

MANAGEMENT DISCUSSION AND ANALYSIS

OVERVIEW OF THE NLRB

ABOUT THE NLRB

The National Labor Relations Board (NLRB) is an independent Federal agency created by Congress in 1935 to administer and enforce the National Labor Relations Act (NLRA or Act), which is the primary Federal statute governing labor relations in the private sector ^{1/}. The purpose of the law is to serve the public interest by reducing interruptions in commerce caused by conflict between employers and employees.

The Act embodies a bill of rights, which establishes freedom of association for purposes of collective bargaining. It defines and protects the rights of employees, unions, and employers, and seeks to eliminate certain unfair labor practices on the part of employers and unions so as to promote commerce and strengthen the Nation's economy. Under the Act, the NLRB has two primary functions:

1. to conduct secret-ballot elections among employees to determine whether or not the employees wish to be represented by a union; and
2. to prevent and remedy statutorily defined unfair labor practices by employers and unions.

The NLRB acts only on those cases brought before it, and does not initiate cases. All proceedings originate with the filing of charges or petitions by employees, labor unions, private employers, and other private parties.

MISSION

The mission of the National Labor Relations Board is to carry out the statutory responsibilities of the National Labor Relations Act, as efficiently as possible, in a manner that gives full effect to the rights afforded to all parties under the Act.

VISION

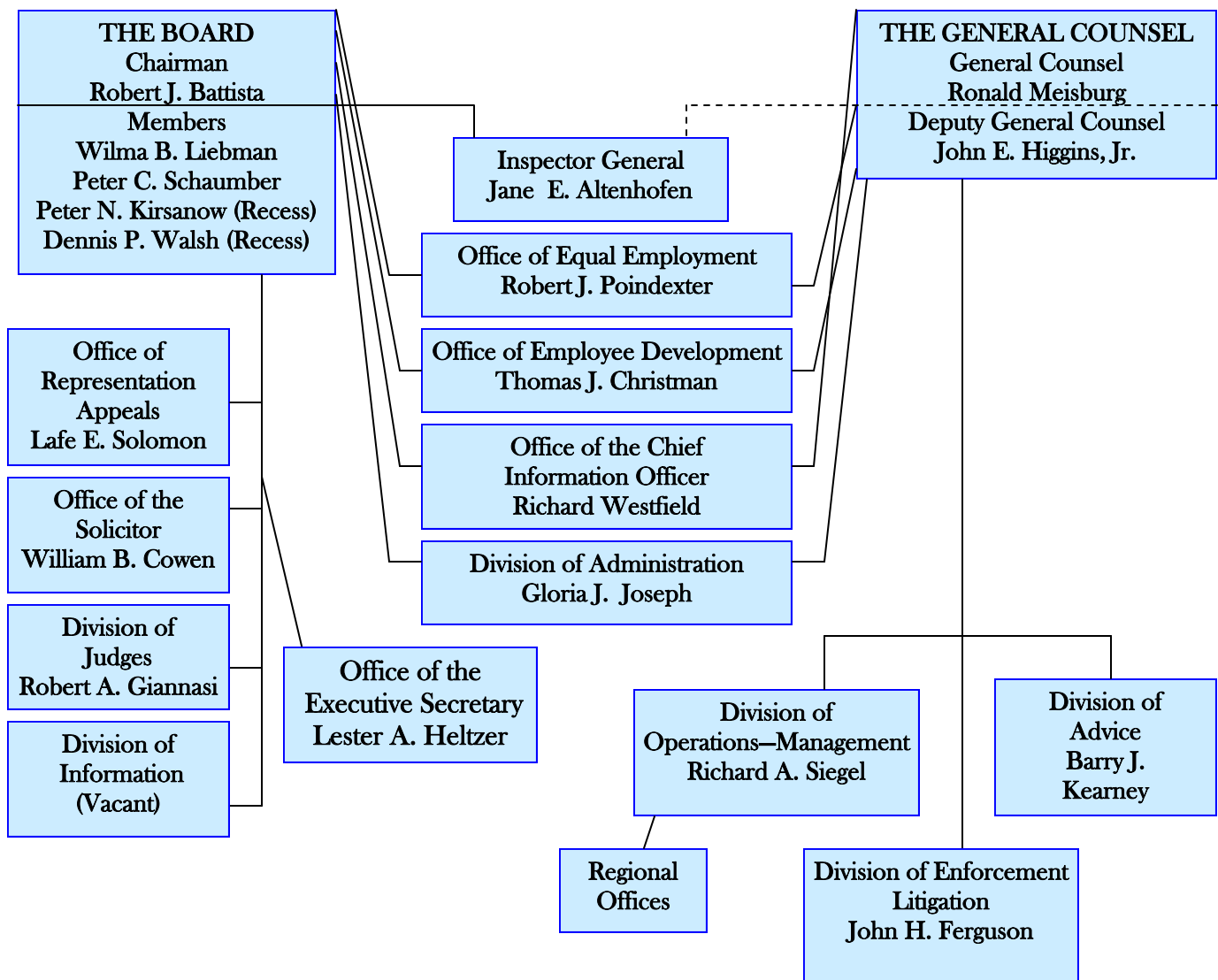
The NLRB strives to create a positive labor-management environment for the nation's employees, unions, and employers by assuring employees free choice on union representation and by preventing and remedying statutorily defined unfair labor practices. The NLRB maintains a customer-focused and a results-oriented philosophy to best serve the needs of the American people.

^{1/} Major amendments to the Act were enacted in 1947 (the Taft-Hartley Amendments) and in 1959 (the Landrum-Griffin Amendments).

***STATUTORY
STRUCTURE OF
THE NLRB***

The Board has five Members and primarily acts as a quasi-judicial body in deciding cases on the basis of formal records in administrative proceedings. Board Members are appointed by the President to 5-year terms, with Senate consent, the terms of one Member expiring each year. The current members are Robert J. Battista (Chairman), Wilma B. Liebman, Peter C. Schaumber, Peter N. Kirsanow, and Dennis P. Walsh.

**NATIONAL LABOR RELATIONS BOARD
ORGANIZATIONAL CHART**



*Statutory Role
(cont'd.)*

The General Counsel is appointed by the President to a 4-year term, with Senate consent, and is responsible for the investigation and prosecution of unfair labor practice cases and for the general supervision of the NLRB Regional Offices. The current General Counsel is Ronald Meisburg. Each Regional Office is headed by a Regional Director, appointed by the Board, who is responsible for making initial determination in cases within the geographical area served by the region.

The NLRB has an unusual structure among executive branch agencies. Agency leadership culminates in six presidential appointees—five Board Members (including the Chairman) and the General Counsel. Day-to-day management of the Agency is divided by law, delegation, and Agency practice between the Chairman, the five-member Board, and the General Counsel. In performing delegated functions, and in some aspects statutorily assigned functions, the General Counsel acts on behalf of the Board. However, with respect to the investigation and prosecution of unfair labor practice cases, the General Counsel has sole prosecutorial authority under the statute, independent of the Chairman or the Board.

UNFAIR LABOR PRACTICE PROCEEDINGS ^{2/}

The NLRA contains a code of conduct for employers and unions and regulates that conduct in unfair labor practice proceedings.



On March 27, 2007, the Board heard an oral argument in the case *The Guardian Publishing Company d/b/a The Register Guardian*. The case raised the issue of whether an employer can ban the non-business related use of its e-mail system. In this case, the President of the local union, representing company employees, sent union-related e-mails to employees over the company's e-mail system for which he was disciplined. The discipline led to unfair labor practice charges which were found to be meritorious by the Regional Director and litigated before an NLRB Administrative Law Judge and then appealed to the five-member Board.

^{2/} Appendix C is a chart of an unfair labor practice case processing

*Statutory Role
(cont'd.)*

Unfair labor practices are remedied through adjudicatory procedures under the NLRA in which the Board and the General Counsel have independent functions.

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 unfair labor practice (ULP) cases.

The General Counsel investigates ULP charges through the Agency's network of Regional, Subregional, and Resident Offices (field offices). Approximately 23,000 ULP charges are filed each year in the field offices. If there is reason to believe that a ULP charge has merit, the Regional Director, on behalf of the General Counsel, issues and prosecutes a complaint against the charged party unless a settlement is reached. With some exceptions, a complaint that is not settled or withdrawn is tried before an administrative law judge (ALJ), who issues a decision which may be appealed by any party to the Board through the filing of exceptions. The Board decides 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.

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. 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. Court 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



At the *Guardian Publishing Company* oral argument, the attorney for the General Counsel argued that the company's communications policy violated the NLRA because it banned employees' e-mail communications about union affairs without offering any justification for such a rule.

*Statutory Role
(cont'd.)*

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.

Section 10(j) of the NLRA empowers the NLRB to petition a Federal district court for an injunction to temporarily prevent unfair labor practices by employers or unions and to restore the status quo, pending full review of the case by the Board. In enacting this provision, Congress was concerned that delays inherent in the administrative processing of ULP charges, in certain instances, would frustrate the Act's remedial objectives. In determining whether the use of Section 10(j) is appropriate in a particular case, the principal question is whether injunctive relief is necessary to preserve the Board's ability to effectively remedy the unfair labor practice alleged, and whether the alleged violator would otherwise reap the benefits of its violation.

Under NLRB procedures, after deciding to issue a ULP complaint, the General Counsel may request authorization from the Board to seek injunctive relief. The Board votes on the General Counsel's request and, if a majority votes to authorize injunctive proceedings, the General Counsel, through his Regional staff, files the case with an appropriate Federal district court.

In addition, Section 10(l) of the Act requires the Board to seek a temporary Federal court injunction against certain forms of union misconduct, principally involving work stoppages or picketing with an unlawful secondary objective.

REPRESENTATION PROCEEDINGS ^{3/}

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 a 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 employees constitute 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

^{3/} Appendix D is a chart on representation case processing.

Statutory Role
(cont'd.)

elections on behalf of the Board based on a delegation of authority made in 1961. As a result, the General Counsel and the Board have historically worked together in developing procedures for the conduct of representation proceedings. 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 PROCEEDINGS

In order to obtain compliance with the Board's Orders and settlement agreements, the General Counsel's 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.

APRIL 12, 1937

What is the significance of this date?

It was on this date that the Supreme Court upheld the constitutionality of the National Labor Relations Act (NLRA). Like many Federal agencies that were part of President Franklin Roosevelt's New Deal, the NLRB had found its very existence in doubt and its employees on April 11, 1937 feared that their jobs would disappear forever. Since the beginning of the President's New Deal, the Supreme Court had put many Federal agencies out of business, finding that Congress did not enjoy power under the Constitution's Commerce Clause to regulate commercial activities like labor disputes and wages unless they directly affected interstate commerce. On April 12, 1937, the Supreme Court ruled that the NLRA was a valid exercise of Congressional power.

Of the cases involving the NLRA that were before the Supreme Court in 1937, the two most noted cases were *Jones & Laughlin Steel* and *Friedman-Harry Marks*. However, *Friedman-Harry Marks* was the only case that did not involve a large, multi-state corporation. *Friedman-Harry Marks* concerned the manufacturing operation of an employer with a single facility located in Richmond, VA. It was exactly the kind of employer about which the Supreme Court had been previously skeptical regarding its effect on interstate commerce. At the time the NLRA was passed, Supreme Court precedent generally held that manufacturing a product in a single location did not affect interstate commerce, and that producing a product that might be sent to another state was merely a *step* in preparation for interstate commerce. The NLRB's first General Counsel, Charles Fahy, fought to include *Friedman-Harry Marks* among the Board's test cases to ensure that the Supreme Court approved "the full spectrum of the Act's potential reach and administration."

On April 12, 1937, by a vote of 5 to 4 the Supreme Court reversed the judgments of the courts of appeals in both *Jones & Laughlin Steel* and *Friedman-Harry Marks* to find the NLRA constitutional. As the Court wrote in its decision in *NLRB v. Jones & Laughlin Steel*: "[T]he stoppage of [manufacturing operations] by industrial strife would have a most serious effect upon interstate commerce. In view of [the company's] far flung activities, it is idle to say that the effect would be indirect or remote. It is obvious that it would be immediate and might be catastrophic. We are asked to shut our eyes to the plainest facts of our national life and to deal with the question of direct and indirect effects [on commerce] in an intellectual vacuum." Further in its decision, the Court recognized the ability of workers to organize and to select representatives of their own choosing as a "fundamental right."

April 12, 1937 is the day that is forever known in NLRB history as "Constitutionality Day," the day the Board commemorates its beginnings, its mission, and its national impact.