire 1,300 replacement workers and reinstate strikers who had been on strike against those newspapers for two years. The union called off the strike earlier this year, heralding a "new phase" in its war on the companies and threatening to use "in-plant" strategies to continue to put financial pressure on them.

Until recently, the Board had moved at a lethargic pace in pursuing its case against the newspapers. The original complaint was issued in 1995, and the General Counsel made no effort to expedite an ALJ hearing on the case. Thus, that hearing did not conclude until the fall of 1996. The ALJ finally issued his decision on June 19, 1997, finding that unfair labor practices contributing to the strike had been committed, which would convert the strikers into unfair labor practice strikers entitled to reinstatement. The alleged violations involved areas where the law is somewhat hazy.<sup>48</sup> In stark contrast to the technical violations committed by the company, the unions have engaged in massive illegalities resulting in court orders to cease their violent activities and NLRB complaints against illegal secondary activities (*i.e.*, pressure imposed on neutral employers).

The Board is proceeding on the theory that, without immediate reinstatement *via* a 10(j) injunction, the strikers may "scatter to the winds," in the words of Chairman Gould who wrote an unprecedented eight-page decision to accompany the decision to seek the 10(j) injunction. Yet, if the workers haven't "scattered" during the two years that the NLRB has dragged its feet on the case, why should they now? According to the newspapers, about one-fourth of the former strikers have already been reinstated because of attrition and, in the vast majority of those cases, the individuals have been easy to locate.

The Board could more properly address the perceived urgency of the case by expediting review of the case by the Board itself and, if the ALJ decision is approved, seeking enforcement by the federal courts. Yet Chairman Gould in his statement blames the Board's lengthy procedures as one of the reasons for short circuiting the process through the 10(j) route. We take this to be an acknowledgment by the Chairman that the Board can't be relied upon to handle difficult cases and so we should instead look immediately to the federal courts for their

<sup>47</sup> Frank W. McCulloch, "The NLRB in Action," Address before the Eighth Annual Joint Industrial Relations Conference, Michigan State University (Apr. 19, 1962) (cited in Herbert R. Northrup & H. Lane Dennard, "The Return of 'Government by Injunction'? Public Policy and the Expansive Use of Section 10(j) of the NLRA," 22 *Employ. Rel. L.J.* 101, 110 (Summer 1996)).

<sup>48</sup> For example, the ALJ found that the News unlawfully implemented a merit pay plan after bargaining to impasse with the union. Normally an employer can implement any change after bargaining to impasse but the Gould Board has recently held that merit pay plans fall within an extremely narrow range of subjects that can never be unilaterally implemented. *McClatchy Newspapers*, 321 NLRB No. 174 (1996). The courts have yet to embrace this theory.

resolution. This admission underscores the need to reexamine the Board's role *in toto*, as we propose later in this testimony.

Meanwhile, the continuation of the Board's normal procedures could hardly cause "irreparable harm" to the strikers who have already gone without working for two years. If they are ultimately reinstated through normal Board procedures, they will receive full back pay. On the other hand, if strikers are ordered reinstated now but the company ultimately prevails, both the company and the replacement workers will be irreparably harmed since they will be unable to recoup their losses from either the union or the NLRB.

Why the Board's sudden urgency to resolve the Detroit Newspapers situation immediately rather than through its normal procedures? Obviously, the unions are serious about taking the actions against the newspapers to a "new level." The day the ALJ decision was issued just happened to coincide with a downtown Detroit rally in support of the unions involving a crowd estimated at up to 25,000 people. If the unions prevail, they will be in an extremely enviable bargaining position with the company. They will be able to continue to press their original demands while applying internal pressure on the newspapers through the anticipated "in-plant" strategies. Meanwhile, any damage this causes the newspapers will not greatly concern the unions since, after the strike began, they established their own competitor newspaper, the *Sunday Journal*.<sup>49</sup>

The Detroit Newspapers case underscores a critical point for Congress to consider. When the Board itself is willing to ignore its own procedures and rush the matter into federal courts, claiming that its own procedures are too sluggish, it raises serious questions as to why the Board is necessary in the first place.

#### **TIME TO REFORM THE NLRB**

We urge Congress to ask itself: Is the National Labor Relations Board still necessary for adjudicating unfair labor practice cases?

**Historic Basis** The Board was originally created in 1935 when a number of new laws were accompanied by the creation of agencies housing experts on the regulated subjects whose informed wisdom would be clearly superior to that of the more generalist courts. At the time, labor law was new and emerging, and there was a strong argument for establishing a panel of experts to spare the federal judiciary from the day-to-day shaping of a law that was written in very broad terms to address situations arising in all but a few American industries. Over the past 60 years, the interpretations of the law have become well established, and in recent years, apart from the current Board's reformist maneuverings, the NLRB has been primarily engaged in shaping nuances.

Meanwhile, since 1935, the federal judiciary has proven quite adept at deciphering the intricacies of numerous other complex areas of the law such as environmental, antitrust, and

<sup>49</sup> In his decision, Chairman Gould asserts that the unions have "provided assurances" that they will discontinue the *Sunday Journal* if reinstatement is granted. However, the petition for the injunction is in no way conditioned on this nor is there any way of assuring that the paper won't later be revived.

pension cases. Moreover, federal judges are able to accomplish this with only about two law clerks each, compared to the 20 attorneys that serve on each Board member's staff.

In addition, the federal judiciary has been given responsibility for the adjudication of a wide range of other employment laws, including Title VII of the Civil Rights Act, the Americans with Disabilities Act, the Worker Adjustment and Retraining Notification Act, and the Age Discrimination in Employment Act, to name a few. These laws are at least as labyrinthine as the NLRA and encompass considerably larger volumes of caseloads. For example, the number of civil rights employment cases filed in the federal courts has increased from 5,017 in 1980 to 18,225 in 1995, a 363 percent increase. In comparison, the number of complaints issued by the NLRB General Counsel have dropped 42 percent in the same time frame, from 6,230 in 1980 to 3,618 in 1995.

Thus, one must ask—what it is that distinguishes the National Labor Relations Act to require a separate judicial body to handle an area of the law in which the principles are well established and the caseload is declining? This question should be asked knowing that the parties who litigate cases before the Board are increasingly viewing it as a costly, time-consuming hurdle that almost always must be jumped over before getting final disposition of these cases.

**Board's Low Credibility in the Courts** Meanwhile, the Board's credibility in the courts is at an all-time low. The percentage of cases in which the Board's orders are fully affirmed is at its lowest in 30 years—70 percent, compared to a historic average of 80 percent. [See Chart 2.] More significantly, the patience of the federal courts with the Board is wearing visibly thin. Consider the following examples of recent quotations by federal courts in rejecting the Board's position:

- “[T]he Board’s decision to issue a bargaining order in this case is so lacking in evidentiary support and reasoned decisionmaking that it seems whimsical.”<sup>50</sup>
- “In this case, the General Counsel went forward with a complaint on the basis of a single, uncorroborated affidavit and in the face of a wall of adverse evidence. In a civil action with a similar record, this would border on conduct sanctionable under Rule 11 . . . . To hold this complaint ‘substantially justified’ would condone the conversion of Board processes into a mechanism of harassment.”<sup>51</sup>
- “[W]e do not question [the Board’s] mandate. But, as we have noted, in fashioning a new rule, the Board’s authority is not without boundaries. The Board may not, by *ipse dixit*, simply issue new rules (or “interpret” its old ones) without explaining the reason for their issuance (or reinterpretation) . . . . [I]t is especially unfortunate when the Board puts forth such a patchwork of

<sup>50</sup> *Skyline Distributors v. NLRB*, 99 F.3d 403 (D.C. Cir. 1996).

<sup>51</sup> *Hess Mechanical Corp. v. NLRB*, 112 F.3d 146 (4th Cir. 1997) (overruling the Board and awarding an EAJA reimbursement of attorney's fees and litigation expenses to the company).

adjudications without adequate rationalization, thereby abandoning potential litigants inside a maze of decisions with no means to map an exit.”<sup>52</sup>

Unfortunately, many courts continue to defer to the Board’s presumed “expertise” regarding the modern workplace and thus help calcify the law in areas where change is genuinely needed. The most recent example of this occurred in the Sixth Circuit’s decision to affirm the Board’s order that Webcor Packaging, Inc., abolish its employee involvement committee as an illegal, employer-dominated “labor organization.”<sup>53</sup> As this Subcommittee is well aware, the Congress has decided that the law in this area—Section 8(a)(2) of the NLRA—is in serious need of reform, as it equates highly praised employee involvement practices with the sham “company unions” of the 1930s. Last year, Congress sent to the President legislation—the TEAM Act—to allow employee involvement teams under the law but the Administration bowed to stiff opposition from organized labor, and the bill was vetoed.<sup>54</sup>

With the law of employee involvement so badly out of touch with today’s workplace realities, one would hope that this would be one area where the courts would question the “expertise” of a Board that, in case after case, continues to apply a 1935 construct to a twenty-first century workplace system. Yet, in *Webcor*, the court simply rubber stamped the Board’s decision, observing: “[T]he best construction of the NLRA . . . is not before us; the question before us is only whether the Board’s reading of the Act is reasonable.”<sup>55</sup>

**AFL-CIO Criticism Underscores Need for Reform** Defenders of the Gould-Feinstein Board have contended that this Board has in reality operated no differently from its predecessors. In attempting to rebut LPA’s criticism of the Gould-Feinstein Board before the Senate Labor and Human Resources Committee last year, the AFL-CIO put forth statistics attempting to show that this Board’s track record in issuing complaints against employers, overturning representation election results, and issuing *Gissel* orders is consistent with the statistics under previous Boards. It was further asserted that the complaints against the Board are based entirely upon the careful selection of a handful of cases that can be “easily mocked” while overlooking the broader majority of cases that are assertedly more representative of the Board’s work. It was further noted that many of the cases for which the Board has been criticized have been joined by Republican appointees to the Board.

In the first place, we do not believe that the question of pro-union bias on the part of the Board lends itself to a statistical analysis. True, statistics may be able to measure the Board’s efficiency, but they can never assess the quality of its decision making. Congress itself isn’t judged ultimately on the *quantity* of legislation it passes, but on the *quality* of the legislation, which can only be appraised by looking at the individual measures passed. As members of Congress well know, policy makers must ultimately be judged by on the basis of a cumulative

<sup>52</sup> *Bro-Tech Corp. v. NLRB*, 105 F.3d 890 (3d Cir. 1997) (finding that the Board had failed to adequately explain why a union’s blaring of a campaign song that could be heard throughout the plant the day of the election did not violate the Board’s long-standing rule against captive audience speeches 24 hours before an election).

<sup>53</sup> *NLRB v. Webcor Packaging, Inc.*, 1997 U.S. App. LEXIS 17342 (6th Cir. July 11, 1997).

<sup>54</sup> The legislation has been reintroduced by Rep. Harris Fawell and Sen. James M. Jeffords in the 105th Congress as H.R. 634/S. 295. LPA strongly support the legislation and encourages its enactment by the 105th Congress.

<sup>55</sup> *NLRB v. Webcor Packaging, Inc.*, *supra* note 53, at 20.

series of individual actions that typically cannot be quantified with mere numbers. For the same reasons, the only way to evaluate the quality of the Board's work is to examine the cases on an individual basis and determine whether they are in touch with the realities of today's workplace. That is what we have attempted to do with this testimony and the book *NLRB: Agency in Crisis* which highlight far more than a handful of cases, indicating that they in fact are *representative* of the Board's work.

At the same time, we do not dispute the fact that some of the cases discussed in this testimony were joined by Republican appointees. It is true that some of the most objectionable actions of the Board over the past 10 years have actually taken place when there was a Republican Board.<sup>56</sup> In addition, we readily acknowledge that any one of the individual cases discussed in this and our Senate testimony conceivably could have been decided similarly by any of the current Board's predecessors. Where we differ is in our assessment that only *this* Board could have decided *all* of them.

Yet there is a more interesting issue raised by the Gould-Feinstein Board's defenders. If one were to accept the suggestion by the AFL-CIO and others that this Board operates no differently than its predecessors, then one should assume that all or most of the cases discussed in this testimony would have been decided the same way regardless of the Board members or General Counsel who happened to be serving at the time.

The recent case of *Sullivan Industries, Inc.*, 322 NLRB No. 188 (Jan. 24, 1997), shows how the Board's languid way of doing business frustrates the efficient and timely administration of the law. The case began in August 1988 when a dispute arose between the new owners of the business and the Steelworkers as to whether the union still represented its workers. The company ultimately agreed to recognize the union on October 4, 1988, but, the very next day, the company was handed a petition signed by 60 of the company's 90 employees saying they didn't wish to be represented by the union. With this objective evidence of loss of union support, the company withdrew recognition of the union.

Over two years later, in March 1991, the Board held that the company's initial failure to recognize the union had tainted the employees' petition and thus ordered the company to bargain with the union anyway. The employer appealed and, one year later, on March 13, 1992, the D.C. Circuit sent the case back to the Board. The court agreed with the Board that the company should have recognized the union in August 1988, but asked the Board to explain why this violation necessarily tainted the petition. The parties—and the court—then waited for the Board's explanation—for five years!

Finally, over eight years after the case arose, the Board has acted. Unfortunately, it still isn't finished with the case. On January 24, 1997, the Board held (as it has in other recent cases) that employee disaffection with a union following an illegal refusal to bargain is

<sup>56</sup> E.g., *Electromation, Inc.*, 309 NLRB 990 (1992) (ruling employee involvement committees to be illegal employer-dominated labor organizations); *Town & Country Elec., Inc.*, 309 NLRB 1250 (1992) (ruling paid union organizers—salts—to be protected "employees" under the NLRA); *Collective Bargaining Units in the Health Care Industry*, 54 Fed. Reg. 16,336 (1989) (defining eight separate bargaining units acute care hospital facilities despite legislative history warning against "a proliferation of units").



inherently tainted by the employer's violation. So the Board sent the case back to an administrative law judge to find out whether a majority of the employees had signed the petition before or after the August 1988 refusal to bargain. Presumably, some form of hypnosis will have to be used to help the workers remember the date they signed a petition that is eight years old. A better question may be whether they even remember the union that the Board is now about to force upon them.

The nine years (and counting) that have been consumed in resolving this case have overlapped both Republican and Democratic Boards.

The endemic nature of the Board's problems, which will surely outlive the Gould-Feinstein regime, underscores the need for Congress to consider changes in the system to ensure that federal labor policies address the needs of the year 1997 and beyond and not 1935.

**Proposed Reform** We believe it would be in the best interests of all parties to streamline the process of adjudicating unfair labor practices. There are numerous options available that Congress ought to consider. One possibility would be to follow the same approach as the Railway Labor Act and simply have the parties litigate unfair labor practices in the federal courts as private actions. This would eliminate the role of the NLRB as a "legal aid society" for unions. Alternatively, the General Counsel could take the cases directly to federal district court for trial (as is currently done by the EEOC) or, to avoid further burdening the strapped resources of the federal courts, retain the administrative law judge function as the trier of fact in accordance with the interpretation of the NLRA of the circuit in which the case is tried. If the losing party wanted to challenge whether the ALJ properly applied the law, the case would go directly to the federal circuit court. Another option would be to provide the party against whom a complaint has been issued with the option of having the case tried either before an administrative law judge or in federal district court.

The existing body of interpretation of the law according to NLRB precedents, with variations in each circuit, could be retained at the outset. However, one would hope that the courts, with their broader view of how labor laws fit within the American socio-economic system, would begin to shape the labor laws to have more relevance to that system.

Another possible solution would be to appoint four of the five Board Member positions from the federal judiciary. The NLRB Chairman would remain a Presidential appointee, but the four remaining Board positions would be filled by federal district judges sitting for a specified term of years. The judges would serve on the Board strictly in an adjudicative capacity—as Article III judges—and rotate back to their district judgeships after their service on the Board. To ensure political balance, there could be the additional requirement that the four positions be filled by two Republican-appointed judges and two Democrat-appointed judges. In addition to solving the problem of maintaining a full Board, a judicial perspective would ensure that the Act would be interpreted within a much broader context than the Board's historic myopic approach.

Recent signals from the Board prove that, if left in the hands of the NLRB, the disconnect between the law and workplace reality will continue to grow worse. For example, the Board recently signaled an intent to revise the rules applying to organizing temporary workers and independent contractors. Among other things, the contemplated changes would

make it easier for unions to automatically fold these individuals into existing unionized units without them even being able to vote upon whether to be represented by the union.

This is not the only radical change being contemplated by a Board that currently only contains one confirmed member. Just last month Chairman Gould indicated a willingness to expand the so-called “contract bar” doctrine from three years to four or more years.<sup>57</sup> This doctrine, which has been in place for 35 years, shields a union from decertification (or a rival union) while a collective bargaining agreement is in force for up to three years. This shield is absolute and applies even if 100 percent of the employees in the unit sign a petition trying to get rid of the union.

The possibility of these radical changes being made in the next few years by a recess-appointed Board underscores the urgency for Congress to act soon to revamp the Board’s structure. Contrary to how some have characterized our suggestions, we are not proposing the abolition of the NLRB. We strongly believe that the Board is still needed to supervise union representation elections. Indeed, the attempts by organized labor to circumvent that system and have representation decided solely by union authorization cards pose a serious threat to genuine employee choice in this matter. In fact, we would encourage Congress to consider *prohibiting* an employer from recognizing a union without a secret ballot election supervised by the Board or some other neutral party.

Some may view our proposed overhaul of the Board as a radical solution, mirroring the reaction to the original National Labor Relations Board which ultimately had to rely upon the Supreme Court to achieve legitimacy.<sup>58</sup> Perhaps a less radical approach would achieve the desired result. Or perhaps an even more radical approach is necessary. Absent further discussion—one that is willing to challenge the notion that a 60-year old agency should continue to plod on just because we are all comfortable with its familiarity—no improvements will be achieved.

The time is ripe for reform. Congress’ role in overseeing the Board has been eviscerated with the abuse of the recess-appointment process which only perpetuates the Board’s lack of touch with reality. The NLRB is indeed an agency in crisis, and we urge the 105th Congress to begin the process of fixing this broken agency.

Thank you for the opportunity to present our views to this Subcommittee.

<sup>57</sup> *Dobbs International Services & UFCW Local 100-1 & IBT Local 705*, 323 NLRB No. 198 (June 30, 1997) (Chairman Gould, dissenting).

<sup>58</sup> *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1 (1937) (holding the National Labor Relations Act to be a constitutional exercise of Congress’ power to regulate interstate commerce pursuant to the Commerce Clause of the Constitution).

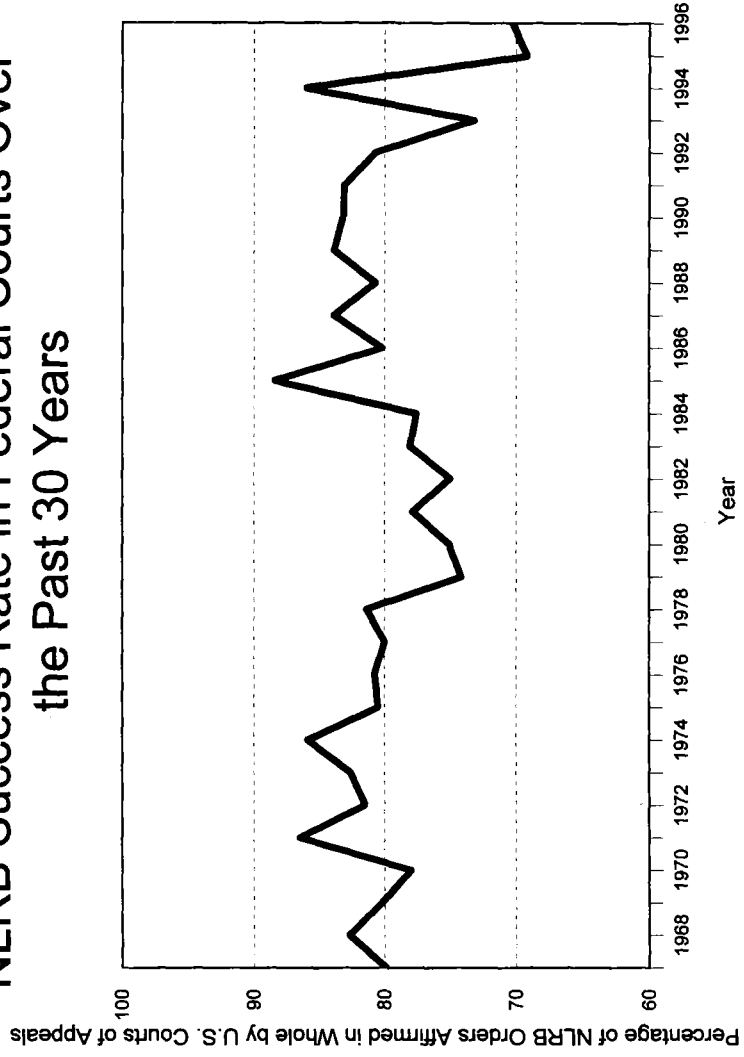


1990 1991 1992 1993 1994 1995 1996 1997 1998

Senate Confirmation	8/3/90-12/16/94	Senate Confirmation	VACANT	VACANT	VACANT	VACANT	VACANT	VACANT
VACANT	John Randsbaugh 8/27/90-12/16/92	Senate Confirmation	VACANT	Margaret Browning 3/3/94-2/28/97	Senate Confirmation	VACANT	VACANT	VACANT
VACANT	VACANT	VACANT	VACANT	Charles Cohen 3/3/94-8/27/96	Senate Confirmation	VACANT	VACANT	VACANT
VACANT	VACANT	VACANT	VACANT	VACANT	VACANT	VACANT	VACANT	VACANT
VACANT	Clifford Oviatt 2/9/90-5/28/93	Senate Confirmation	VACANT	William Gould, IV 3/3/94-8/27/98	Senate Confirmation	VACANT	VACANT	VACANT

Chart 2

# NLRB Success Rate in Federal Courts Over the Past 30 Years





September 30, 1996

The Honorable Nancy Landon Kassebaum  
Chairman, Committee on Labor and Human Resources  
United States Senate  
SD-428 Dirksen Senate Office Building  
Washington, DC 20510-6300

Dear Senator Kassebaum:

As a follow-up to my testimony in the September 17 oversight hearing on the National Labor Relations Board, I am enclosing certain correspondence pertaining to the discussion of the *Perdue Farms* case that I respectfully request be added to the hearing record, along with the federal district court decisions to which the correspondence refers.

As you know, our testimony contains an extensive discussion of alleged forgeries of union authorization cards by United Food and Commercial Workers Local 204 and the failure of the NLRB Regional Office to conduct a proper investigation. This failure by the Regional Office has prompted a federal court injunction against any further NLRB proceedings involving Local 204's attempts to organize the Perdue Farms facility in Lewiston, NC.

In that regard, enclosed are:

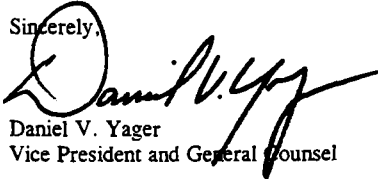
- the district court decisions in *Perdue Farms, Inc. v. NLRB* granting issuance of the temporary restraining order and the preliminary injunction;
- a letter to the Labor Policy Association received from Joyce Murphy Brooks, an attorney who represents United Food and Commercial Workers Local 204 regarding our discussion of the *Perdue-Farms* case;
- a press release issued by the UFCW concerning Ms. Brooks' letter; and
- my letter in response to Ms. Brooks.

Ms. Brooks' letter was received by facsimile on the eve of the hearing and the press release was issued at the hearing. These were obviously intended to pressure us into not discussing the *Perdue Farms* case. You will note that the letter from Ms. Brooks refers to evidence that presumably would exonerate Local 204 in this matter. Yet, this evidence has not been shared with either your Committee or the federal district court that issued the preliminary injunction against the NLRB. Rather than

Chairman Nancy Kassebaum  
September 30, 1996  
Page 2

share this evidence, the UFCW has instead attempted to prevent any public discussion of a federal decision that is a matter of public record. The tactics used by the union against us raise a serious question of potential violation of the prohibition against intentionally harassing a witness in a proceeding before Congress (18 U.S.C. § 1512(c)) as well as obstruction of federal proceedings (18 U.S.C. § 1505). Your Committee may wish to consider asking the Department of Justice to investigate this matter.

I appreciate your attention in this matter.

Sincerely,  
  
Daniel V. Yager  
Vice President and General Counsel

cc: The Honorable Edward Kennedy  
The Honorable James M. Jeffords  
The Honorable Dan Coats  
The Honorable Judd Gregg  
The Honorable Bill Frist  
The Honorable Mike DeWine  
The Honorable John Ashcroft  
The Honorable Slade Gorton  
The Honorable Lauch Faircloth  
The Honorable Clairborne Pell  
The Honorable Christopher J. Dodd  
The Honorable Paul Simon  
The Honorable Barbara A. Mikulski  
The Honorable Paul David Wellstone  
Joyce Murphy Brooks, Esq.

# UFCW

*news*

United Food and Commercial Workers International Union, AFL-CIO/CLC  
1775 K Street, NW, Washington, DC 20006-1598 • Contact: Greg Denier (202) 466-1591

FOR IMMEDIATE RELEASE

SEPTEMBER 17, 1996

**PRESS RELEASE**

**PERDUE AND LABOR POLICY ASSOCIATION PUT ON NOTICE:  
ANTI-UNION SLANDER COULD BRING LAWSUIT**

**"Maliciously false statements"  
Used To Fuel Political Attack**

**Union Turns Over Evidence To Federal Investigators**

The United Food and Commercial Workers Union (UFCW) Local 204 has put Perdue Farms, Inc. and the Labor Policy Association on notice that continued dissemination of "contrived charges of criminal conduct" by a union officer could result in legal action.

The nation's second largest poultry producer and the prominent big business-backed, anti-union lobbying organization are using "maliciously false statements" alleging the forgery of union authorization cards to fuel a political attack on workers, unions and the National Labor Relations Board (NLRB)—an attack that includes Congressional hearings.

The Labor Policy Association, in particular, has used media releases and public statements concerning the allegations to further its political agenda of weakening legislation that protects workers.

According to the union's notification letters, Perdue "knew or should have known since the baseless allegation was first contrived, officers of UFCW Local 204 did not forge the signatures of Perdue employees who authorized union representation," and that the "Labor Policy Association is actively assisting Perdue...in communicating maliciously false statements."

Further, the union charges that the "maliciously false statements were made and distributed with a conspiratorial design."

The UFCW has turned over all its evidence to federal investigators, including evidence that no forgery occurred from "an independent expert whose credentials and conclusions are beyond reproach.

**-MORE-**



The case grows out of Perdue's on-going smear campaign designed to stop worker organization at its plant in Ahoskie, North Carolina.

The Poultry producer feared that the NLRB would order a new union representation election at the plant based on the substantiation of management misconduct charges during a previous election.

The company and the Labor Policy Association disseminated statements alleging that a union official had forged employee signatures in order to obtain an election.

The union is demanding that the statements be retracted.

206

Joyce Murphy Brooks  
Attorney and Counselor at Law  
227 West Trade Street, Suite 2140  
Charlotte, North Carolina 28202  
Telephone: (704) 376-3698

Telecopy: (704) 332-2716

September 16, 1996

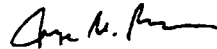
Mr. Jeffrey McGuiness  
Labor Policy Association, Inc.  
1015 15th Street NW  
Suite 1200  
Washington DC 20005

BY TELECOPY TRANSMISSION

Dear Mr. McGuiness:

We have been unable to confirm your receipt of our  
correspondence of September 11. Therefore a copy is attached.

Sincerely yours,



Joyce M. Brooks

JMB:kg

Joyce Murphy Brooks  
Attorney and Counselor at Law  
227 West Trade Street, Suite 2140  
Charlotte, North Carolina 28202  
Telephone: (704) 376-3698

Telecopy: (704) 332-2716

September 11, 1996

Mr. Jeffrey McGuinness  
Labor Policy Association, Inc.  
1015 15th Street NW  
Suite 1200  
Washington DC 20005

Re: *UFCW Local 204*

Dear Mr. McGuinness:

This correspondence relates to Perdue Farms, Inc., and its officers, agents, and publicists (hereinafter collectively "Perdue"), in connection with contrived charges of criminal conduct. I represent United Food and Commercial Workers Local 204 and its officers.

It has come to our attention that your organization has been engaged in republication and dissemination of defamatory statements concerning criminal conduct allegedly perpetrated by an officer of Local 204. We have reason to believe that the Labor Policy Association is actively assisting Perdue in abusing process by inter alia communicating maliciously false statements for improper and ulterior purposes. For example, the Labor Policy Association has intentionally portrayed an allegation of forgery by an officer of Local 204 as a statement of fact. As you are no doubt aware, such linguistic slights of hand constitute libel and slander *per se*. Lest there be any mistake, the statement that an officer of Local 204 "forged" or "directed the forgery" of authorization cards submitted to the NLRB is patently false. The fact that no forgery occurred, and the confirmation of this fact by an independent expert whose credentials and conclusions are beyond reproach, have been communicated to federal officials, along with substantial evidence that Perdue knew or should have known that the forgery allegation was wholly contrived. Local 204 and its officers have requested an investigation of the conduct of those persons associated with and responsible for the submission of false statements to federal authorities.

Local 204 and its officers do not intend to stand idle in the face of continuing attempts to obstruct justice. The statements attributed to the Labor Policy Association, along with other relevant information, strongly suggest actual malice. The Labor Policy Association, along with its shareholders and supporters, enjoy no immunity for recklessly false statements. Your organization simply may not continue to portray my clients in a false light.

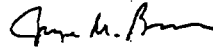
Mr. Jeffrey McGuiness  
Labor Policy Association, Inc.  
September 11, 1996  
Page two

The republication of maliciously false statements involving my clients' trade and profession, containing imputations necessarily harmful and hurtful in their effect on my clients' business, will not be tolerated. Furthermore, such false statements cannot as a matter of law be communicated in good faith when made with reckless disregard for the truth or with a high degree of awareness of probable falsity. A conspiratorial design to injure or destroy my clients' business activities exposes each participant to joint and several liability.

Pursuant to the provisions of common law, and in the event that N.C. General Statute §§99-1 through 99-5 (and similar statutes in other jurisdictions) apply, UFCW Local 204 and its officers give notice to the Labor Policy Association, its officers, agents, and employees, to retract defamatory statements published in any manner at any time since in or about March 1996. In particular, my clients seek retraction of defamatory statements falsely alleging that an officer of UFCW Local 204 "forged" or "directed the forgery" of union authorization cards that were submitted as a showing of interest to the National Labor Relations Board. The requested retractions should be made immediately.

The egregious conduct must cease forthwith. You are so advised.

Sincerely yours,



Joyce M. Brooks

JMB:kg



September 16, 1996

Ms. Joyce Murphy Brooks  
Attorney and Counselor at Law  
227 West Trade Street, Suite 2140  
Charlotte, NC 28202

Re: *UFCW Local 204*

Dear Ms. Brooks:

I am in receipt of your letter of September 16, 1996, in which you claim that the Labor Policy Association "has been engaged in republication and dissemination of defamatory statements concerning criminal conduct allegedly perpetrated by an officer of Local 204." You refer to *Perdue Farms, Inc., v. National Labor Relations Board and Willie L. Clark, Jr.*, No. 96-CV-27-BO(1), 1996 U.S. Dist. LEXIS 11882 (E.D.N.C. July 23, 1996). In that case your client has been trying to organize certain employees of Perdue Farms in Lewiston, North Carolina. Two representation elections have recently been held there, but in both instances your client was rejected by the employees to become their exclusive bargaining representative. Efforts were underway by the NLRB to conduct a third election, but the district court issued an injunction in the above cited case ordering it to halt any further proceedings. Specifically, the district court enjoined the National Labor Relations Board (NLRB) from:

conducting any proceeding or issuing any orders relating to objections filed to the representation election on April 4, 1996 at [Perdue's] facility in Lewiston, North Carolina, pending [the NLRB's] full compliance with the mandates of 29 U.S.C. SEC 159(c). The defendants are further ORDERED to immediately halt any proceedings relating to the second election currently underway, and are ENJOINED from enforcing any orders which may have issued in relation to said representation election."

*Id.* at \* 37.

The reason for the court's action is found in part in *Perdue Farms, Inc., v. National Labor Relations Board and Willie L. Clark, Jr.*, 927 F.Supp. 897 (E.D.N.C. 1996), in which the district court made the following statement:

On March 26, 1996, two former UFCW organizers came forward and confessed in highly detailed sworn affidavits that of the approximately 800 authorization cards returned to them by Lewiston employees prior to the first election, some 400 cards

Ms. Joyce Murphy Brooks  
September 16, 1996  
Page 2

were unsigned and subsequently forged by, and at the direction of, the Local's president.

*Id.* at 900. Despite these affidavits, the NLRB had continued to press for a third election.

The first *Perdue* case cited above also contains four additional statements relevant to your letter to us:

Additional facts which have only recently come to the Court's attention concern a remarkably similar case, *N.L.R.B. v. Carolina Food Processors, Inc.*, 81 F. 3d. 507 (4th Cir. 1996). In *Carolina Food*, U.F.C.W. Local 204 was suspected of having forged authorization cards forming the basis for an election. *Carolina Food*, 81 F.3d at 512-13; *see also* Dockery Affidavit, p. 4 (suggesting forgery at Carolina Food Processors).

*Perdue Farms, Inc.*, No. 96-CV-27-BO(1), 1996 U.S. Dist. LEXIS 11882 at \*2 n.2.

The evidence in this case indicates that card forgery is a common practice of this Union, (Dockery Affidavit, p. 10), and that cards were forged during the Union's Lundy Packing campaign: He said, "Brian [Murphy, President of Local 204], these cards need signatures -- you can handle that the way you did at Lundy's," and then he laughed. Brian [Murphy] said something like "that many cards? . . . [Local 204 President Murphy] then began forging signatures on the cards . . . (Dockery Affidavit, p. 4).

*Id.* at \*12 n. 9.

The Board could hardly take a different position where a union submits a bogus petition based upon hundreds of cards forged by the union's president [Brian Murphy], and it cannot avoid reaching such unpleasant decisions by deliberately turning a blind eye to the fraud in violation of its statutory duty.

*Id.* at \*19.

Sham hearings on election objections and elections based on forged cards were not contemplated by Congressional sponsors of the Labor Act.

*Id.* at \*30 n. 16.

You say in your letter that "the Labor Policy Association has intentionally portrayed an allegation of forgery by an officer of Local 204 as a statement of fact." You go on to give notice to our Association that it retract defamatory statements made regarding Local 204.

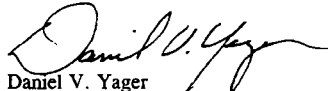
Ms. Joyce Murphy Brooks  
September 16, 1996  
Page 3

Your letter, however, does not give any specific examples what defamatory statements we have made. Until such time as you provide us details regarding what those statements you claim we have made were, we are not in a position to do anything further.

It should be noted that your letter was faxed to us on September 16 at 3:47 p.m. Although dated September 11, we never received a copy of your letter by mail. On September 17, LPA will testify before the Senate Labor and Human Resources Committee in oversight hearings on the recent conduct of the National Labor Relations Board. The *Perdue* situation figures prominently in those hearings, and we plan to discuss the court's findings in that case notwithstanding your blatant attempt at intimidation by your threat of litigation. The National Labor Relations Board is in crisis right now because of a pattern of deliberate manipulation and misuse of government processes by those seeking to use the Board to achieve certain objectives. The public has a right to know what is going on in individual cases involving the National Labor Relations Act, like *Perdue*, that are a matter of public record and provide evidence whether the law is being enforced as Congress intended.

There are a number of Congressional committees that have a strong interest in the *Perdue* situation. In your letter you describe the existence of an independent expert who you claim will confirm that no forgery took place in the *Perdue* situation. You may wish to get in touch with these committees to let them know of this person should they be interested in having him or her testify on the *Perdue* matter. If the facts are what you claim them to be, one might ask why it has taken so long to get them on the record. To expedite the matter, I have already forwarded a copy of your letter to Senator Nancy Kassebaum, Chairman of the Senate Labor and Human Resources Committee, Rep. William Goodling, Chairman of the House Economic and Educational Opportunities Committee, and Rep. Peter Hoekstra, Chairman of the House Oversight and Investigations Subcommittee. The sooner this entire matter can be cleared up, the sooner the third election can be held and the sooner the *Perdue* employees can register yet another opinion regarding Local 204 of the United Food and Commercial Workers.

Sincerely,

  
Daniel V. Yager  
Vice President and General Counsel

DVY/lg



March 28, 1997

The Honorable Frederick L. Feinstein, Esq.  
General Counsel  
National Labor Relations Board  
Room 10100  
1099 14th St., N.W.  
Washington, DC 20570

Dear General Counsel Feinstein:

We are writing to express our grave concern regarding the conduct of Mr. Glenn Zipp, the Director of National Labor Relations Board Region 33, during the ongoing dispute between Caterpillar, Inc., and the United Auto Workers.

Since early 1992, Caterpillar has had more charges filed against it and more unfair labor practice complaints issued against it than any other company in recent memory. In the last five years, the United Auto Workers filed 818 charges against Caterpillar, and NLRB Region 33, under Director Zipp's guidance, issued 335 formal complaints based on these charges. Many of the complaints are petty and appear to have been issued on highly questionable grounds. In our opinion, the level of charge activity and the types of complaints that have been issued are indicative of a sophisticated program of harassment conducted in accordance with corporate campaign manuals published by labor unions. In our opinion, Mr. Zipp has allowed the union to use him as a vital part of this campaign. In so doing, he has allowed the litigation situation in Region 33 to spin out of control and soak up an excessive amount of the Board's limited resources.

Director Zipp's actions over the last five years have caused us to conclude that he has become too close to the Caterpillar-UAW dispute. As the attached fact sheet indicates, Director Zipp exhibits personal bias against Caterpillar when commenting on the dispute. Further, his actions are partisan, clearly favoring the union when issuing complaints. Moreover, Director Zipp has chosen to become a public figure siding with the UAW in this labor dispute, hardly a legitimate role for a Regional Director. In our opinion, it would be best for all parties concerned if you were to move Mr. Zipp immediately to another NLRB region and bring in a new regional director committed to ending the litigation.

We thank you for your consideration of this matter.

Sincerely yours,

A handwritten signature in black ink, appearing to read 'Jeffrey C. McGuinness', is written over a horizontal line. The signature is fluid and somewhat stylized, with a long horizontal stroke extending to the right.

Jeffrey C. McGuinness  
President



### Examples of Conduct Unbecoming an NLRB Regional Director

RE: Glenn Zipp, NLRB Region 33 Director

- Mr. Zipp willingly appeared on-camera with union leaders to personally accept union unfair labor practice charges against Caterpillar. Each time, Mr. Zipp grinned broadly as he reached out to shake hands with Jerry Brown, UAW Local 974 President, creating the impression that the NLRB favored the union in the dispute. Peoria area television news broadcasts, November 17, 1992 and April 16, 1993.
- Mr. Zipp wrote a letter to the editor calling Caterpillar's rationale for firing a union member who threatened a supervisor with bodily harm "a skewed sense of fairness." "Cat's Skewed Sense of Fairness," *Peoria Journal Star*, December 21, 1996.
- Mr. Zipp supported union leaders in their attempt to obtain from Caterpillar a list of union workers who crossed the picket line. An ALJ ruled against Mr. Zipp. "Judge Scores One For, Against Cat," *Pekin Daily Times*, January 9, 1995, at A1.
- Mr. Zipp tried to enforce an unlawful contract term requiring Caterpillar to pay union committee members more money because they held union leadership positions. An ALJ labeled the practice clearly discriminatory to non-strikers. "NLRB Rules in Cat's Favor," *Peoria Journal Star*, February 3, 1995.
- Mr. Zipp accused Caterpillar of supporting the TEAM Act so that the company could kill the union and start a company union. "Subcommittee Will Hear About NLRB from Cat." *Pekin Daily Times*, July 12, 1995. Realizing the impropriety of his statement, a month later Zipp had a retraction printed, saying he was only "relaying what opponents of the legislation said." *Peoria Journal Star*, August 8, 1995.
- Mr. Zipp issued a complaint against Cat because the company provided free popcorn and pizza only to non-striking workers and not to strikers. "NLRB Sees Cat Bias in Food for Workers," *Peoria Journal Star*, December 25, 1996.
- Mr. Zipp filed a complaint against Cat in January 1997, over two and one-half years after the strike started and one year after it ended, accusing the company of causing the strike. "NLRB Blames Strike on Cat," *Peoria Journal Star*, January 17, 1997.



UNITED STATES GOVERNMENT  
NATIONAL LABOR RELATIONS BOARD  
OFFICE OF THE GENERAL COUNSEL  
Washington, D.C. 20570

Jeffrey C. McGuinness, President  
Labor Policy Association, Inc.  
1015 Fifteenth Street, N.W.  
Washington, DC 20005

May 6, 1997

Dear Mr. McGuinness:

I am in receipt of your March 28, 1997 letter regarding the Agency's handling of the charges brought by the United Auto Workers against Caterpillar, Inc.

I am certainly aware that the dispute between Caterpillar and the UAW is contentious and that its prolongation does not well serve either the parties or the country. There is little news that I would welcome more as General Counsel than that the parties have settled this dispute and that the concomitant NLRB litigation can be brought to a close.

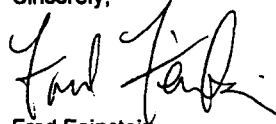
The first charges in the *Caterpillar* case were filed in Region 33 in 1992, before my term. Many additional charges have been filed since then. The Region has investigated each of the charges under long standing procedures and, together with several other Regions where charges against Caterpillar were filed, has issued more than 370 complaints alleging that Caterpillar has violated the Act. Decisions issued by the Board and others by administrative law judges, currently pending before the Board, have for the most part upheld the complaints. Caterpillar has entered into settlement agreements in 16 cases and in another 50 it has taken some action that led to withdrawal of the charge. Sixty-eight charges against Caterpillar have been dismissed as lacking merit and an additional 127 have been withdrawn after significant investigation—in most instances after the Union was advised that the charge lacked merit.

As you know, the case has been handled principally by Region 33 in Peoria. Glenn Zipp, the Regional Director of Region 33, is a career veteran—indeed, he is now one of the most senior of the 31 incumbent Regional Directors, having been appointed in 1978. Mr. Zipp has a well-deserved reputation as a scrupulously fair and honest public servant. Like my predecessors, I have great confidence in his abilities as a manager and as an enforcer of the National Labor Relations Act. That confidence of course extends to his participation in the *Caterpillar* cases. I do not believe his actions have in any way prolonged this, regrettably bitter, labor dispute.

Mr. Jeffrey C. McGuiness  
Page 2

Thank you for your letter and for your interest in the enforcement of the Act.  
Please do not hesitate to contact me again regarding this or any other matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Fred Feinstein". The signature is written in a cursive, flowing style with a prominent initial "F".

Fred Feinstein  
General Counsel

cc: Glenn A. Zipp, Director, Region 33

Mr. SHAYS. Mr. Joseph, you will have 5 minutes, and I'm going to roll it over another 5 if you need it.

Mr. JOSEPH. Thank you, Mr. Chairman. I appreciate the opportunity to be here.

I'm Jeff Joseph with U.S. Chamber of Commerce. Our Chamber is a federation of more than 3,000 State and local Chambers, more than 1,200 associations, and about 200,000 companies. Most of our members are small businesses, most of our members are not unionized, but nevertheless I am here to report the perception that they all seem to be getting that the NLRB, as an agency, has lost its focus from once being an objective arbiter of labor-management disputes into something that has gone into the captive side of organized labor.

The perception they have is that the political structure has overtaken the efficiency and the administrative functions that were originally delegated to the agency and it will take strong oversight by the Congress and this committee to try and provide balance back into the process.

I think it's self-evident that the Board's critical role as an impartial and independent agency was unilaterally changed by the current chairman who, not long after being confirmed, made no secret of the fact that he considered himself a member of the President's administration. He said the same thing under oath this morning.

Quite frankly, I have a hard time understanding how he can get away with that. This reflects his belief somehow that the Board is not a neutral, independent agency bound to enforce existing law but, rather, a policy-driven organ somewhat related to the administration. As a result, we believe the Board's decisions are tainted with the suspicion that its determinations are designed to achieve the political ends of the administration rather than the purposes and policies of the National Labor Relations Act.

How can he say that, since they are a judicial function, and then mention that he is a member of the President's administration? How can Congress, which has to arbitrate between executive branch agencies and independent agencies, allow someone who is independent of the administrative branch walk around and say that he is there to follow the directions and the goals of the administrative branch? I think it is clearly improper, if not illegal.

We believe that there are other factors that erode the Board's credibility, Mr. Chairman. You have talked about the situation of just having a few people there, only one confirmed by the Congress. That obviously undermines the credibility of the agencies in the labor management community as well as in the courts. We think the Board's credibility has been diminished by other actions as well: Salting, which was raised earlier; corporate campaigns; secret ballot elections; new rulemakings; a number of efforts that are very clearly, from our members' perspective, being undertaken to support the unions in their organizing efforts.

If you stop and step back for a second and look into the world of business today, you see the stock market at a record high, the economy doing great, 90 percent of the employees not choosing to be in unions, the majority of workers are now working for small businesses, and you find as employees have chosen over the last several decades not to become members of unions, union strategies,

instead of trying to encourage workers to go their way, are using tools to try to coerce employers to basically throw up their hands and say, OK, you guys win; come on in and take them over.

We think this whole confrontational strategy of management versus labor which was set up 65 years ago in the industrial era makes no sense at all as we go into the 21st century. And to second some of the comments that were just made, we think it's time to look at all of the labor laws, including the NLRA, in terms of thinking what processes and procedures make sense in dealing with workplace rules and regulations.

The Board, under Chairman Gould, appears to be creating new laws even though he assured Senators during his confirmation hearings that he would merely interpret existing laws. But during the past 3 years, the Board has overruled or significantly altered the law a number of times, and the Court of Appeals has not looked favorably on these actions. My full testimony cites a number of actions where they have been taken to task for again going off of the historical, beaten track. And because of our—the allegations that we are making that everything is tied to being a member of the administration and the goal of trying to align NLRA and NLRB actions with the intentions of the administration, we think the greatest challenge to peaceful and cooperative labor relations lies ahead.

As you know, in February, Vice President Gore announced to the AFL-CIO Executive Committee that the Clinton administration planned to issue an Executive order and regulations that would virtually require all government construction projects to be performed pursuant to project labor agreements and would debar government contractors that violated or were alleged to have violated various labor laws, including the NLRA.

You heard in testimony earlier today about frivolous charges and how many get dismissed, yet this becomes a new stick, a new club, that could be used potentially by organizers as a way of intimidating employers to coerce to union demands.

We think that in light of the administration's plans, it is appropriate for this committee and this Congress to ask the Board a number of questions.

First, Congress should know to what extent NLRB employees, including Board members and its general counsel, have been consulted by the administration as it prepares new administrative regulations.

The next question should be an effort to learn to what extent would such regulations affect union organizing and the NLRB, and would the Board's role enforcing those regulations require more funding or less than it now receives, and what role will the Board have in enforcing the regulations in consulting with other agencies, and to what extent would that role fit in with the Board's current responsibilities.

We believe that labor relations stability is absolutely essential to most businesses, especially those whose employees are represented by a union. But when the Board routinely alters established precedent, it's not possible for the employers to know whether the actions that they have planned are potentially in violation of the

NLRA. This information could be essential to avoid a Board finding of huge liability and back pay or other make-whole relief.

The Chamber urges Congress to make more aggressive steps to control what appears to be the NLRB's efforts to rewrite the National Labor Relations Act, effectuate administrative policy objectives, and provide even more weapons to aid labor's organizing drives.

Thank you.

[The prepared statement of Mr. Joseph follows:]

Statement  
on  
The Mission, Management and Performance of the  
National Labor Relations Board  
before the  
Subcommittee on Human Resources  
of the  
House Committee on Government Reform and Oversight  
for the  
U.S. Chamber of Commerce  
by  
Jeffrey H. Joseph, Vice President  
July 24, 1997

The U.S. Chamber of Commerce is the world's largest federation of business organizations representing an underlying membership of more than three million business and professional organizations of every size, in every business sector, and in every region of the country. The Chamber serves as the principal voice of the American business community. An important function of the Chamber is to represent the interests of its members in significant and substantial matters before the federal courts, the U.S. Congress, the Executive Branch, and independent agencies for the federal government.

Mr. Chairman, when you invited me to testify at this hearing you said the Subcommittee was particularly interested in "the Board's capacity to implement the Government Performance and Results Act." I regret that I am unable to comment directly on the Board's compliance with that Act because we were unable to obtain that agency's strategic plan. When asked last week if we could pick up a copy of the plan or an advance draft we were told that it was still being drafted and that we could not see it until today. Once we receive the strategic plan, with your permission, I will supplement my statement after reviewing that document.

The National Labor Relations Board (NLRB) had, until recently, a well-deserved reputation for objectivity, efficiency and expertise. Not all parties to Board proceedings were entirely satisfied with the agency's decisions or procedures all of the time, but for the most part, employers, unions, taxpayers, and most importantly -- employees -- were well-served by the NLRB. Unfortunately, this is not now the case. The Board has been turned into a tool and ally of organized labor. For a number of reasons the agency has lost site of its purpose. The Board is now seen by many as just another politically motivated and controlled function of a frustrated administration overly anxious to appease a faithful political supporter. The Board's staff, especially its General Counsel, is widely viewed by many employers as willing to use and abuse the National Labor Relations Act and its traditions to further the goals of the AFL-CIO.

The Board can regain its reputation for objectivity, fairness, and efficiency but it will take determined and targeted reforms and probably intense Congressional leadership and oversight.

The business community expects such action, taxpayers demand this approach, and America's workers are entitled to nothing less!

The NLRB's myriad problems have many causes. Some are easily identified. For example, the Board was established in 1935 to be an independent, quasi-judicial law enforcement agency. For decades it fulfilled its law enforcement role with both political parties adhering to an unwritten rule that three of the agency's five members, nominated by the President and confirmed by the Senate, would be of the President's political party and the remaining two from the other party.

The Board's critical role as an impartial and independent agency was unilaterally changed by the current Chairman who, not long after being confirmed, made no secret of the fact that he considered himself a member of the President's Administration. So much for the NLRB being an independent agency. Chairman Gould was heard to say in speeches that he is proud to serve in the Administration. This reflects his belief that the Board is not a neutral, independent agency bound to enforce existing law but rather a policy-driven organ of the White House. As a result, the Board's decisions are tainted with the suspicion that its determinations are designed to achieve the political ends of the Administration rather than the purposes and policies of the National Labor Relations Act.

There are additional factors eroding the Board's credibility. At the moment, the Chairman is the only member of the Board who has been confirmed by the Senate. There are two vacant seats and two members are serving as recess appointees — members appointed by the President during a congressional recess and thus never even brought before the Senate for confirmation. Amazingly, this President has nominated only one person to the Board since 1993, even though there have been several vacancies. Instead, he has avoided Senate confirmation of his nominees by designating them recess appointees. Without Senate confirmation, the credibility of the recess appointees, and that of the agency as a whole, is significantly diminished in the eyes of labor-management community as well as in the view of the federal courts.

The Board's credibility is diminished by other actions as well. First, there is the issue of "salting." This term refers to a union's placing of its agents on the payroll of a targeted employer by having the agent pose as a legitimate applicant for an opening on the employer's staff. The agent, usually a full-time employee of the union, does not divulge his or her status as the union's employee. When hired, the "salt" begins an intensive campaign to convince fellow employees to support the union, usually while subordinating legitimate work effort to the organizing activity. In this manner, the salt is able to make face-to-face contact with the targeted employer's workers fomenting discord, dissatisfaction, and dissent among the workers and thereby enhancing the union's appeal. Unfortunately, the Board and Supreme Court view this a legitimate organizing activity under one interpretation of the National Labor Relations Act. Clearly, the drafters of this law did not intend that employers be required to employ union organizers. The law must be amended, directly or indirectly, to correct this unintended consequence.



Salting is used in another, more sinister and damaging manner as well. If an employer whose employees have chosen not to be represented by a union, as is their right under the NLRA, decides to compete against unionized firms in the same industry, the unions often will determine that the presence of a non-union firm with its typically lower payroll costs and greater efficiency undercuts the ability of its members' employers to compete successfully. The unions' answer is to ask the non-union firm to recognize the union and adhere to a contract similar, if not identical, to the labor agreement it has with the unionized firms. If the non-union employer refuses to recognize the union, as it is virtually obligated to do under the NLRA, the union commences a salting campaign against the non-union employer. Only the objective of this campaign is not to organize the workers, rather it is to put the targeted employer out of business!

This is easily accomplished by having the salts (in these circumstances there are usually several placed on the targeted employer's payroll at one time) actively disrupt and impede productivity, commit work rule violations for which they will be discharged, and file numerous, often totally frivolous charges with administrative agencies such as the NLRB, OSHA, and the Dept. of Labor. The employer will be forced to pay substantial legal fees to defend the meritless allegations and will either withdraw from the market or cease doing business. Of course, the employees of the targeted employer are also victims as they lose employment opportunities and/or are laid off.

The abuse of the NLRB and other administrative agencies is a key element in another tactic becoming increasingly popular with organized labor. In "corporate" or "strategic" campaigns a union will attempt to force an employer to agree to its demands at the bargaining table or its demand to be recognized as the collective bargaining representative of the employer's workers. By filing numerous administrative charges a union brings another form of pressure to bear against an employer that may be resisting its bargaining demands. A good example of this is the ongoing dispute between the UAW and Caterpillar. In that situation the union cannot defend its unreasonable contract demands so it has embarked on a corporate campaign which includes overwhelming the NLRB and Caterpillar with numerous charges of questionable merit, all of which require at least lengthy and expensive investigation and substantial legal fees.

A corporate campaign using the NLRB can have another objective. As in a salting campaign, smaller employers when faced with multiple administrative charges will face enormous economic pressure defending the charges. Even employers with more resources will sooner or later have to limit the legal fees. At this point, the campaigning union has achieved its objective and the employer either withdraws from the market or accedes to the union's recognition demands. Either way, the employees are the primary victims whether it is because their jobs are lost or because their rights under the NLRA are ignored.

Another aspect of corporate campaigns involves a campaigning union's attempts to block employer efforts to get building permits, zoning approvals, environmental clearances, etc. Often these tactics include direct appeals to the public and uninvolved parties on non-labor issues – all with the objective of adversely affecting the employer's reputation in the community or among its customers, shareholders, and financial supporters.

Because we live in a democracy, we often take for granted our right to vote for our representatives. Few things are as moving as seeing people exercise that right for the first time or the first time in a long time. A good example was the pictures of long lines of newly enfranchised South Africans waiting for hours in the hot sun to vote for the first time. Much the same awe is experienced when one sees a line of employees waiting to cast their ballots in a NLRB-supervised election to determine whether they will be represented by a union. The Clinton Board, whose Chairman proudly confirms his allegiance to the Administration's political objectives, is engaged in an effort to do away with this cornerstone of industrial democracy in favor of mail ballots. Citing administrative difficulties and expenses, the NLRB now claims that its almost universally admired elections will instead be handled by distributing mail ballots to eligible employees. Thus, the secret ballots that used to be marked in the confines of an election booth and deposited in a ballot box for later tabulation will now be marked, it is hoped, by an employee in the presence of whoever can convince him or her to allow their presence. The vote can be influenced up to and including the moment it is marked as there will be, and can be, no restrictions on who the voter allows into his or her presence when the ballot is marked or where the voter chooses to mark the ballot.

Before relying on mail ballots as a routine matter, the Board should carefully consider the statement of one of its own employees who later, as a member of Congress, warned:

"Back when I had a real life, I was an NLRB attorney. And so therefore I probably know more about this stuff than I ever wanted to know... I remember how complicated so many of these cases would be. Sometimes the [union authorization] cards that were turned in were found to be fraudulent because somebody got excited; sometimes employees changed their minds, and all sorts of things."

Representative Pat Schroeder (D-CO), Congressional Record, p. H3556, June 15, 1993. Speech on the floor of the U.S. House of Representatives during debate on an amendment for H.R. 5 (striker replacement), urging approval of an amendment to limit coverage of the proposed amendment to employees already represented by a union recognized by their employer.

The NLRB under Chairman Gould appears to be creating new law even though the Chairman assured Senators during his confirmation hearing that he would merely interpret existing law if confirmed. For example, the NLRB under Chairman Gould has moved to implement a proposed regulation that would overturn the Board's time-honored and statutorily-based bargaining unit determination procedure. Under the new rule, instead of careful investigations and thorough hearings if appropriate, the Board will automatically determine that the bargaining unit proposed by a union organizing the employees of a single location in a multi-site operation, such as a group of similar stores or restaurants in a city, is appropriate. Thus, if there are five identical fast-food restaurants in one city or town, all owned, operated and managed by one company in a central location, the Board will allow a union to bargain on behalf of the employees of just one of those restaurants even though those employees share a community of interest with the workers at the four similar restaurants.

This type of rulemaking, rarely done by the Board, will give union organizers the ability to concentrate their efforts on the few employees working at one location instead of the broader work force at related operations. Fortunately, Congress has limited the funds available to the Board to so blatantly overturn years of court-approved legal precedent in this area. We hope that Congress maintains this restriction until the Board realizes that it should not attempt to rewrite the National Labor Relations Act.

The Board's reputation even among its strongest allies is diminished. Union organizers now are encouraged to avoid the NLRB procedures when possible and instead use alternative means to achieve recognition as a collective bargaining agent. The favored means is through a card-check. Theoretically, a union organizer will solicit evidence of employee support for the union by obtaining employee signatures on a union authorization card. Such cards state that the undersigned employee wishes to be represented by the union. The organizer obtains signed cards from over 50% of the employees in the desired bargaining unit and then merely demands that the employer recognize the union as the collective bargaining agent for all of the employees in the unit.

Of course the recognition demand is accompanied by an offer to show the employer that the requisite majority of employees have indeed signed the union cards. In the event that the employer rejects the recognition demand, the organizer is prepared to conduct a corporate campaign against the employer with the objective of forcing recognition as a means of ending the campaign. In this manner, the organizer does not have to submit the issue of union representation to an employee secret-ballot election conducted by the NLRB.

This method of organizing necessarily involves the dangers former representative Schroeder warned the House of Representatives of in 1993. (See above.) Regardless of the validity of signatures on the union cards, in this situation the employees are denied the option of voting in a government supervised secret-ballot election to determine whether a majority of the employees in an appropriate bargaining unit wish to be represented by the union. There is little doubt why unions prefer card check recognition to NLRB elections. Unions usually lose at least half of such elections thereby precluding further recognition efforts for a full year. Union's non-NLRB recognition methods serve as a clear statement that they are unwilling to abide by the clear wishes of the majority of employees they seek to represent.

The NLRB has managed to alienate both organized labor and the business community. However, the greatest challenge to peaceful and cooperative labor relations lies just ahead. In February Vice President Gore announced to the AFL-CIO Executive Committee that the Clinton Administration planned to issue an Executive Order and regulations that would virtually require all government construction projects to be performed pursuant to a "project labor agreement" and would debar government contractors that violated, or were alleged to have violated, various labor laws including the NLRA.

Apparently, President Clinton is so indebted to the AFL-CIO that he is willing to again try to augment through regulations the sanctions specified by Congress for violations of federal labor and employment laws. This is occurring even though the federal courts quickly granted our legal challenge to his ill-conceived striker replacement executive order.

In light of the Administration's plans, it is appropriate for Congress to learn the answers to several questions regarding the formulation of the promised regulations. First, Congress should know to what extent NLRB employees, including Board members and its General Counsel, have been consulted by the Administration as it prepares the regulations. The next question should be an effort to learn to what extent will such regulations affect union organizing and the NLRB? Will the Board's role in enforcing those regulations require more funding or less than it now receives? What role will the Board have in enforcing the regulations and consulting with other agencies, and to what extent will that role fit in with the Board's current responsibilities?

Finally, I would add that the Board's tendency to overrule its own long-standing and court-approved precedent tends to undermine the labor relations stability. Even the federal appellate courts have criticized the Board for not following established precedent. The following cases are good examples: Lee Lumber & Building Material Corp. v. NLRB, 1997 WL 370186 at \*8 (chastising the Board for "continu[ing] to ignore" the D.C. Circuit); ConAgra, Inc. v. NLRB, 1997 WL 370176 at \*9 (D.C. Cir. July 8, 1997)(refusing to enforce Board order that amounted to "an unexplained (indeed unacknowledged) departure from the Board's precedent"); Performance Friction Corp. v. NLRB, 1997 WL 356931 at \*6 (4<sup>th</sup> Cir. June 30, 1997) (criticizing the Board for exceeding its remedial authority by issuing an order that "is the equivalent of a hostile government takeover of a company through administrative agency regulation."); NLRB v. Lundy Packing Co., No. 95-1364(L) (4<sup>th</sup> Cir. March 21, 1996) (criticizing the Board for "contraven[ing] its jurisdictional limits and [seeking] to bypass this court."); Reisback Food Markets, Inc., 91 F.3d 132 (4<sup>th</sup> Cir. July 19, 1996) (refusing to enforce Board decision for failure to apply controlling precedent).

Labor relations stability is absolutely essential to most businesses, especially those whose employees are represented by a union. When the Board routinely alters established precedent, it is not possible for employers to know whether the actions they have planned are potentially in violation of the NLRA. This information can be essential to avoiding a Board finding of huge liability in backpay or other make whole relief.

The U.S. Chamber of Commerce urges Congress to take more aggressive steps to control what appears to be the NLRB's efforts to rewrite the NLRA, effectuate Administration policy objectives, and provide even more weapons to aid labor's organizing drives.

Thank you for the opportunity to address the Subcommittee. I will be happy to answer any questions.

Mr. SHAYS. Thank you.

Mr. Hiatt.

Mr. HIATT. Thank you, Mr. Chairman.

This is the fourth congressional committee to hold an oversight hearing on the NLRB in the past 2 years. The prior hearings have largely served to provide a platform for those who have declared war on the Board and to pursue their continuing attacks, and I want to say that it was most welcome but, at the same time, a sad commentary perhaps on what has come before, that the chairman felt compelled to assure us that today, at least, there is no hidden agenda.

Mr. SHAYS. Let me just tell you, Mr. Hiatt, only because I'd heard that criticism from your organization, and, frankly, I was slightly outraged by it. So I just want to explain to you why. It came from your organization, since you mentioned it, and we have been deficient in not looking at all labor activities because we have five panels.

So I find it interesting that you want to start your testimony this way.

Mr. HIATT. I am sorry, Congressman. I just wanted to say that we have not suggested that about this subcommittee in the slightest, but the fact is that in some of the hearings that have preceded this one, the focus has been not on the kinds of questions that were asked of the Board this morning or the kinds of testimony that was delivered but, rather, simply on providing a forum for complaints about actions that the Board has taken now, no different from those that the Reagan and Bush Boards took and were taken in prior decades, but which some segments of the business community, at least, are suggesting represents such a diversion from the past.

There was a commission established by the President 3 or 4 years ago headed by former Secretary of Labor John Dunlop, composed of both labor and management representatives, in which business and labor and others were invited to testify, and the business community was effectively invited to describe all that they felt was wrong with the NLRA and the NLRB both in terms of substance and in procedure, and they could not—the business community kept assuring the commission that the law was working just fine, that the Labor Board was working just fine, that there was absolutely nothing wrong, that no changes were warranted, with the one possible exception that some members in the business community felt should be changed concerning section 8(a)(2), the TEAM Act kinds of issues.

And yet today, because of what is viewed as a more aggressive enforcement of the law, some of these same representatives believe that total overhaul both of the law itself and of the agency is called for.

I just want to be clear that the AFL-CIO also sees much to be disappointed about in the way that the act is being administered today. We are certainly troubled by the large and growing backlog of cases awaiting investigation, a backlog that has nearly doubled in just 3 years. We are troubled by restrictions that have been placed on investigators that limit their ability to ferret out the facts. We are troubled by the vast majority of meritorious charges

that continue to be resolved by a minimal slap on the wrist. And we are troubled by the continuing backlog of cases awaiting decision by the Board as the median length of time from the filing of a charge to a decision by the Board is stretched to over 18 months.

And especially in light of these delays, we are deeply disturbed by what appears to us to be a significant retreat by the Board in its use of the section 10(j) injunctions, which are intended to secure immediate relief from unfair labor practices committed by employers or unions.

We are also disappointed by the fact that there is only one confirmed member on the Board, two recess appointees, and two vacancies, and we appreciate your offer to try to spur the administration to addressing that. We think the Senate leadership needs to be spurred as well, since we are told that the Senate leadership has indicated that they have no interest in having these appointments taken up for consideration. And if that is wrong, we would welcome action in that area.

Notwithstanding all of that, the fact remains that the NLRA is the only national law that recognizes the fundamental right of working people to associate freely for their mutual aid or protection. And they have to depend on the general counsel's office and on the Board to vindicate those rights of free association. And when the agency is bloodied, it is working people who suffer, and to some degree that is what is happening now.

Consider the matter of NLRB funding. Law enforcement, as we have heard this morning, is very labor intensive work. The cost of lawyers and investigators continue to rise, yet since 1985 the Board's budget has been slashed in inflation-adjusted terms by 17.4 percent and the agency's had to reduce its staff by more than 25 percent.

And as disturbing as this defunding has been, the appropriations process itself over the past 2 years has, we fear, done even more damage to the cause of effective enforcement of the laws. The Board has been overtly threatened with budget cuts if it ruled in a particular manner in a particular case that was pending before it. To its enormous credit, we feel the Board has stood up to those threats, but as a result of its independence, the Board has faced the possibility of budget cuts so large that they would have destroyed the agency.

And even though those cuts—threatened cuts were scaled down, the Board has suffered a real cut of 6 percent over 2 years as the price for being, in the words of the chairman of the House Appropriations Committee, "too intrusive."

Meanwhile, as I say, some segments of the business community have launched a propaganda war against the Board that is designed to rationalize the defunding and the interference with the Board's independence by illegitimizing the agency.

Mr. Yager says that the only issue that seems to count in a dispute before the general counsel and the Board is, how can the interests of the union involved be enhanced by the agency? And while that rhetoric is powerful, the specific charges lack any basis in fact. Let me just give you a few quick examples.

The LPA claims that the general counsel's office cares more about furthering the interest of the union, but in fact the general

counsel is dismissing upwards of 65 percent of the charges filed with him, three-quarters of which are filed by unions and employees, and this is the same percentage roughly as was true under the Reagan and Bush Boards and before that.

Second, while the LPA accuses the Board of making Herculean efforts of finding employer violations to overturn elections when unions lose, in fact those objections continue to be overruled in 75 to 80 percent of all cases; again, the same percentage as under the Reagan and Bush Boards and the Boards before that.

Third, the LPA claims that where employees have rejected a union in an election, the Board has simply ordered the union to bargain with the union anyway by making bargaining orders a common tool, and there have been a lot of unfair labor practices during the campaign. But, in fact, the Gould Board has issued an average of 8.4 such orders per year, which is a rate which is a third below that of the Reagan and Bush Boards were issuing bargaining orders at, a fact that is not mentioned by the LPA or the business community that now complains so loudly about these bargaining orders.

Fourth, the LPA claims that the Gould Board has been the worst performer of any board in the past 30 years of securing enforcement of its decisions in the courts of appeals. But if you use the LPA's own definition of wins and full wins, partial wins, partial losses, and so on, the Board's win rate in fiscal year 1996 was 78.6 percent and in the first 9 months of fiscal 1997 was 79.7 percent, which perfectly tracks the Board's historical rate of 79.4 percent under the Bush-Reagan years and before.

None of this is meant to say that—and I would just point out that the three new cases that Mr. Yager relates in his testimony this morning as examples where courts of appeals overturned the Labor Board recently are cases which in one case was initiated by General Counsel Hunter, Republican general counsel; in one case joined by Board Member Cohen in a unanimous decision that included the Republican member of the Board; and in the third case—

Mr. SHAYS. I don't understand when you say—what was unanimous? The Board had a unanimous decision and then they went and asked the court to overturn a case they had ruled the other way around?

Mr. HIATT. The Board sought enforcement in the Court of Appeals.

Mr. SHAYS. Right, right, right.

Mr. HIATT. Or the losing party sought to overturn the Board's decision, either of which is a common way of getting to the Court of Appeals. And those were indeed three cases where the particular courts took the Labor Board to task. That happens about 20 percent of the time, but it always has. It happened in the Reagan-Bush Board years, it happened before that, and the three examples that are given today where a particular court of appeals got particularly impatient with the Labor Board were cases that were either initiated before Gould-Feinstein came along or were joined by Republican members of the Board.

Finally, the examples of cases that are cited now that the LPA says, well, you can't just look at the statistical analysis, you have

to also look at the quality of the decisions, and so a number of cases very selectively—in the book that Mr. Yager has provided the committee in the past and in today's testimony, very selectively parts of a few cases are used to mock the Board's case handling today, the kinds of decisions that are coming out today.

So, for example, this forgery case that Mr. Yager refers to in his testimony today is a great example of that. It sounds terrible. It sounds like the Board is approving forged authorization cards. But if you look at the facts of this case, what happened is that there were 131 people in the unit; 100 of them had signed authorization cards. Under the Board's rules, all that was needed was 30 percent, and a handful were allegedly forged cards. The employer wasn't even able to prove that they were forged, but the Board said, even if those few were, that is irrelevant, you have gotten way more than the 30 percent, you are entitled to a secret ballot election, which is where you can really test employee sentiment anyway.

So we will supplement the record, if we may, with respect to the cases that were provided, as we did last year. The handful of cases that are provided to make a mockery of the way the Board is now deciding cases, we submit, gives a very, very unfair and one-sided opinion. And what is new, we submit, is not that the performance of the Board—is not the performance of the Board itself but of these tactics of some Members of Congress, not this committee, and some significant sectors of the management community to delegitimize and destabilize the agency, and those destructive efforts, rather than the record of the Board itself, are indeed most sorely in need of your committee's attention.

And I thank you for the opportunity.

[The prepared statement of Mr. Hiatt follows:]



TESTIMONY OF JONATHAN P. HIATT  
GENERAL COUNSEL, AFL-CIO

BEFORE THE

SUBCOMMITTEE ON HUMAN RESOURCES

OF THE

HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT

July 24, 1997

Mr. Chairman and Members of the Committee:

Thank you for this opportunity to testify before you today.

This committee is now at least the fourth congressional committee to hold an oversight hearing on the National Labor Relations Board in the past two years. The prior hearings have largely served to provide a platform for those who have declared war on the Board to pursue their relentless attack.

The AFL-CIO fears that this assault will succeed in depriving the Agency of the financial resources, the intellectual independence and creativity, and the moral capital that effective law enforcement demands. It is imperative for those who care about the Agency, and about the law it administers, to speak out. That is my mission here today.

In taking on this mission on behalf of the AFL-CIO, I want to be clear at the outset that I do so even though we see much to be disappointed about, and even more room for improvement in, the way the National Labor Relations Act is being administered today.

We are, for example, troubled by the large and growing backlog of cases awaiting investigation – a backlog that has nearly doubled in just three years. We are troubled by restrictions

that have been placed on investigators -- restrictions that limit their ability to ferret out the facts. We are troubled that the vast majority of meritorious charges continue to be resolved by a minimal slap on the wrist -- most often, an agreement by the employer not to violate the law in the future. We are troubled by the continuing backlog of cases awaiting decision by the NLRB, as the median length of time from the filing of a charge to a decision by the NLRB has stretched to over 18 months.

Especially in light of these delays, we are deeply troubled by what appears to us to be a significant retreat by the NLRB in the use of Section 10(j) injunctions -- intended to secure immediate relief from unfair labor practices committed by employers or unions -- from 104 in FY 95 to 54 in FY 96. And, we are equally troubled by an almost total failure of the NLRB to use its injunctive power in the courts of appeals under Section 10(e) of the Act -- the provision that enables the Board to seek injunctive relief in aid of a request for judicial enforcement of its orders issued to employers and unions to remedy their unfair labor practices.

Let me also state clearly, at the outset, that it remains our view that no matter how vigorously the NLRA is enforced, its substantive and remedial provisions are inadequate to deliver on the promises of the Act, especially in light of the changes that have taken place in the workplace in the more than sixty years since the statute was enacted. We believe that it is time -- indeed, long past time -- to revisit and revitalize the NLRA.

But as weak as the NLRA may be and as disappointing as its enforcement has been, the fact remains that the Act is the only national law that recognizes the fundamental right of working people to associate freely for their "mutual aid or protection." By protecting individual rights in the workplace, the NLRA is every bit a civil rights law as the employment discrimination laws enacted since the 1960's, and the NLRA demands no less vigorous enforcement.

Unlike other civil rights laws, however, the NLRA does not provide any private recourse to those whose rights are violated. Rather, the task of enforcing the NLRA is assigned exclusively to the Office of the General Counsel, and the primary jurisdiction to adjudicate cases brought under the Act belongs to the NLRB. If the General Counsel's Office is unable to prosecute a case, the case must go unprosecuted; if the Board is unable to adjudicate a case, the case will languish.

Also unlike other civil rights laws, the NLRA does not provide any means of punishing wrongdoers. Only equitable remedies are provided for under this Act -- for example, back pay for unlawful discharge but no damages, which are available to redress violations of virtually every other civil right protected by statute. As a result, the only conceivable way of deterring wrongdoing under the NLRA is through enforcement that is swift and certain.

Thus, the working men and women of this nation must depend upon the Office of the General Counsel and on the NLRB to vindicate their rights of free association. When the Agency is bloodied, it is hard-pressed working families who experience the pain.

By the same token, an impotent General Counsel and NLRB are every anti-union employer's dream. What could be better from that employer perspective than a federal law that occupies the field, thereby preempting states from acting, but is only haphazardly enforced? Indeed, the only time in recent memory when the management community has rallied behind the Board occurred in response to a proposal to raise the Board's jurisdictional requirements and thereby narrow the NLRB's jurisdiction. Management lawyers were quick to point out that the small businesses that would be jurisdictionally excluded would "forfeit" the "protections" of the NLRA.<sup>1</sup>

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<sup>1</sup> BNA Daily Labor Report, June 21, 1996.

That, we submit, is what the assault on the NLRB is all about: a calculated effort to protect management by undermining the enforcement agency at every turn and depriving it of the wherewithal to do its job -- while knowing that where the NLRB does assert its jurisdiction, however ineffectively, the states are barred from providing alternative procedures.

Tragically, that assault is succeeding.

Consider the matter of the NLRB's funding. Law enforcement is, of course, labor intensive work, and the cost of lawyers and investigators continues to rise. Yet since 1985, the NLRB's budget has been slashed, in real (inflation-adjusted) terms by 17.4%. As a result, the Agency has had to reduce its staff by more than 25%. The Agency now employs fewer staff than it did in 1963, even though the number of unfair labor practice charges and representation petitions filed with the Board has since increased by more than 50%. And, because of employee buyouts undertaken to reduce labor costs, the ranks of the senior, experienced staff have been particularly hard-hit.

With reductions of this magnitude, something had to give -- and it has. Many of the concerns I previously noted about the way the law is being enforced today reflect the fact that the 900 plus professional employees in the field are no longer able to keep up with a docket that takes in roughly 40,000 new cases each year.

For example, the General Counsel has reported that, because of staffing shortages, at the end of 1996 there were 7,000 "situations" pending investigation.<sup>2</sup> We believe that is an historic high. Furthermore, whereas the expectation has been that the investigation of every charge would be concluded within 45 days after the charge was filed, the General Counsel recently has had to adjust

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<sup>2</sup> Statement of General Counsel Fred Feinstein Before the Subcommittee on Labor, Health and Human Services, Education and Related Agencies of the House Committee on Appropriations, March 19, 1997.

those expectations, and now allots 100 days or more for the investigation of lower priority cases. Even so, the proportion of "overage" cases pending investigation -- that is, cases that have passed the point at which the investigation should have been concluded -- is up dramatically.<sup>3</sup>

Once cases are investigated and found meritorious, further delays are occurring in getting to a hearing because of a shortage of attorneys to handle these cases. Indeed, the General Counsel has reported that in some Regions trial calendars have stretched out as much as nine months.<sup>4</sup>

Other aspects of the work of the Regional Offices have been shortchanged as well. Investigators are now severely limited in their freedom to travel to question witnesses face-to-face. The Board's training of attorneys and field staff has ground to a virtual halt. Quality obviously suffers.

In short, the systematic defunding of the NLRB is undermining the capacity of the Agency to enforce the Act on behalf of America's workers.

As disturbing as this defunding has been, the appropriations process itself over the past two years has, we fear, done even more damage to the cause of effective enforcement of the law. The FY '96 appropriations debacle provides a particularly important case in point.

The NLRB's FY '96 appropriations request was pending before the Appropriations Committee at the same time that the Board was considering whether to seek a federal court injunction against Overnite Transportation Company to secure interim relief, pending the Board's full consideration of

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<sup>3</sup> The proportion of overage charges was 5% in 1988 and 11% in 1991. Statement of General Counsel Fred Feinstein Before the Subcommittee on Labor, Health and Human Services and Education and Related Agencies of the House Committee on Appropriations at 4 (March 14, 1996). At year-end, 14% of the highest priority cases; 29% of the middle tier of cases; and 19% of the lowest priority cases were overage.

<sup>4</sup> 1997 Statement, *supra* n.2.

the case, to remedy the company's massive unfair labor practices against employees seeking to organize. At the behest of Overnite (and/or its parent, Union Pacific), at least a dozen members of Congress wrote letters to the Board "warn[ing] against seeking an injunction" in the Overnite case;<sup>5</sup> letters from members of the Appropriations Committee pointedly noted that "all parts of the federal government are being reviewed for ways to cut spending."<sup>6</sup>

The Board nonetheless decided that the case warranted injunctive relief. The very next day, letters of protest were sent to the Board by the House Majority Leader and the House Republican Conference Chairman. Representative Boehner's letter began by expressing confidence that "you have followed the appropriations allocations for the Labor/HHS/Education budget" and "[w]ith this in mind" suggested that the Board's handling of the Overnite case was "somewhat surprising."<sup>7</sup>

One week later, Representative Dickey, a member of the Appropriations Subcommittee, wrote to say he was "stunned" by the NLRB's decision and that the 10(j) injunction process is "an outrage." Mr. Dickey closed with an ominous warning: "The American public demands that their tax dollars be spent in a more economical fashion."<sup>8</sup>

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<sup>5</sup> "Businesses Find Allies in GOP To Launch Attacks on Federal Job-Safety and Labor Regulation," Wall Street Journal, July 20, 1995, p. A14.

<sup>6</sup> "Pressure on the NLRB Turns into a Doubled Budget Cut," The Washington Post, July 20, 1995 p. A8.

<sup>7</sup> James Douglas, the President of Overnite, referenced these letters in testimony before the Subcommittee on Oversight and Investigations of the House Educational and Economic Opportunity Committee, July 12, 1995. The AFL-CIO subsequently obtained copies of the letters pursuant to the Freedom of Information Act.

<sup>8</sup> "Pressure on the NLRB Turns into a Doubled Budget Cut," The Washington Post July 20, 1995 p. A8.

Within three weeks, "Republican appropriators took their ire with the current leadership at the National Labor Relations Board out on the agency's budget," as BNA's Daily Labor Report reported. Over the protest of Representative Porter, the Appropriations Subcommittee chairman, who warned that "we are a country committed to the rule of law" and that under the rule of law "you don't cut judicial bodies because they make decisions you don't like,"<sup>9</sup> the Subcommittee adopted a proposal by Mr. Dickey to slash the NLRB's budget by 30%. Mr. Dickey made no bones about the fact that this was retaliation pure and simple; indeed, the Wall Street Journal reported that "a lobbyist for Overnite Transportation Co.'s Union Pacific parent stood at the elbow of Rep. Dickey as he readied [the] provision."<sup>10</sup>

When the NLRB's FY '96 budget reached the full Appropriations Committee, the cuts were sustained. The chairman of the Appropriations Committee, Representative Livingston, made no attempt to defend the cuts on any rational budgetary ground; instead, he said that the NLRB had become, in his words, "too intrusive."<sup>11</sup> As The Washington Post reported, these were "unusual hardball tactics."<sup>12</sup>

These draconian cuts hung over the Agency, Damocles-like, for nine months while the Board operated under a series of continuing resolutions. Eventually the cuts were scaled down, although the Board still ended up paying a price for being "too intrusive": the Board suffered a 3.3% reduction

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<sup>9</sup> Id.; see also "Teamsters Strive for Overnite Success," Newsday, March 17, 1996, p. 6.

<sup>10</sup> "Businesses Find Allies in GOP to Launch Attacks on Federal Job-Safety and Labor Regulations," Wall Street Journal, July 20, 1995, p. A14.

<sup>11</sup> BNA Daily Labor Report, July 13, 1995.

<sup>12</sup> "Pressure on NLRB Turns Into a Doubled Budget Cut," The Washington Post, July 20, 1995, p. A8.

in its budget; after taking into account the increased cost of living, the actual cut was closer to 4% or 5% in real dollars.

Just two months after the FY 1996 appropriation was finally resolved, the House Appropriations Committee was at it again, proposing to slash NLRB funding by 15% while freezing the budgets of every other agency covered by the Labor-HHS appropriations bill -- including, even, the Occupational Safety and Health Administration. This time it took three months to reach a resolution. The Board's great "victory" was that its appropriation was raised back almost to its FY 1994 level -- meaning that in real terms the Board's budget has suffered a 6% cut since FY '95.

We have related this history at length because it illustrates the terrorist tactics to which the Board has been subject. There is no mystery as to what has been animating all this activity. The voice may be that of some members of the appropriations (and authorizing) committees, but the hand is the hand of business. And, the message is loud and clear.

It is difficult to know how much damage has been inflicted on the morale, and the independence, of the NLRB's investigators, prosecutors and decision-makers by these tactics. We have the utmost respect for the integrity and professionalism of the NLRB's career and political employees. But surely, as they go about their business, it cannot escape their notice that hell hath no fury like an employer scorned, and that in the current environment, the NLRB can find itself one complaint, or one 10(j) action away, from invoking that wrath.

What is the General Counsel to do, for example, when he finds himself "blasted," to quote the report of BNA's Daily Labor Report, at an appropriations hearing for having had the temerity to "issue a complaint that would ask the board to hold that graduate student assistants at Yale University



are employees?"<sup>13</sup> What is the Board to do when Representative Hoekstra, the chairman of the House Subcommittee on Oversight and Investigations, appears before the National Association of Manufacturers to express "concern" about a set of pending cases,<sup>14</sup> and when the Board itself receives a letter signed by various members of the Oversight and the Appropriations subcommittees stating the same "concerns" and expressing their desire to "work with" the Board "on these and other matters?"

Can the General Counsel and the Board make an independent determination of whether to seek injunctive relief against the Detroit Newspapers when four members of the Senate Labor Committee already have weighed in expressing their "concern[]" and demanding "a status report"? Or, perhaps most troubling of all, can the General Counsel and the Board fairly consider new charges pending against Overnite Transportation Company when the Board is being barraged by a new set of letters?

This oversight committee has not recently undertaken a review of NLRB operations, and we appreciate that it has not been a party to the conduct by members of both Houses that I have just described. We welcome the committee's interest in protecting the neutrality of the NLRB, and we would encourage you to conduct hearings into the ways in which the independence of the General Counsel and the Board in making prosecutorial and adjudicative decisions has been systematically undermined.

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<sup>13</sup> "Board Officials Defend FY '98 Budget Request of \$186 Million," BNA Daily Labor Report, March 20, 1997.

<sup>14</sup> BNA Daily Labor Report, December 4, 1996.

At the same time that all this has been transpiring, the business community has launched a propaganda war against the Board, designed to rationalize the defunding and the interferences with the Board's independence by delegitimizing the Agency. Last Fall, the Labor Policy Association, a coalition of 240 large corporations, took this war to an unprecedented level. The LPA submitted to the Senate Committee on Labor and Human Resources, and subsequently published in book form, a fifty-three page, single-spaced diatribe dedicated to impugning the integrity of the Members of the Labor Board and of the General Counsel. The thesis of the LPA's polemic, stated in its title, was that the NLRB is an "agency in crisis."<sup>15</sup>

Mr. Chairman, the NLRB is "in crisis" only in the sense that it is under siege by both hostile members of Congress and certain elements of the employer community that see advantage in a hobbled NLRB, and is chronically short of the human and financial resources necessary to do the job that Congress has entrusted to it.

Professing an interest in the "effectiveness of the NLRB"<sup>16</sup> -- ar, interest neither the LPA nor any of its constituents have ever manifested before -- the LPA claims that the current Board and General Counsel "have virtually stripped the agency of not only the appearance but also the actuality of impartiality it must have to operate effectively."<sup>17</sup> According to the LPA, the "Gould-Feinstein Board" has "demonstrated an almost total abandonment of neutrality"; rather, "the only issue that

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<sup>15</sup>D. Yager, NLRB: Agency in Crisis (LPA 1996) ("Agency in Crisis").

<sup>16</sup> Testimony of Daniel Yager Before the Labor, Health and Human Services, Education Subcommittee of the House Appropriations Committee, April 16, 1997.

<sup>17</sup> Agency in Crisis at 3.

seems to count in a dispute coming before the General Counsel or the Board is how can the interests of the union involved be enhanced by the agency."<sup>18</sup>

The LPA, as the mouthpiece of big business in labor-management disputes, is, of course, peculiarly ill-suited for the task of assessing the "neutrality and impartiality" of the Labor Board. Indeed, it would have taken an extraordinary effort of self-control for the LPA to have provided an objective assessment of the Board's enforcement of the Act, or of the extent to which the Board is protecting the rights of employees. And, so far as it appears, the LPA has spared itself any such effort at all.

From reading the LPA's polemic, one would think that, at present, every charge against an employer results in a complaint by the General Counsel, every such complaint in an adverse decision by the Board, and that every decision is then reversed by the courts of appeals. The real world, of course, is quite different, as the LPA well knows. Consider the following:

- \* The LPA says "that the only thing that seems to count in a dispute coming before the General Counsel ... is how can the interests of the union involved be enhanced." Yet the record shows that the General Counsel dismisses upwards of 65% of the charges filed with him, of which approximately three-quarters are filed by unions and employees. This is in keeping with historical norms.<sup>19</sup>
- \* The LPA says that "the Gould-Feinstein Board views its role as being to ensure that if some of the employees want a union or if a union wants to represent them that preference will prevail regardless of what the majority wants."<sup>20</sup> Yet the record shows

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<sup>18</sup> *Id.* at 33.

<sup>19</sup> The "merit factor" -- that is, the percentage of charges found to have merit -- for the past twelve years is set forth in the Statement of Fred Feinstein Before the Subcommittee on Employer-Employee Relations, House Committee on Economic and Educational Opportunities, September 27, 1995, at 28. Between 1985 and 1995 the merit factor fluctuated between 32.4% (1985) and 36.1% (1991); in FY 1995 it was 35.8%.

<sup>20</sup> *Agency in Crisis* at 34.

that -- as has been true for years and years -- roughly half of all representation cases end up in a certification by the NLRB that the employees do not desire union representation.<sup>21</sup> And, while the LPA accuses the Board of making "Herculean efforts to find employer violations to overturn elections when unions lose,"<sup>22</sup> in fact objections continue to be overruled in roughly 75% to 80% of all cases.<sup>23</sup>

- \* The LPA claims that "where employees have rejected a union the Board has simply ordered the employer to bargain with the union anyway" by making bargaining orders "a common tool ... to secure union representation of workers."<sup>24</sup> In fact, however, according to our research the Gould Board has issued a grand total of 28 such orders since assuming office in March, 1994 -- an average of 8.4 such orders per year. In contrast, during the 1970's, the Nixon, Ford and Carter Boards issued an average of 67 such orders per year,<sup>25</sup> and during the 1980's the Reagan and Bush Boards issued an average of 12.6 per year.<sup>26</sup>
- \* The LPA faults the Board for "abusing the Board's 10(j) injunction authority," claiming that "[t]he Board's zeal for pursuing 10(j) actions ... was directed almost universally at employers."<sup>27</sup> The LPA neglects to point out, however, that under the Act, the most serious union unfair labor practices are remediable through injunctions under § 10(l) and not § 10(j), and that the Gould Board has continued (as required by law) to aggressively pursue § 10(l) injunctions against unions. Indeed, when the § 10(l) injunction actions are combined with the § 10(j) proceedings against unions

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<sup>21</sup> See Daily Labor Report, June 24, 1996 at C-2 (data for 1991 through 1995). For prior years, see NLRB Annual Reports, Table 13.

<sup>22</sup> Agency in Crisis at 40.

<sup>23</sup> Sixtieth Annual Report of the NLRB, Table 11E (1995); Fifty-Ninth Annual Report of the NLRB, Table 11E (1994).

<sup>24</sup> Agency in Crisis at 38.

<sup>25</sup> Wolkinson, The Remedial Effect of Gissel Bargaining Orders, 10 Indus. Rel. L.J. 509, 509 n.2 (1980).

<sup>26</sup> Brudney, A Famous Victory: Collective Bargaining Protections and the Statutory Aging Process, 74 N.C. L. Rev. 939, 1008 n.223 (1996).

<sup>27</sup> Agency in Crisis at 75, 77.

and compared to the number of charges filed or complaints issued, it turns out that the Gould Board disproportionately seeks injunctions against unions, not employers.<sup>28</sup>

- \* The LPA claims that "the Gould Board has been the worst performer of any Board in the past 30 years" in securing enforcement of its decisions in the courts of appeals.<sup>29</sup> But in FY '96 -- the first year in which the courts of appeals were predominantly reviewing Gould Board decisions -- 65.8% of the decisions were enforced in full and another 12.8% were enforced with modifications (which even the LPA concedes should be counted as a success); ignoring cases which are affirmed in part and remanded in part (which the LPA claims should be viewed as losses), the FY '96 "win" rate would be 78.6%. And, during the first nine months of FY '97, the win rate -- calculated as the LPA does -- was even slightly higher (79.7%). This success rate perfectly tracks the NLRB's historical win rate of 79.4%.

Ignoring all of this data, the LPA claims that the charges it has levelled against the Board are the result of the LPA having "researched the actual cases decided by the Board."<sup>30</sup> Yet it is apparent that the cases the LPA chose to "research" -- or at least to report about -- were selected not because they are most important, nor because they are most representative, but only because, in the LPA's view, these cases are most easily mocked.

But even its self-selected sample of cases did not generate sufficient materials to enable the LPA to make its case against the Board. The LPA was thus driven to take great liberties with the facts of these cases in an effort to make its charges stick.

To begin with, the LPA presents the cases it cites as the product of anti-business zealotry on the part of General Counsel Feinstein, and pro-union result-orientation by Chairman Gould and his Democratic colleagues on the Board. But the fact of the matter is that in 16 of the 31 cases (52%)

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<sup>28</sup> See Sixtieth Annual Report of the NLRB, Tables 3, 20 (1995) (NLRB sought 23 10(l) injunctions and 4 10(j) injunctions against unions in FY 1995, which together represent 9% of complaints against unions; injunctions were sought against employers in 2% of cases).

<sup>29</sup> *Agency in Crisis* at 26.

<sup>30</sup> Testimony of Daniel Yager, *supra*.

the LPA discusses in which the Board ruled against the employer in an unfair labor practice case, the complaint was issued not by General Counsel Feinstein but by his predecessor, Jerry Hunter, the present and former management attorney who was appointed by President Bush. And, in 16 of those 31 cases, the Board's opinion was joined either by Member Stephens, a Reagan-Bush appointee who came to the Board from Senator Hatch's staff, or by Member Cohen, the management attorney who President Clinton appointed to the Board at the behest of the management community. Indeed, only 5 of these 31 cases were the product of what the LPA labels the "Gould-Feinstein Board."

Reading the LPA's descriptions of these cases, it is difficult to understand how former General Counsel Hunter or former Members Stephens and Cohen could have had anything to do with the Board's decisions; indeed, from the LPA's descriptions it is often difficult to understand how any thinking person could have ruled as the Board did. But that is a testament not to partisanship of the Board, as the LPA claims, but to the disingenuity of the LPA. Consider the following examples:

- \* To support its allegation that "the Board has turned a blind eye" to "concerns about violence ... when organized labor's interest are involved," the LPA cites Chicago Tribune, 316 NLRB 996, enf. denied, 79 F.3d 604 (7th Cir. 1996).<sup>31</sup> The LPA describes this as a case in which the Board ordered the company to turn over to a union the names and address of replacement workers who had been hired during a strike and "who had every reason to fear for their safety and that of their families" in light of the "history of the strike, which had included a stabbing, death threats, tire slashing, and mob violence." Id. The LPA does not bother to mention, however, that the strike in question had occurred five or six years before the NLRB ruled, and that in the intervening time the replacement workers and union supporters had been working side by side without incident. As Member Cohen explained in concurring in the Board's opinion, "a replacement employee could not reasonably fear acts of intimidation, harassment or violence following a five or six year period free of such conduct."
- \* To support its claim that "[w]hen it comes to sexual harassment, the Board is just as callous towards the interest of employees," the LPA cites NMC Finishing, Inc., 317

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<sup>31</sup> Agency in Crisis at 49.

NLRB 826 (1995), as a case in which the Board ordered reinstatement of a striking employee who "during the strike" had carried a picket sign with an obscene message directed towards a female employee who had crossed the picket line and returned to work.<sup>32</sup> This time the LPA neglects to note that the woman whom the LPA accuses of "sexual harassment" and whom the Board ordered reinstated had carried the sign in question for a grand total of five minutes on only one occasion, and that the object of that sign had not even seen it. Given those facts, the Board -- with Member Stephens joining -- ruled that the employee in question had not forfeited her right to return to work at the conclusion of the strike.

- \* To support its claim that "even the most defensible of reasons for discharging or disciplining an employee will not preclude the Board from assuming that the employee's prouion sentiments or activities prompted the action," the LPA cites KBI Security Service, Inc., 318 NLRB 268 (1995), enf. denied in part, 91 F.3d 291 (2d Cir. 1996), claiming that the Board ruled against the employer in that case on "a technicality -- it [the employer] had missed the 14-day deadline for filing a response."<sup>33</sup> But the fact of the matter is that the employer did not "miss the 14-day deadline"; the employer never deigned to file an answer to the complaint. The Board -- this time with Member Cohen joining -- thus entered a default judgment against the employer, consistent with its policy of many years and with the policy of trial courts everywhere.
- \* To support the claim that the Board is guilty of "skewing the collective bargaining process," the LPA cites to Doerfer Engineering, 315 NLRB 1137 (1994), enf. denied, 79 F.3d 101 (8th Cir. 1996).<sup>34</sup> The LPA describes this as a case in which, after "losing" a grievance in arbitration, the union took the case to the "Gould Board, which ruled that the matter was not arbitrable" and hence was subject to Board decision. In fact, it was the arbitrator in that case who expressly ruled that the grievance was not arbitrable. And, it was on the basis of that arbitral ruling that the Board -- again with Member Cohen joining -- unanimously ruled that deference was inappropriate.
- \* To buttress its attack on the General Counsel for a "total disregard of the law and ... facts in pursuing salting cases," the LPA relies on Bay Electric, Inc., JD-99-96 (July 3, 1996). The LPA asserts that the General Counsel in that case "stretched things"

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<sup>32</sup> Id. at 51.

<sup>33</sup> Id. at 68.

<sup>34</sup> Id. at 84.

by seeking relief for individuals who "had never applied for a job."<sup>35</sup> In fact, the ALJ found that the individuals in question had submitted applications, but had done so seven months before filing their unfair labor practice charges and that therefore their claims were barred by the six-months statute of limitations (a defense the employer did not raise in its answer). The case is currently pending before the NLRB on exceptions to the ALJ's decision.

These are just illustrative of the half-truths and untruths that pervade the LPA's submission.

Of course, the fact that in Chicago Tribune five years had passed between the time of the strike and the Board's ruling on the union's request for the names and addresses of the employees, or that in KBI Securities the employer had failed to file an answer, does not necessarily mean that the Board was correct in those cases. Reasonable people can and do disagree -- as the appellate court decisions in those cases make clear -- as to whether, for example, five years after a violent strike a union should be allowed to obtain the employee list or whether a procedural default should preclude an employer from defending against the remedy of reinstatement.

But that on the real facts -- as opposed to those invented by the LPA -- reasonable people can disagree about these cases is precisely the point. The LPA admits of no such possibility. Rather, the LPA treats each and every decision rendered against management as proof positive that "this federal agency cannot be trusted."<sup>36</sup> But all that the LPA's bill of particulars ultimately shows is that the Agency cannot be trusted to do the LPA's bidding -- and LPA cannot be trusted to give a fair portrayal of the NLRB's record.

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<sup>35</sup> Id. at 73.

<sup>36</sup> Agency in Crisis at 3.



And that is the heart of the matter. The vision of the LPA and a substantial segment of the business community is that of a union-free America -- an America in which management's power in the workplace is unlimited and unchecked.

The National Labor Relations Act embodies a different vision -- a vision of shared power in which terms and conditions of employment are mutually agreed upon rather than unilaterally imposed. That explains why the management community bitterly opposed the enactment of the NLRA 60 years ago, and why the management community has fought every proposal to strengthen the Act. And that -- rather than any supposed misdeeds or missteps by the "Gould-Feinstein" Board -- explains why the NLRB today finds itself under such vicious attack.

In closing, the AFL-CIO again urges this committee to stand up for the professionalism and integrity of the NLRB by examining the efforts by some in Congress -- often at the behest of particular respondents in cases pending before the Board -- to bully the Board into shaving its decisions in order to preserve its funding. And, we urge the committee to look askance at the misleading and disingenuous attacks on the Board by the LPA and others who have never supported the Board's basic mission. What the Board needs is adequate resources and the independence ordinarily accorded to federal adjudicatory bodies. If this committee speaks with a voice of reason both of these might begin to be restored.

Thank you very much.

Mr. SHAYS. I thank you for you being here. It's nice to have your testimony.

When I look at my understanding of the numbers of requests by the Board for 10(j) relief, in 1995—I hope this is a complete year—there were 47 requests, and—oh, it is partial. So let me take 1994. In 1994, there were 85 requests and 62 petitions filed. In 1993, there were 42 and 34.

When would the Gould Board have been set up? They would have been there in the 42 and 34, I believe.

Mr. YAGER. No; they came in in April of fiscal year 1994.

Mr. HIATT. March 1994.

Mr. SHAYS. I honestly don't see all that much difference. Admittedly, in 1994 there were 85 and 62 petitions filed, but in 1993 there were 42 and 34 petitions; and 1992, 27 and 24 petitions. So why don't we just start with that, and tell me—actually, I want to put on record something.

I am going to take your first point, Mr. Yager. It seems logical to me that if you can bypass a court system and go directly to a Board, and hopefully resolve the case, to me, it seems more logical than going directly to court.

Let me ask you the first thing. How many of the cases that the Board decides are actually then furthered to the courts? What percentage?

Mr. YAGER. Of cases that are actually decided by the Board?

Mr. SHAYS. Once the Board has made a decision.

Any of you?

Mr. YAGER. I can find that for you, Congressman.

Mr. SHAYS. Would we say it is 50 percent; 20 percent?

Mr. YAGER. It would be my guess on the 50 percent.

Mr. HIATT. No; I think it is closer to 20 percent. It is a relatively small percent. Most of the cases are not appealed by either the—by the losing party, nor does the Board need to go to court for enforcement, because they are complied with in the majority of cases.

Mr. SHAYS. But my judgment is, any time you can reduce the number of cases that go before the courts, you would want to. But what I don't understand is that it would strike me, however, that if a case is pending for more than a period of time, that you would almost automatically want to go right to the courts. There would be a mechanism that would enable either side to petition to say this is just taking too long, we want to go directly to the courts.

What would be the response of any of the three of you?

Mr. YAGER. Well, I think there have been suggestions in the past as part of labor law reform to do something like that, but it's more along the lines of obtaining something like an injunction; in other words, injunctive relief in the interim for the grieving party until the Board has actually ruled on the case.

We obviously would have a problem with that. And that is our problem with 10(j)'s; you don't get a full adjudication of the matter before the Federal court. If what you are suggesting instead is a mechanism whereby the case goes to the court and it is fully litigated before the Federal court, I think that is a step in the same kind of direction that we are suggesting.

Mr. SHAYS. My suggestion is that if the Board doesn't reach a decision by a period of time, that either party would have the ability

to go to court and fully adjudicate. It would seem to me that that might be a solution to both sides. There is nothing that tells me that being in court—being before the Board 6 years is a benefit to labor or management. I think it is a plague on both houses.

Mr. Joseph, why don't you respond, and Mr. Hiatt, and then we will come back.

Mr. JOSEPH. I think we need to rethink why we are here. We are here because 65 years ago you had 37 percent of the work force in unions and you had very tricky legal issues that it was presumed that judges in general would not understand. And so this kind of specialized body was set up, allegedly with the expertise to be able to wade through the negotiated contracts to determine who really struck John and who is entitled to this or that. And you have an OSHA review commission, you have a number of specialized groups, because the assumption was, the generalized bench couldn't figure it out.

Now you have 90 percent of employees not in union settings and the courts handling all sorts of court-related issues, some judges to the point of saying it is overwhelming, how many they get.

And I am not trying to suggest just do away with this and continue to burden the courts with everything else, but I do think that there needs to be a serious academic discussion about the relationship of all the labor laws and all of the potential enforcement mechanisms and how they are done.

Mr. SHAYS. I hear you have made that point, and I am asking you to look at an incremental issue here. I know that you have your desire to make major reform of the system. But would that be an improvement to both sides to allow that if they were before the NLRB and the NLRB simply hadn't acted by a particular period of time—a year, 2 years, 3 years—some particular period of time, that either side would have the right to go to court directly and not wait?

Mr. JOSEPH. I can't subscribe to a specific period of time, but I can confirm what you said. We have heard businesspeople saying for years that these long, protracted proceedings do not benefit them.

Mr. SHAYS. So you are saying that you can't speak for the Chamber on an issue like this?

Mr. JOSEPH. Because we haven't taken a specific position, unlike my colleague here.

Mr. SHAYS. So you can speak on total reform, but you can't speak on this particular issue here?

Mr. JOSEPH. That's right.

Mr. HIATT. We would certainly be interested in discussing with the business community and with any committee whether there could be some kind of procedural reforms that could help speed things up. I think there would have to be a number of questions that would have to be discussed as part of that.

For example, if moving to court simply then meant the beginning of a new round of delays there, I mean, in our experience, the courts are as—as bad as things are at the Board, the time it takes to process the cases through courts can be even worse. And, furthermore, once you get to court under that kind of a procedure, does that mean that the full range of formal discovery applies, or

do you still have what is really a much more informal and, in some ways, more economical system at the Board?

There is no private right of action right now under the NLRA. It is easy to forget this is not just unions and employers that are using the NLRB. A large proportion of the charges that are filed are brought by individual workers in nonunion facilities, as well as unionized facilities, who do not have representation, and particularly in low-wage jobs—

Mr. SHAYS. Tell me how it works for nonunion. I have made the assumption—I'm exposing my ignorance—that most of the cases that are adjudicated by the Board are representative cases.

Mr. HIATT. I think a majority are, but there is a large minority, somewhere between 25 and 50 percent, I believe, of cases are filed by individual employees, and in many cases they are just as protected against—under the National Labor Relations Act as a union employee is against retaliation for organizing activities or any kind of concerted protest. If two workers go to the boss and complain about something and get fired, even if there is no union in the picture, that is the one law where they have protection. They go to the Labor Board, and they file charges.

And unlike under wage and hour laws or title VII, there is no private right of action. They are totally dependent on this agency to investigate that case and, if there is merit to it, to process that case. They could not, as it now stands, go to court on their own.

Mr. SHAYS. One of your points would be that there is a record developed in the Board proceeding that then the court makes a determination so they don't—they basically have a transcript and a record to pass judgment on?

Mr. HIATT. That might be one way—I mean, if you took—I am sure you could talk about taking the proceedings and the investigation as it developed through a certain point at the Board and saying that if the Board hadn't concluded, that there should be some access to the courts, and I think that would be worth talking about.

But I think that there are—it does raise, as you suggest, a number of issues about how much of the record then already applies, depending on what stage you are at: Is there formal discovery that starts over again, and so forth, is what we would have to explore.

I do find it somewhat ironic that 3 years ago, when we would have loved to have a discussion of necessary reforms under both the law and procedure, there was no interest whatsoever, and now that you are finding a little bit more energy in seeking injunctive relief and—

Mr. SHAYS. Is that when this was a Democrat-controlled Congress and a Democrat President?

Mr. HIATT. Yes.

Mr. SHAYS. The irony is, I remember when I was in the Statehouse and we wanted to repeal the dividends tax as Republicans in the minority, and when we got into the majority, we decided what we wanted to do was, we wanted to reduce the sales tax on clothing and a whole host of other things, and we forgot about the dividends tax. And as soon as we were defeated and were now in the minority again, someone said, hey, the first thing we should do is repeal the dividends tax.

This may be a parenthetical that really may seem like another question mark not directly related to what we are talking about, but when you talk about—let me just establish this point. My understanding was that, basically, NLRB was looking at collective bargaining units and dealt with employees who were part of a collective bargaining unit. And that is not correct. This is any employee?

Mr. HIATT. That is right. It is not limited to collective bargaining employees.

Mr. SHAYS. It tends to be individuals that are in collective bargaining units?

Mr. HIATT. Certainly a disproportionate number of employees, of disputes, that come before the Board do involve unionized employees, but the law itself is not so limited and use of the Board is not so limited.

Mr. SHAYS. One of my theories about why you have a decline in the enrollment in some cases in unions is, obviously, smaller businesses. You have seen the greatest growth in the public sector. What you didn't see on the bargaining table sometimes happens through legislation. And now it seems to me that a lot of the argument for why some people were going to join unions you have put into law with so many protections. And I am basically then leading to this question of your description of what existed 60 years ago and what exists today.

I think it was you, Mr. Yager, or Mr. Joseph, was talking about the fact that collective bargaining is a very changed process and more institutionalized. I would like you to elaborate a little bit more on that, and therefore—Mr. Yager, was it you?

Mr. YAGER. I can comment. I don't believe it was my remarks.

Mr. SHAYS. I heard the argument—and I am sorry—that we don't need the Board, and I guess I was thinking—I was going to interrupt you, and say for me, if I could take it out of the courts, I want it in the Board in a more informal process, tell me what would be the effect if you didn't have the NLRB.

Mr. JOSEPH. Well, you have, as I described—I mean the facts of life are that the majority of people today are working for small businesses. Now if there is a work unit of 5 or 10, what is happening in the general sense that—that to your point, Mr. Chairman, a lot of the employee benefits that the unions requested 10, 20, 30, 40 years ago are all standard package today; there are obligations that every employer must provide for the good of the individual, for the good of the country, for the good of the economy; and, by and large, it's competitive pressures in the global marketplace that determine what any employer and employee end up with in terms of piece of the pie after all is said and done.

The fact that you have a smaller percentage every year of people who are actually covered by union agreements means that if that continues over some period of time, you will continue to have a minority legal system, a minority legal structure, for a growing percentage of people in the workplace. And just with regard to, by and large, union organizing or representational or trying to do representational kinds of activities, other disputes go on elsewhere, safety disputes are elsewhere, affirmative action or sexual discrimination or whatever.

So it goes to my general point. If every agency that affects labor-management relations in the workplace is left to itself and its respective oversight body to think just singularly what to do with it, you are still going to end up with a dysfunctional system where employees and employers are still playing different games. And depending on what the nature of the dispute is, it's a different process, a different procedure, different hoops; it is a different kind of thing.

And I don't know why we couldn't, in the broadest possible sense, you know, have some sort of intellectual, serious discussion about how to put all the employment laws and practices on the table and talk about what makes sense for the 21st century.

We don't have to have this confrontational atmosphere that was rooted in the laws in the thirties. We are very much in a competitive global world marketplace, and I think that not only do employers know that but the average employee knows that, whether they are in a union workplace or in a nonunion workplace. And so against this, I think that the possibility of having serious discussion about change is something that could be framed in an apolitical way: What is the best way just to restructure how we handle disputes and grievances in the 21st century?

Mr. SHAYS. Mr. Yager, do you want to respond?

Mr. YAGER. Well, I think just going back to the focus of the hearing on NLRB, clearly the importance of the NLRB has declined. Notwithstanding that there are charges filed from nonunion settings, the vast majority of the time the law is being applied in a situation where a union is either already in place or is attempting to organize that setting.

To have this kind of elaborate structure and pay \$170 million a year or whatever it costs to continue to fund the agency at a time when you know interest in unionization is declining, the law is pretty well fleshed out. By the way responding to something Mr. Hiatt said, our disagreement with them several years ago when they were proposing changes was them using the law as an excuse for a failure of unionization.

We have always asserted that the basic principles of the law are there and, really, unionization is a product of employee choice. I would agree with you. I think to a large extent they have legislated themselves out of existence by providing things like family and medical leave, pension protections under ERISA, Occupational Safety and Health Act. These days, why would you need to go to a shop steward when, in fact, most of the time you can take your case to either a government official or to a plaintiff's attorney?

Mr. SHAYS. Mr. Hiatt, do you remember the question?

Mr. HIATT. I believe so.

Mr. SHAYS. The whole issue is just, tell me why the Board—I mean, I was expressing an opinion why I felt that so much is in legislation now that one of the strong selling points earlier on for unions—but that was really a side to the key point, which is: Is the Board still really relevant?

Mr. HIATT. Right. And I think if the Board—if the functions of the Board weren't housed at the Board, they would have to be housed somewhere else. One can devise—one can imagine transferring them to the Federal courts and transferring the costs of dis-

pute resolution to private parties, taking that \$170 million that is right now spent on the government and saying that private parties, including from your lowest wage individual employee who's fired for trying to join a union, to employers who believe that there is violence on picket lines, should be paying the cost of that kind of dispute resolution themselves.

And that is a fair debate to be having. But the notion that that \$170 million cost would go away and it wouldn't be needed anymore because we are approaching the 21st century or because there is no Labor Board, I just don't think there's any basis for saying that.

Sure, there are many laws on the books, employment laws that provide a statutory floor now, be it economic floor like minimum wage and family and medical leave, or other kinds of employment regulation. But there is still only one law that governs the right of employees to join together to be able to negotiate with their employers their basic working conditions, and in some cases that may involve a desire to get paid more than minimum wage.

And let's not forget that the National Labor Relations Act and the Fair Labor Standards Act that set a minimum wage were passed roughly at the same time. It was recognized that there would be these minimum floor statutes but, at the same time, that there was a proper place for workers to negotiate either for better conditions than the minimum, the statutory minimums, or for other things that are not addressed in the laws.

And this is, the National Labor Relations Act, with all its faults—and we certainly agree that it could be improved—is the only law that ensures some degree of democracy in the workplace, some ability of workers to organize themselves together to have a voice, an effective voice, with the employer.

And I think in a time when you are seeing that one out of every four organizing campaigns, at least one worker who takes a lead role in trying to have a union is fired, according to what is proven. I am not talking about charges that are dismissed—and in many of those cases it is more than one who is fired for trying to have a union—to think that there is no longer a need for some kind of government regulation about right to organize is just totally unrealistic.

Mr. SHAYS. One of the amazing things is that it's only been recently that we allowed employees in this Congress to organize and we are still debating the issue of whether our own staff can. And whether you all agree with allowing for organization—and I think you do to some measure—that is not the issue.

What is amazing to me is that Congress for so many years was able to say that somebody else had to do it, but we didn't have to. And it has been a very important thing for me to have to pay my employee time-and-a-half who may not be in a supervisory role. And in some cases I think that it has been educational, because that has helped us want to look at time-and-a-half off rather than time-and-a-half with pay.

So in some way it works to those who don't want to see collective bargaining having us have to live under it. We say, gosh, it is not as easy as you say. And some ways it works to those who want to

have collective bargaining to make sure that we understand how the law works and that we live under it.

I am just going to ask one other question, and then, Cherri Branson, I am going to invite you to ask some questions since I am the only Member here.

I will say to you, Mr. Hiatt, that I wish I had—because I kind of remember thinking about—I mean, I remember thinking a little bit uncomfortable—it wasn't you, Mr. Hiatt.

Mr. JOSEPH. I apologize. You raised a question referring to the Board as the Clinton administration Board or the Clinton Board. I should believe that this—the NLRB is a true judicial body that is supposed to be fair to all sides. Do you think that Mr. Gould should be a little more careful in terms of how he refers to his Board? Do you think it is inappropriate to refer to it as the Clinton Board?

Mr. HIATT. If you are asking me, I have to confess that until Mr. Joseph pointed out that Mr. Gould had referred to it as a Clinton Board, I hadn't noticed it. I assumed that he was referring to the appointing officer, who in his case is President Clinton.

I don't believe there is any evidence whatsoever that this Board, this Labor Board, has acted any more at the behest of the appointing administration than any other Board in our history that I am aware of.

Mr. SHAYS. Since I didn't ask him, I feel a little—I am acknowledging I really probably should have asked him to respond. I hope his answer would be that we want you to know what we have done since I have been in charge in terms of moving cases or not moving cases. But I do think it probably is unwise for him to make reference to a Board as being a Clinton Board as opposed to a Reagan Board or a Bush Board.

Mr. JOSEPH. Mr. Shays, I have heard him use the phrase a number of times. I see him wear it as a badge of honor.

Mr. SHAYS. People should be proud of the work that they have done, but I am having to say that I will raise that question with him in a letter, not making a big deal out of it in terms of other than to just say that I think he may need to rethink that.

Ms. Branson.

Ms. BRANSON. Thank you, Mr. Chairman. I just have one—well, actually I have one.

Mr. SHAYS. You have about 5 minutes.

Ms. BRANSON. There was an idea earlier about sort of a process where the Board could, or someone could, issue a letter to kick loose a claim after a certain amount of time. I would like to point out to the chairman that the EEOC does that and their backlog has not been significantly reduced. As a matter of fact, GAO has recently chided them for that.

For Mr. Hiatt, some people have said that the controversy surrounding the Board has to do with the change in the post-industrial service economy where competition is worldwide. Can you tell me whether the Board—excuse me. Can you tell me whether you believe that the economy plays a role in the controversy that currently surrounds the Board?

Mr. HIATT. I think it certainly does. There is no question. There are a number of factors that have affected the application of our



labor laws and the labor movement and employees' relationship with unions, and the global economy is unquestionably one of those factors.

But I do not believe that that in any way makes either the Labor Board or the act obsolete. What it does is, it changes the kinds of issues and concerns that workers have. More often, workers are seeking to negotiate on the threats that are posed by international competition, and in some cases that means holding up job security issues and plant closing issues and issues like that that certainly are not covered by any of the minimum floor statutes on the books, and, if anything, it just makes it all the more important that workers who do want to have some independent voice in the workplace and want independent representation should have that opportunity. And until we have a better system, I think it is irresponsible to be advocating the destruction of the existing one.

Ms. BRANSON. Thank you, Mr. Chairman.

Mr. SHAYS. Do you want to comment?

Mr. YAGER. If I could ask just a request.

Mr. SHAYS. Not on the question? Just to ask—are you responding to the question just asked?

Mr. YAGER. No, I'm not. I am sorry.

Mr. SHAYS. I am going to invite any of the three of you to respond, if there was a question that you wished I had asked you that you wanted to discuss. And if there is any closing comment you want to make.

And if you want to start, Mr. Yager, you may.

Mr. YAGER. Yeah, I guess I would just go back to the original point. Clearly, you have got a law that was written 60 years ago and it is a struggle to keep it up with the changing economy. Part of the problem that we have with the Board is that it has gotten very calcified and very myopic. There is an inability on the Board to look at the law in view of the changes. We saw that with the Electromation case that treats employee involvement committees the same way they treat illegal, sham company unions.

You are more likely to get administration of the act and enforcement of the act with a broader perspective than if you do start looking more to the courts, which, as I say, the parties are inclined to do.

I would like to ask—I didn't want to take the time of the committee to respond to each of the points that Mr. Hiatt made with some of the cases that we raised in our book and the statistics.

Mr. SHAYS. The record is open if you are wondering if you can respond to any comments made.

Mr. YAGER. I would like to do that in writing. I just didn't want silence to be viewed as assent.

Mr. SHAYS. No, it isn't. It is actually welcomed.

Mr. YAGER. I thought it probably was. That is why I decided.

Mr. SHAYS. Only because of the time.

The record is open Friday, Monday, and Tuesday? So at the end of Tuesday, you need to respond.

[The information referred to follows:]



July 28, 1997

The Honorable Christopher Shays  
Chairman  
Subcommittee on Human Resources  
Committee on Government Reform and Oversight  
Room B-372 Rayburn Building  
Washington, DC 20515-6143

Dear Chairman Shays:

As I promised at the July 24 hearing, I am writing to respond to the points raised by Jonathan Hiatt of the AFL-CIO in his testimony attacking the LPA position on the NLRB.

First, in response to one of the questions you asked our panel, I have been informed by the NLRB Division of Information that roughly 50% of contested Board cases involving unfair labor practices are appealed to the federal courts. This conforms with my own impression as I stated at the hearing and is a significantly higher percentage than the 20% perceived by Mr. Hiatt. This shows that, in at least half of all cases, our proposal to eliminate the Board's role in adjudicating unfair labor practices would significantly reduce the time necessary to resolve the case. (In FY 1996, the median time for Board review of an administrative law judge decision was 215 days.)

With regard to its criticism of LPA's position, the Federation relies extensively on statistical data regarding the agency's performance in its attempt to portray the agency as serving in an impartial manner. As we noted in our testimony, because issues of fairness and impartiality don't lend themselves to such measurements, we deliberately chose not to base our critique on statistics. The sole exception was the NLRB success rate in the federal courts which the AFL-CIO has claimed in the past to be the "only measurable and objective" test for assessing the Board. By that yardstick, the Board's performance is dismal.

Instead of cold numbers, we based our assessment on the realities of the cases actually brought by the General Counsel and decided by the Board. We focused on the quality of the decisionmaking, not the quantity. Ten cases overturning ten long-standing precedents are more important than 100 routine cases dealing with insignificant issues.

The Honorable Christopher Shays  
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Regarding a few specific points raised in the AFL-CIO response:

1. The AFL-CIO states: "The LPA, as the mouthpiece of big business in labor-management disputes is, of course, peculiarly ill-suited for the task of assessing the 'neutrality and impartiality' of the Labor Board." If LPA is not well-suited to comment on the course of NLRB decision making, then neither is the AFL-CIO for, we would remind the Federation, it too is a spokesperson for a partisan who often raises issues involving the NLRA before the Congress. We would hope that the fact that they are being raised by a "partisan" would not of itself rule out their consideration by your Subcommittee at some future date.

2. The AFL-CIO makes the following statement regarding the cases we have chosen in the past to discuss in our testimony:

Yet it is apparent that the cases the LPA chose to "research"—or at least to report about—were selected not because they are most important, nor because they are most representative, but only because, in the LPA's view, these cases are most easily mocked.

We would submit that these cases are a mockery. But they are a mockery not just in the view of our Association, but in the eye of any disinterested observer of the behavior of governmental organizations. Moreover, as we pointed out in our testimony, the fact that a few of these cases may have involved participation by Republican appointees doesn't make those cases any less a mockery. Rather, it suggests that the serious problems with the Board may be so thoroughly ingrained that a mere change in its leadership will not correct them.

One of the cases singled out by the AFL-CIO to make this point bears discussion here because it illustrates the myopia of the NLRB and its defenders. The AFL response contends, with regard to the Seventh Circuit reversal of the Board in the *Chicago Tribune* case: "Reasonable people can and do disagree—as the appellate court decisions in these cases make clear—as to whether, for example, five years after a violent strike a union should be allowed to obtain [a list of replacement workers and their addresses]." We would contend that only an organization that exalts union activity over all other forms of human endeavor would consider it "reasonable" to require an employer to provide such a list when the employees themselves have asked the employer not to do so and the employer has suggested alternative ways to address the union's request.

3. Finally, Mr. Hiatt makes numerous accusations regarding the truthfulness of LPA in describing the cases cited:

- "The LPA was thus driven to *take great liberties with the facts* of these cases in an effort to make its charges stick."

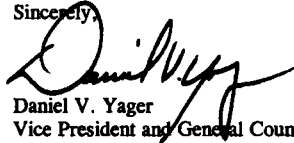
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- “But that *on the real facts—as opposed to those invented by the LPA*—reasonable people can disagree about these cases is precisely the point.”

This is an interesting accusation coming from an organization which, in its efforts over the past two decades to pass union-friendly legislation and in its more recent sponsorship of corporate campaign tactics against targeted employers, has honed the use of half-truths and unsubstantiated accusations into a fine art. In fact, unlike labor’s countless “horror stories” based upon subjective accounts by interested parties, we have based our entire appraisal of the NLRB upon matters of record—reported ALJ, NLRB, and federal court decisions with citations available for anyone who wishes to double-check our account of the cases. All we ask is that the cases be allowed to speak for themselves; they don’t need third party interpretations.

We appreciate your attention in this matter and respectfully request that our response be made part of the hearing record.

Sincerely,



Daniel V. Yager  
Vice President and General Counsel

cc: Members of the Subcommittee on Human Resources  
Jonathan P. Hiatt, Esq.

SUPPLEMENTAL STATEMENT OF  
JONATHAN P. HIATT, GENERAL COUNSEL, AFL-CIO  
TO THE  
SUBCOMMITTEE ON HUMAN RESOURCES  
OF THE  
HOUSE COMMITTEE ON GOVERNMENT REFORM AND OVERSIGHT  
July 29, 1997

The AFL-CIO appreciates the opportunity to submit this supplemental statement following the oversight hearing on the National Labor Relations Board that the Subcommittee held on July 24, 1997. We do so to respond briefly to the virulent attacks on the Board made by the Labor Policy Association (LPA) and the United States Chamber of Commerce. Although their submissions largely echo their previous testimony before other committees over the past two years -- to which the AFL-CIO has previously responded -- we wish to underscore a few matters for consideration by this Subcommittee, which has not held an NLRB oversight hearing for several years.

The LPA's overheated rhetoric promotes the thesis that the NLRB is driven by an "intense bias favoring union interests over those of employers," and so the "chances" of an employer "being given a fair hearing before the General Counsel and the Board are slim at best." Rather, says the LPA, employer cases "probably have to be taken to the federal courts of appeals for a proper ruling." LPA Testimony at 2. These assertions simply bear no relation to reality.

In FY '95, the most recent year for which statistics have been published, the General Counsel of the NLRB closed almost 24,000 cases in which unfair labor practice charges were

filed against employers. Despite the LPA's claim that employers cannot receive "a fair hearing" before the General Counsel, in fact over 60% of the closed cases were either dismissed by the General Counsel or were withdrawn after the General Counsel notified the charging party that the charge would be dismissed. Another 37% of the cases were resolved by agreement of the parties -- most often before a complaint was issued by the General Counsel.

Of the 680 cases that were resolved in FY '95 as the result of litigation, 235 (34.6%) were resolved by a decision of an NLRB Administrative Law Judge, without appeal to the Board; 244 (35.8%) were resolved by a decision of the Board with no appeal to court; and only 201 (29.6%) were resolved by decision of the courts. In short, despite the LPA's claim that the only way employers can get a fair hearing is by going to court, in fact far more often than not decisions by the NLRB or its ALJs are not appealed to the federal appeals courts, and less than 1% of the charges filed against employers result in judicial review. And, of those, over 70% result in affirmance of the Board's decision.<sup>1</sup> In the words of John Raudabaugh, a career management attorney who served for three years as a Member of the Bush NLRB, "Whether a Bush Board or a Clinton Board, the statistics over time have been and will remain essentially the same . . . . The overwhelming number of outcomes affirm a non-political corps of [administrative] law judges."<sup>2</sup> And, the cases heard by ALJs and the Board are investigated and processed by a Board and Regional Office staff comprised almost exclusively of non-political career attorneys and field examiners who act as diligently as their insufficient resources permit.

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<sup>1</sup> See National Labor Relations Board, Sixtieth Annual Report Table 8.

<sup>2</sup> J. Raudabaugh, "Perspectives on Labor Law Reform," April 21, 1994.

The LPA recognizes that the actual record of NLRB and General Counsel dispositions of cases contradicts its analysis, so the LPA opines that it "does not believe that the question of pro-union bias on the part of the Board lends itself to a statistical analysis." LPA Testimony at 21. But the fact of the matter is that the LPA (and the Chamber of Commerce) are attacking the General Counsel and the Board for the manner in which they routinely handle the cases that come before them. The only fair way to evaluate the LPA's charge that the General Counsel and the Board are systematically biased in their performance of their duties is by examining their record as a whole in resolving the thousands of cases that come before them year in and year out.

The LPA instead prefers, as it has in the past, to seize upon isolated cases -- all instances, of course, where the Board has ruled against employers -- and hold the decisions in those cases up to ridicule, using them as the basis for unsupportable sweeping generalities about the Board's alleged bias. But once again, the cases the LPA cites do not reveal a Board bent on distorting the law to hurt employers. Rather, the LPA analysis of those cases reveals a management spokesman bent on distorting the truth in an effort to discredit the Board.

Consider the following examples:

- \* The LPA accuses the Board of "politicking" to assist an organizing campaign involving the employees of Overnite Transportation by upholding bargaining units which include mechanics and units which exclude mechanics depending on the union's preference. LPA Statement at 4. What the LPA fails to acknowledge, however, is that under the NLRA, as it has been interpreted by the Board and the Supreme Court, for at least forty-five years, the question for the NLRB in a representation proceeding is whether a petitioned-for unit is "an appropriate unit" for bargaining and not whether the unit is "the ultimate unit, or the most appropriate unit."<sup>3</sup> And, since almost 30 years prior to the Overnite campaign, it

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<sup>3</sup> Morand Bros. Beverage Co., 91 NLRB 409, 418 (1950); see American Hospital Ass'n v. NLRB, 499 U.S. 606, 610 (1991).

has been settled NLRB law that a unit of truck drivers is appropriate whether that unit includes or excludes mechanics.<sup>4</sup> Thus, far from "politicking," the Board in handling the Overnite cases has simply followed established law in treating units with and without mechanics as appropriate.

- \* The LPA asserts that the "most contemptible example of [the Board's] permissiveness towards unions has occurred in the Board's willingness to ignore allegations of forgeries committed by certain unions in attempting to secure enough union authorization cards to hold a union representation election." LPA Statement at 4. Yet one of only two cases cited in support of this egregious accusation did not even involve union authorization cards at all, but rather involved a (disputed) charge that two out of 190 employee signatures on a handbill distributed in the course of the organizing campaign were forged.<sup>5</sup> In the one case cited by the LPA which at least did involve authorization cards, the union had submitted authorization cards from 100 of the 131 employees -- 60 more than were needed to secure an election -- and the employer claimed (based on highly suspect evidence) that at most 17 of those cards were forged.<sup>6</sup> In each case the Board not surprisingly held that these alleged forgeries were not sufficient to overturn the results of an election in which the employees had voted decisively for union representation.
- \* Having thus distorted the Board's policy regarding forgeries, the LPA goes on to claim that the Board "feels so strongly" about its right "to ignore allegations of forgeries" that "the Board fought all the way to the Fourth Circuit Court of Appeals in order to resist having to conduct an investigation of allegations of 400 forged cards." LPA Statement at 4. According to the LPA, "the Board was able to defeat an injunction" in that case only by "providing assurances to the court the forgeries would finally be investigated." In truth, however, the Board in that case, while declining to grant an interlocutory appeal from a Regional Director's decision to proceed to an election, had made plain that it was doing so "without prejudice to the employer's right to raise these issues in any appropriately filed exceptions." Thus, the Board was not fighting "to resist having to conduct an investigation" as the LPA falsely asserts; to the contrary, as the Fourth Circuit stated, the Board was "commit[ted] to consider Perdue's fraud allegations," and was merely seeking to prevent premature judicial intervention in the Board's

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<sup>4</sup> See, e.g., Mc-Mor Han Trucking Co., 166 NLRB 700 (1967); Indiana Refrigerator Lines, 157 NLRB 539 (1966).

<sup>5</sup> Findlay Industries, Inc., 323 NLRB No. 139 (May 22, 1997).

<sup>6</sup> Crystal Art Gallery, 323 NLRB No. 34 (March 11, 1997).



proceedings. And, the court of appeals not only agreed with the Board that an injunction was improper but also agreed with the Board that "any defect in the initial showing of interest will be rendered moot if the board upholds th[e] result [of the election]."<sup>7</sup>

- \* The LPA charges that "in its efforts to assist union organizing," the NLRB is "often out of touch with reality" when it comes to determining which employees are "supervisors." LPA Statement at 7. To support this accusation, the LPA cites *Spentonbush/Red Star Cross*<sup>8</sup> as a case in which "any schoolchild [would] recognize that the captain of the boat is the boss." Apparently, former General Counsel Jerry Hunter -- the present and former management attorney who was appointed by President Bush -- did not have the "schoolchild's" understanding, since it was Hunter -- and not General Counsel Fred Feinstein who filed the complaint in that case. And, General Counsel Hunter's action in that case -- as well as the ruling of the Administrative Law Judge and the Board -- are entirely understandable when it is noted that the captains had for many years been covered by a series of collective bargaining agreements that the employer had voluntarily signed, and the employer had offered to continue to treat the captains as employees so long as they acceded to the employer's economic demands. Thus, while a schoolchild may have viewed this as an open-and-shut case, more mature decision-makers viewed the answer somewhat differently.

None of this is meant to say -- as the LPA claims we have argued -- that all of the cases cited by the LPA "would have been decided the same way regardless of the Board members or General Counsel who happened to be serving at the time." LPA Statement at 22. Of course it is true that, in some cases, the current Board may draw different factual inferences, or reach different interpretations of the law, than the prior Board (most of whose Members came from, and returned to, the ranks of management attorneys). That a Board appointed during a Democratic Administration differs, at the margins, from a previous Republican-appointed Board is neither remarkable nor objectionable, so long as it acts fairly and responsibly. On that basic

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<sup>7</sup> *Perdue Farms, Inc. v. NLRB*, 108 F.3d 519, 521 (4th Cir. 1997).

<sup>8</sup> 319 NLRB 988 (1995), *enft denied*, 106 F.3d 484 (2d Cir. 1997).

point, it is telling that the LPA polemic nowhere points to a single instance where the current NLRB has overruled previous Board law.

It would not serve the LPA's ends, however, to acknowledge only that the current Board is marginally different from the prior Board. Instead, to further its vision of a union-free workplace, the LPA has declared an all-out war on the Board and openly urges its partial elimination. But the LPA's statement proves once again that in ideological as in actual warfare, the first casualty is the truth.

We address only briefly the proposal the LPA highlights as its solution to the supposed chronic problems afflicting the Board, namely, transferring its jurisdiction over unfair labor practice cases to the federal courts. We believe the courts are even less likely than a resource-pinched NLRB to accord the timely justice that is so often necessary to workers, unions and employers alike. We further believe this change would make labor-management disputes more litigious, and effectively would deny legal access to most of the individual employees who now bring fully a third of the unfair labor practice charges that are filed with the Board every year.

As for the Chamber's assault on the Board, the three issues the Chamber raises -- "salting," mail ballot elections and single location unit rulemaking -- have been thoroughly aired before other committees, and our positions on these issues have been stated on numerous occasions. Suffice it to say here that the Chamber's attack on the Board, like the LPA's, is rooted in nothing more than straw men of its own manufacture.

Again, as I stated in my original testimony, the AFL-CIO has strong reservations about the Board's backlog and its retreat in the exercise of its injunction option. But the answer is not further abuse of the Board or reductions in its budget. We support at least the Administration's

modest request for an increase in the Board's budget for FY '98 -- which would still produce a budget 3.6% below the FY '95 funding level, accounting for inflation. The Subcommittee would perform a distinct public service if it added its voice to that request; the infinitesimal sliver of the total federal budget that is at issue would make a very significant difference to thousands of workers.

Finally, we appreciate the Subcommittee's concern that the Board be able to function professionally as an impartial adjudicatory body. We again submit that the conduct by some in the Congress of making defunding threats in order to extract certain decisional outcomes from the Board grossly abuses that professionalism and independence. The LPA and the Chamber of Commerce are, shortsightedly, silent on this issue -- we suppose because they like whose ox is gored -- but the Subcommittee ought not be reluctant to use its good offices to deter such efforts.

Mr. SHAYS. Mr. Joseph.

Mr. JOSEPH. Just appreciate the opportunity to be here, and we appreciate your willingness to look into the Board.

Mr. SHAYS. Well, we are happy to look into this issue and the Board. And we are troubled by some things we see and know that it is a factor of many things, but we are going to do our job and look at this Board and see how we can make it work better.

Mr. Hiatt.

Mr. HIATT. Thank you, Mr. Chairman. I feel like I am in a “Jeopardy” situation that I have to think, you know, what answer I want to give. So I have to tell you what the question is that I wish you had asked.

I guess the only other point that I would like to make is that I think when we have these kinds of hearings—and this has certainly been a great deal less confrontational than some of the other hearings on the subject of the NLRB in the past couple of years. But when we do have these kinds of hearings, we lose track of the fact that some 95 to 98 percent of the functions that the Labor Board does do on a day-in-day-out basis on behalf of individual workers, unions and employers is not really in controversy at all.

One of the points that Mr. Yager made in his testimony, I believe at one point, is that a current Republican member of the Labor Board has agreed with the Democratic members 97 percent of the cases, and that is probably not atypical. It may be a little higher, because this three-member Board has not been taking very many controversial cases lately. But even at times when there are a number of controversial cases, the percentage of cases where the Board members who are appointed by Republicans and Democrats and where the business community and labor community would see the outcome exactly the same way and the procedures exactly the same way is extraordinarily high.

And I think it is important to not lose sight of that, because the average worker on the average day has a great deal at stake in just having the regular functions of the Labor Board at their disposal. And I appreciate this opportunity, and we would be more than happy to work with you on any followup where you give us that opportunity.

Mr. SHAYS. We will definitely have followup, and we look forward to working with all of you and thank you again for spending basically your whole day on this hearing. And thank you very much.

And at this time, we adjourn.

[Whereupon, at 4:53 p.m., the subcommittee was adjourned.]

