

## VI. STATUTORY STRUCTURE OF THE AGENCY: ROLE OF THE BOARD AND THE GENERAL COUNSEL

The NLRB's authority is divided by law and by delegation between the five-member National Labor Relations Board ("the Board") and the General Counsel, all of whom are appointed by the President, subject to confirmation by the Senate.<sup>3</sup> To carry out their respective functions, described below, the Board and the General Counsel maintain a headquarters in Washington, D.C. The Agency also maintains a network of Regional or "Field" offices, each of which is under the direction of a Regional Director<sup>4</sup>, and three satellite Judges' offices.

The NLRA assigns separate and independent responsibilities to the Board and the General Counsel in the prevention and remedying of unfair labor practices. This division of authority between the Board and the General Counsel is reflected in the Agency's operations, thereby affecting the Strategic and Annual Performance Plans. An explanation of this division of authority between the Board and the General Counsel will help to provide an understanding of the Agency's operations.

### **Unfair Labor Practice Proceedings<sup>5</sup>**

Unfair labor practices are remedied through adjudicatory procedures under the NLRA in which

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<sup>3</sup> As of August 2006, there were five Board Members, with three confirmed Members and two recess appointees. The General Counsel's position is filled with a confirmed appointee.

<sup>4</sup> Exhibit B is an organization chart of the Agency.

<sup>5</sup> Exhibit C is a chart on ULP case processing.

the Board and the General Counsel have independent functions. The role of the General Counsel is to investigate ULP charges filed by individuals and organizations and, if there is reason to believe that a charge has merit, to issue and prosecute a complaint against the charged party unless settlement is reached. With some exceptions, a complaint that is not settled or withdrawn is tried before an administrative law judge, who issues a decision, which may be appealed by any party to the Board through the filing of exceptions. The Board acts in such matters as a quasi-judicial body, deciding cases on the basis of the formal trial record according to the statute and the body of case law that has been developed by the Board and the federal courts.

Congress created the position of General Counsel in its current form in the Taft-Hartley amendments of 1947. At that time, it gave the General Counsel sole responsibility -- independent of the Board -- to investigate charges of unfair labor practices, and to decide whether to issue complaints with respect to such charges. The Board, in turn, acts independently of the General Counsel in deciding ULP cases.

As noted earlier, the General Counsel's decision to prosecute or not is unreviewable. A decision to dismiss a charge after full investigation is, in many respects, a resolution of that labor dispute.

Under Section 10(l) of the Act, when a Region's investigation of a charge yields reasonable cause to believe that a union has committed certain specified unfair labor practices such as a work stoppage or picketing with an unlawful secondary objective, the Regional Officer or Regional Attorney is *required*, on behalf of the Board, to seek an injunction from a U.S. District Court to halt the alleged unlawful activity. Section 10(j) of the Act provides that where the General Counsel has issued a complaint alleging that any other type of unfair labor practice has been committed, by a union or by an employer, the Board *may* direct the General Counsel to institute injunction proceedings if it determines that immediate interim relief is necessary to ensure the efficacy of the Board's ultimate order.

If the Board finds that a violation of the Act has been committed, the role of the General Counsel thereafter is to act on behalf of the Board to obtain compliance with the Board's order remedying the violation.<sup>6</sup> Although Board decisions and orders in ULP cases are final and binding with respect to the General Counsel, they are not self-enforcing. The statute provides that any party (other than the General Counsel) may seek review of the Board's decision in the U.S. Courts of Appeals. In addition, if a party refuses to comply with a Board decision, the Board itself must petition for court enforcement of its order. In court proceedings to review or enforce Board decisions, the General Counsel represents the Board and acts as its attorney. Also, the General Counsel acts as the Board's attorney in contempt proceedings and when the Board seeks injunctive relief under Section 10(e) and (f) after the entry of a Board order and pending enforcement or review of proceedings in circuit court.

## **Representation Proceedings<sup>7</sup>**

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<sup>6</sup> Exhibit D is a chart on NLRB Order Enforcement

<sup>7</sup> Exhibit E is a chart on representation case processing.

In contrast to ULP proceedings, representation proceedings conducted pursuant to the Act are not adversarial proceedings. Representation cases are initiated by the filing of a petition -- by an employee, a group of employees, an individual or labor organization acting on their behalf, or in some cases by an employer. The petitioner requests an election to determine whether a union represents a majority of the employees in an appropriate bargaining unit and therefore should be certified as the employees' bargaining representative. The role of the Agency in such cases is to investigate the petition and, if necessary, to conduct a hearing to determine whether the petition-for unit of employees constitutes an appropriate bargaining unit under the Act. The NLRB must also determine which employees are properly included in the bargaining unit and therefore eligible to vote, conduct the election if an election is determined to be warranted, hear and decide any post-election objections to the conduct of the election, and, if the election is determined to have been fairly conducted, to certify its results.

In the processing of representation cases, the General Counsel and the Board have shared responsibilities. The Regional Offices, which are under the day-to-day supervision of the General Counsel, process representation petitions and conduct elections on behalf of the Board. As a result, the General Counsel and the Board have historically worked together in developing procedures for the conduct of representation proceedings. Although the Board has ultimate authority to determine such matters as the appropriateness of the bargaining unit and to rule on any objections to the conduct of an election, the Regional Directors have been delegated authority to render initial decisions in representation matters, which are subject to Board review.

### **Compliance Cases**

In order to obtain compliance with the NLRB's Orders and Settlement Agreements, staff must follow up to ensure that the results of the processes discussed above are enforced. Staff must be prepared to work with employees whose rights have been violated to calculate backpay, work with respondents when terminated employees are entitled to reinstatement or having their records expunged in unlawful disciplinary actions, or monitor the bargaining process when the Board has ordered the parties to bargain. Noncompliance or disputes on findings may require additional hearings or actions by the judicial system.

Further, at times the financial status of the respondent has changed during the period the case has been litigated. These changes may require more and more sophisticated litigation in bankruptcy and federal district courts pursuant to the Federal Debt Collection Procedures Act of 1990. As the Agency has been required to engage in this complex litigation, considerable staff resources have been devoted not only to the actual litigation, but also towards preparing and training staff to represent the Agency in these forums.

### **Administrative Functions**

Section 3(d) of the Act assigns to the General Counsel general supervision over all attorneys employed by the Agency, with the exception of the administrative law judges, who are under the general supervision of the Board; the Agency solicitor; and the attorneys who serve as counsel to the Board Members. The Board has also delegated to the General Counsel general supervision over the administrative functions of the Agency and over the officers and employees in the

## Regional Offices.

Under the General Counsel, the Division of Operations-Management has responsibility for the administration of the NLRB's Field offices. Approximately 70 percent of the Agency's staff, or about 1,243 of the 1,789 FTE utilized in FY 2006, is employed in the field, where all ULP charges and representation petitions are initially filed. Currently, the Field offices include 32 Regional Offices, 3 Subregional Offices, and 16 Resident Offices.

## **Effect of Division of Authority on GPRA Plans**

The General Counsel and the Board share a common goal of ensuring that the Act is fully and fairly enforced on behalf of all those who are afforded rights under the Act, but the division of authority mandated by the Act necessarily means that the two branches of the Agency will have separate objectives and strategies for achieving objectives relating to those aspects of their statutory functions which are uniquely their own. The statutory framework in the processing of ULP cases separates the prosecutorial functions of the General Counsel from the adjudicatory functions of the Board. The Board and the General Counsel do work together in developing one comprehensive Strategic Plan and Annual Performance Plan.