



**UNITED STATES GOVERNMENT**  
***National Labor Relations Board***  
**Office of Inspector General**

## **Memorandum**

July 18, 2007

To: Lester A. Heltzer  
Executive Secretary

From: Jane E. Altenhofen  
Inspector General

Subject: Inspection Report No. OIG-INS-49-07-01: Board Statistical Study

We initiated this inspection in January 2007 to determine whether timeliness of case processing before the National Labor Relations Board (Board) is impacted by the type of party filing exceptions to the administrative law judge's (ALJ) decision. Parties that can file exceptions to an ALJ decision are the charging party, the respondent, or the General Counsel.

We analyzed the Board's case processing statistics from a variety of vantage points. Decisions generally took longer to issue if they had a factor that increased the complexity of a case, such as multiple parties filing exceptions, multiple allegations, appending concurring or dissenting opinions, or a difference from the ALJ decision. Also, cases that were on the Lead Case List or assigned a related issue code took significantly longer to process. Cases on the Lead Case List were pending on average 1,312 days compared with 824 days for cases that were not.

We found no indication of purposeful delay based on the identity of the party filing exceptions to an ALJ decision. In Fiscal Year (FY) 2006, 79 percent of cases with exceptions to ALJ decisions were filed by employers, while 92 percent of these cases were initiated by charges against employers. Because of this disparity, drawing conclusions regarding disparate treatment of the parties is difficult. Additionally, the National Labor Relations Act (NLRA) requires that priority be given to certain employer initiated charges. Nevertheless, the statistics show substantial delay in the Board issuing decisions and, in turn, substantial delay in providing remedies under the NLRA, the impact of which is disparately felt by employees.

### **SCOPE**

We reviewed laws and regulations related to the processing of unfair labor practice (ULP) cases after the issuance of an ALJ decision. We reviewed internal guidance to the Board, including the Guide for Staff Counsel of the National Labor Relations Board (Staff Counsel's Guide). We interviewed staff in the Office of the Executive Secretary (OES), the Office of the Chief Information Officer, and Board Member offices to learn about how ULP cases are

processed and how the cases are tracked in the Pending Case List (PCL) module of the Judicial Case Management System (JCMS).

We obtained databases of ALJ decisions in which exceptions were filed that were assigned to counsel during FY 2006, issued during FY 2006, and pending as of October 1, 2006. We reviewed Board decisions and ALJ decisions for data that was not contained in JCMS. From this data, we computed statistics and time periods related to the contested ALJ decisions. We analyzed Board reports and databases for FY 2006 to determine whether cases were being held pending cases that were received more recently.

We conducted this review from January through July 2007. This review was done in accordance with the Quality Standards for Inspections issued by the President's Council on Integrity and Efficiency.

## **BACKGROUND**

After a ULP charge is filed at one of the National Labor Relations Board's 51 field offices, a case is opened and investigated by a Board agent. If the investigation determines that a violation of the NLRA did not occur, the case is dismissed by the Regional Director, absent withdrawal. If the case is deemed meritorious, the Regional Director issues a complaint. Throughout the life of a case, the goal is to have the parties settle the case without a hearing. Approximately 97 percent of all meritorious cases were settled without a hearing during FY 2006. If the parties cannot reach an agreement, the Regional Office prosecutes the case before an ALJ. The ALJ then issues a decision that is filed with the Board.

The parties, including the General Counsel, are permitted under the NLRA to file exceptions to the ALJ decision. Although the General Counsel does not represent the charging party, the interests of the General Counsel and the charging party are usually aligned. If no exceptions are filed, the ALJ decision automatically becomes the Board's decision and order. If exceptions are filed, the Board will review the case record and issue a decision in which it may adopt, modify, or reject the findings and recommendations of the ALJ. Any party, except the General Counsel, may seek review of the Board's decision in the U.S. Court of Appeals.

Board casehandling data is maintained in PCL, which provides real-time reports showing the status of any cases before the Board. OES also regularly prepares an internal memorandum that lists potential Board agenda issues and lead cases, known as the Lead Case List. The list enumerates and categorizes by issue cases that have been identified as presenting major issues by OES and the Triage Committee, which is made up of the Deputy Chief Counsels, the Executive Secretary, Director of the Office of Representation Appeals, and the Solicitor. The list presents ULP and Representation cases by issues, including a brief narrative description of the issue and the status, and a listing of cases previously appearing on the list that have been decided. The list is distributed to the Board, Chief Counsels, and the Triage Committee.

The Board received 258 contested ULP cases during FY 2006. Of these, 143 resulted from contested ALJ decisions. Approximately 88 percent of the contested ALJ decisions were

CA cases, which are filed against employers and include allegations such as threatening job loss or plant closure if employees join or vote for a union. Ten percent were CB cases, which are charges against a union and include a failure to fairly represent members. CC cases comprised 1 percent of the cases received and are filed against a union and include allegations of secondary boycotts. CE cases were also approximately 1 percent of the cases received and involve allegations that a union and an employer have agreed that employees are not required to work on goods for an employer designated by a union as unfair, which can be filed against both unions and employers.

The Board issued decisions in 324 contested ULP cases during FY 2006, of which 225 were contested ALJ decisions. These cases took on average 629 days to issue. On October 1, 2006, 267 contested ULP cases were pending before the Board. Contested ALJ decisions accounted for 226 of the contested ULP cases pending. On average, the contested ALJ decisions were pending 917 days from the assignment of counsel. The average processing time for the cases pending on October 1, 2006, was greater than the time to issue a decision during FY 2006 by more than 9 months.

## RESULTS

### Casehandling Factors

#### *Parties Filing Exceptions*

Only one of the parties filed exceptions in 165 of the 225 cases issued during FY 2006 and 151 of the 226 cases pending as of October 1, 2006. The average time to issue a decision varied by the party who filed the exceptions, but for the pending cases the time did not, except for an insignificant number of cases in which a union was a respondent. The average times from assignment when one party filed exceptions are shown in the following table.

**Exceptions Filed by One Party**

FY 2006	Issued Decisions		Pending Cases	
	Number	Average Days	Number	Average Days
Party Filing Exceptions				
Employer (as respondent)	134	564	125	919
Charging Party / General Counsel	23	432	23	953
Union (as respondent)	8	429	3	178
Total	165	539	151	909

A more significant variation existed for issued decisions, but not pending cases, when multiple parties filed exceptions to an ALJ decision. For the issued decisions, the time increased significantly when more than one party filed an exception. The amount of time for pending cases, however, did not fluctuate significantly when one or multiple parties filed exceptions. The times are shown in the following table.

### Number of Parties Filing Exceptions

FY 2006	Issued Decisions		Pending Cases	
Party Filing Exceptions	Number	Average Days	Number	Average Days
One Party	165	539	151	909
Multiple Parties with Aligned Interests	15	813	18	838
Multiple Parties with Opposing Interests	45	895	57	964
Total	225	629	226	917

#### *Case Type*

ULP charges are given a case type based on the subsection of the NLRA alleged to be violated. CA cases accounted for 92 percent of the decisions issued during FY 2006 and 91 percent of the cases pending as of October 1, 2006. The remainder were CB, CC, and CE cases. On average, CA cases, which are charges against employers, took the longest time to issue and were generally pending the longest time, as shown in the table below.

### Contested ALJ Decisions by Case Type

FY 2006	Issued Decisions		Pending Cases	
Case Type	Number	Average Days	Number	Average Days
CA	207	649	206	942
CB	16	371	6	370
CC	2	527	11	733
CE	0	0	3	962
Total	225	629	226	917

#### *Charging Party*

Approximately 78 percent of the decisions issued during FY 2006 and 83 percent of the cases pending on October 1, 2006, were the result of charges filed by unions, with the remainder being charges filed by individuals, employers, or a combination of parties. Cases in which a union was a charging party took the longest time to issue and were generally pending the longest time on average, as shown in the following table.

### Contested ALJ Decisions by Charging Party

FY 2006	Issued Decisions		Pending Cases	
Charging Party	Number	Average Days	Number	Average Days
Union	176	653	188	963
Individual	37	490	10	676
Individual and Union	7	914	11	668
Employer	5	381	15	677
Employer and Individual	0	0	1	656
Employer and Union	0	0	1	1,389
Total	225	629	226	917

### *Types of Allegations*

ULP charges allege at least one violation of a subsection of the NLRA. As the number of subsections of the NLRA alleged increased, the time for cases to issue during FY 2006 generally increased. For pending cases, the time did not vary significantly, with the exception of an increase between one and two types of allegations. The times are shown in the following table.

#### **Types of Allegations**

FY 2006 Types of Allegations	Issued Decisions		Pending Cases	
	Number	Average Days	Number	Average Days
One type	66	574	52	776
Two types	114	610	117	1,050
Three types	31	812	46	767
Four or more types	14	632	11	807
Total	225	629	226	917

### *Appended Opinion*

The time to issue a decision varied when a separate opinion, either concurring or dissenting, was appended to the majority decision. The 64 decisions with appended opinions took on average 728 days from assignment to issuance, compared with 589 days for the decisions in which no opinion was appended. Dissenting opinions accounted for 57 of the 64 decisions with separate opinions. Staff noted that dissenting opinions are usually written toward the end of the process, and they are circulated to the other Board members, which adds time to issuing the Board decision. Additionally, the dissenting opinions at times cause the majority Board members to rewrite or modify the Board decision to address the issue discussed in the appended opinion. Staff also stated that the number of dissenting opinions has increased significantly in recent years.

### *Disposition*

The time to issue a decision increased when the Board decision modified the ALJ decision. The 99 decisions that affirmed the ALJ decision took on average 398 days. The decisions that differed to some degree, such as being "affirmed as modified," from the ALJ decision took on average 787 days, which was nearly double that time. Cases remanded to the ALJ took on average 998 days.

### *Lead Cases*

The average time to issue a decision was significantly longer for the cases that were listed on the Lead Case List. During FY 2006, 11 cases on the Lead Case List were issued. These cases took on average 1,145 days, compared with 602 days for cases not on the Lead Case List. The average time for pending cases also increased significantly for the 43 cases that were listed on the September 20, 2006 Lead Case List and were pending on October 1, 2006. These cases were pending on average 1,312 days, compared with 824 days for cases that were not on the

Lead Case List. The Board's representatives stated that the length of delay in issuing lead cases reflects the nature of the cases, which are non-routine and sometimes novel. Further, many of these cases involve highly contested difficult issues and requests from the parties for the Board to reexamine precedent. As a result, the Board is often confronted with the prospect of changing the law, so the practice is to wait until the Agency has a full Board, or at least can obtain a three-member majority. Long periods where the Board is at three members or is an evenly divided four-member Board inevitably delay the issuance of lead cases. Additionally, lead cases often have dissents and amici briefs.

We identified no instances where a lead case was holding up cases received significantly before the lead case. Earlier Lead Case Lists identified two major "Salting" cases and stated that more than 40 "Salting" cases were pending. The OES database contained 41 cases with the related issue code for "Salting." The cases on the Lead Case List were among the earliest that dealt with the issue. On May 31, 2007, the Board issued a decision in *Oil Capitol Sheet Metal, Inc.*, one of the "Salting" cases on the Lead Case List. This case took 2,449 days to issue, as compared with the most recent "Salting" case, which was pending for 647 days on that date.

### ***Related Issue Codes***

OES assigns a numeric code to cases dealing with the same issue. The codes are known as related issue codes. Forty-four related issue codes were assigned to cases that were pending as of October 1, 2006. The three most common codes were "Salting" (41 cases), "No Solicitation/No Distribution" (22 cases), and "Bargaining – Refusal to Provide Information" (15 cases). Approximately half of the cases pending were assigned at least one code.

The average time a case was pending increased significantly for the cases that had a related issue code. The 116 contested ALJ decisions categorized using a code were pending on average 1,136 days, compared with 687 days for cases not having a code. As of October 1, 2006, "Salting" cases had been pending on average 1,591 days.

### **Cases Pending as of March 2, 2007**

The Staff Counsel's Guide divides the Board's processing time into three stages: Stage I, which runs from assignment to staff counsel until the date of initial action, which is either a subpanel or draft in lieu of subpanel. The subpanel is a screening function by which a tentative position of the Board member is expressed by a staff supervisor or staff attorney representative. Stage II runs from the end of Stage I until circulation of the draft decision to Board members for approval. Stage III runs from the end of Stage II to clearance of the Board's decision.

Of the 226 contested ALJ decisions pending at the end of FY 2006, 172 were still before the Board on March 2, 2007. Approximately 41 percent of those cases were in Stage I, 23 percent were in Stage II, and 36 percent were in Stage III. The cases in Stage I had been pending an average of 1,346 days, compared with 1,009 days for Stage II and 951 for Stage III. This indicates that the cases moving quicker towards being issued were those that had been at the Board for the shortest period of time. Approximately 66 percent of cases in Stage I dealt with lead case issues.