

OFFICE OF THE GENERAL COUNSEL**MEMORANDUM GC 02-02**

December 6, 2001

TO: All Regional Directors, Officers-in-Charge, and Resident Officers**FROM:** Arthur F. Rosenfeld, General Counsel**SUBJECT:** Impact Analysis Program Modifications

As you are aware, consistent with the original expectation that the Impact Analysis program should adapt to changed circumstances, the Impact Analysis Committee recently met to reexamine the program in light of our recent experience and current resources. Based upon its examination of the results of the field's activities pursuant to Impact Analysis, the Committee concluded that Impact Analysis continues to serve its intended purpose of maximizing our effectiveness and remains an integral part of our casehandling system. Following consideration of numerous options, the Committee concluded that the program should be modified to both enhance our effectiveness in carrying out the mission of the Agency and to help achieve our goal of reducing the Agency's situations pending preliminary investigation (i.e., the inventory).

This Committee's recommendations were based upon our experience with the modifications to the program that were effective October 1, 2000 as well as an examination of our existing resources. It was also based upon the expectation that the Agency's FY 2002 budget will permit us to maintain casehandling activities at their recent level and to maintain staffing at or near our current level of FTE. In its deliberations, the Committee was guided by the underlying principles of Impact Analysis to ensure that our resources continue to be focused on resolving cases with the greatest public impact as well as on the need to reduce the inventory, given the expectations of Congress and OMB. Throughout its deliberations and the resulting recommendations, its principal concern was the impact of our actions on the public and effective enforcement of the Act.

A review of Regional Office performance under Impact Analysis demonstrates that substantial improvement has been made in timely processing cases over the past year. Thus, as of September 30, 2000, the national cumulative percentage of unexcused coverage cases was 11.5, 14.9, and 12.2 for Categories III, II and I, respectively. As of September 30, 2001, the cumulative percentages had been reduced to 8.8, 11.3, and 7.3, respectively. These improvements are the result of a number of factors: increased staffing (field FTE in Fiscal Years 1998 through 2001 was 1299, 1259, 1293, and 1380 (est.), respectively and the projected field FTE for Fiscal 2002 is approximately 1380), a decrease in intake (case intake has decreased over the past three years from 35,486 in Fiscal Year 1998 to 33,515 in Fiscal Year 2001), coupled with the diligent efforts of the staff.

In view of the above, I concur with the Committee's recommendation that, under the present circumstances, the following changes will both effectively strengthen the Agency's efforts in effectuating the purposes of the Act and help bring about a meaningful reduction in situations pending preliminary investigation:

1. Expand the scope of Category III cases to include the following allegations that had previously been included in Category II:
 - a. All termination cases, whether as a result of Section 8(a)(1), (3), (4) or (5) allegations. Such cases are limited to circumstances in which the alleged discriminatee suffers a permanent or indefinite loss of employment.¹
 - b. All Section 8(b)(2) cases where it is alleged that individuals have been denied work opportunities because of the union's discrimination, including hiring hall refusal to refer allegations.
2. Expand the scope of Category II cases to include all current Category I cases for which alternative means of redress are not available. Thus, the following types of cases, which previously had been included in Category I, would now be included in Category II:
 - a. Independent Section 8(a)(1) and 8(b)(1)(A) allegations.
 - b. Section 8(b)(1)(A) duty of fair representation cases.

- c. Section 8(a)(5) and 8(b)(3) failure to provide information cases.
- d. AC and WH cases.

While a change in the scope of issues to be included in the various categories was considered in the past, such an approach was not adopted since the recently hired employees lacked training and experience to be significantly involved in case processing. A further consideration was that the demands of the 10(j) program, R case priorities and other pressing matters outweighed the value of shifting cases within the categories.

Many of these recently hired Board agents, however, have now received significant training. Case intake, particularly R cases, is below last year's level while the number of Board agents has increased again this past year. In addition, the vast majority of Regions have demonstrated their ability to readily manage the existing caseload. In such an environment, the modification of categories should not create significant casehandling problems. Moreover, this approach permits us to increase our effectiveness to the public by expanding the scope of issues that receive higher priority.

Refusal to hire cases, however, will remain in Category II. Refusal to hire cases necessarily involve inquiry into matters which are beyond the scope of traditional discharge cases, such as whether any other employees were hired, whether the applicant was qualified for the position and how many openings existed. Such evidence is generally peculiarly within the knowledge or possession of the employer, and thus not readily available. Therefore, investigations of such issues necessarily are often more time consuming and difficult than most discharge cases. Under all these circumstances, and because the changes outlined above represent a significant challenge to the Regions' casehandling capacity, it is most prudent and appropriate to retain refusal to hire cases in Category II.

Given the expansion of the scope of issues now included in Categories III and II, and the significantly reduced scope of matters incorporated in Category I, I also have decided, in agreement with the Committee's recommendation, that the current time frames for case disposition of 7, 9 and 12 weeks, respectively, remain unchanged. It is anticipated that the Regions' performance under the new categorization system will be periodically reviewed, so that any necessary adjustments can be made. I also concur with the Committee's view, however, that, based on the overall success of the field in the recent past and the other considerations detailed earlier, the allowable overage percentages should be reduced. Specifically, the appropriate percentages will be:

Category III	8%
Category II	10%
Category I	10%

Face-to-face affidavits remain the cornerstone of our investigations. Experience has shown, however, that there are also alternative investigative techniques that can save time and resources without adversely affecting quality in certain types of cases.² Especially where significant travel would otherwise be involved, such techniques save both considerable time and resources, thereby allowing Board agents to address other matters. While the need to utilize these techniques, such as questionnaires and telephone affidavits, was originally based upon a shortage of casehandling resources, even with adequate resources the use of these techniques in the investigation of certain types of cases should be continued in order to promote both efficiency and economy. In particular, all Regional Offices should utilize alternative techniques for all Category I cases and continue to use them for certain Category II cases, such as a Section 8(a)(5) or 8(b)(3) request for information or a Section 8(b)(1)(A) duty of fair representation allegation, which, as previously noted, will now be placed in Category II.³ Additionally, consistent with Memorandum OM 99-75, Regional Directors continue to have the discretion to use these techniques for other Category III and II cases, where appropriate. As stated in that memorandum:

In situations where substantial travel will be necessary, the Regional Directors may exercise their discretion to take telephonic affidavits in circumstances where the affidavit is a supplemental statement, where individuals are providing evidence that corroborates evidence presented in a face-to-face affidavit or where there is a very high probability that the case has no merit. (Footnote omitted).

Moreover, the concept of teamwork has contributed to our efficiency and effectiveness. As originally contemplated, teamwork was deemed necessary to insure that the limited resources available within an office would be directed to the higher priority

cases.⁴ As with the use of alternative investigative techniques, however, teamwork can reduce inefficiencies in investigations by facilitating the coordination of travel and the exchange of casehandling information among team members, thereby identifying the need for assistance and possible sources to provide such help.

There are also two other issues that need to be addressed to maximize the effectiveness of the revised Impact Analysis model in reducing the situations pending preliminary investigation. First, a significant and disproportionate percentage of all unexcused overage cases is concentrated among a small number of regional offices. Attention to those offices and their ability to reduce their overage cases will be given a high priority. These Regions' situations will be examined to determine the basis for their overage cases and what corrective actions are necessary. Second, Regions receiving cases pursuant to the Interregional Assistance Program have made critical and valuable contributions in reducing our situations pending preliminary investigation. One consequence of the revised categorization, however, will be to place many of the types of cases which had been handled through interregional assistance in Category II instead of Category I. As a result, the receiving offices will no longer have as much time to dispose of such matters as in the past. Moreover, there has often been considerable delay between the date the charge is filed and the date the file is received by the receiving office. In view of the shorter time goal that will now apply to many cases subject to interregional assistance, such a delay can no longer be tolerated. Therefore, for all cases being transferred from one office to another under this program, sending offices shall fax a copy of the charge and any evidence accompanying it to the receiving office within two business days from filing. Such a procedure will avoid placing an undue burden on the receiving Region and will help ensure that the goals of the revised Impact Analysis model can be effectively accomplished.

All of the foregoing changes will be effective as of January 2, 2002. Thus, charges filed prior to January 2nd should not be recategorized to conform to the changes in the Impact Analysis categories. The impact of these changes on our ability to process cases efficiently and effectively will have to be assessed based upon our experience under the revised system, as well as staffing and other resources. Therefore, the Regions' experience under these revised standards will be reviewed periodically in light of changes in available resources and anticipated budgets.

If you have any questions concerning this memorandum, please contact your AGC or Deputy.

/s/
A.F.R.

cc: NLRBU

Release to the Public

MEMORANDUM GC 02-02

Appendix A

The Revised Impact Analysis Model: Category Descriptions

Category III	Exceptional Impact
Category II	Significant Impact
Category I	Important Impact

For purposes of this description, the identification of the types of cases included in each category will be described in the highest category, beginning with Category III, Exceptional cases. The following guidelines are intended only to assist Regions in exercising discretion as to the appropriate differentiation of cases; it is understood that unusual situations will arise which warrant placement of a case in a category different than that which would ordinarily be appropriate. As a guiding principle, when in doubt about the appropriate category placement, the higher category should be chosen.

Category III (Exceptional cases) includes cases involving the allegations most central to the achievement of the Agency mission.

Illustrations include:

- 10(j) and 10(l) cases.
- All representation cases involving the resolution of a QCR, i.e., RC, RD and RM petitions as well as any post-election cases.
- All blocking charge cases.
- All cases in which the establishment or continuation of a union's status as a 9(a) representative is at stake. This would include: cases involving *Gissel* bargaining orders; the relocation, transfer or elimination of a bargaining unit; "test-of-cert." summary judgment; and alleged misconduct designed to frustrate a union's ability to obtain an initial contract after certification.
- Cases involving the resolution of whether a strike or lockout is based on economic or unfair labor practice considerations.
- Any case involving the issue of whether a strike is unprotected and the status of strikers is at issue or the employment status of significant numbers of employees.
- Section 8(g) cases.
- 8(a)(1), (3), (4) or (5) permanent or indefinite loss of employment cases.
- 8(b)(2) cases where individuals have been denied work opportunities because of the union's discrimination, including hiring hall refusal to refer allegations.
- National cases or cases of unusually high visibility such as *Greyhound* or *Beck* type violations involving the national application of a provision affecting employment.

Category II (Significant cases) are all other cases except for those included in Categories III and I. They typically involve conduct which affects core rights under the Act, and for which there is no alternative remedy. Those involving Section 8(d) duties refer to conduct which does not imperil the bargaining relationship itself.

Illustrations include:

- 8(a)(1), (3) and (4) discrimination cases which do not involve a permanent or indefinite loss of employment.
- Refusal to hire cases.
- Non-Section 10(j) picket line violence or misconduct cases.
- All Representation cases which do not involve the resolution of a QCR, i.e., UC, UD, AC and WH cases.
- 8(a)(5)/8(b)(3) refusal to provide information cases.
- 8(a)(5) unilateral change allegations.
- 8(b)(1)(A) duty of fair representation cases.
- Independent 8(a)(1) allegations.

Category I (Important cases) make up the remainder of our work. They either are deferrable or involve conduct for which alternative means of redress are available to the charging party.

Illustrations include:

- Collyer/Dubo and other deferral cases.
- 8(a)(5) pension and welfare contribution collection cases.

¹ Situations in which the alleged discriminatee has been reinstated or where the loss of employment is of a brief, finite duration remain in Category II. Likewise refusal to hire cases remain in Category II.

² Alternative investigative techniques were fully discussed in Memorandum GC 95-15.

³ Thus, although the disposition of such cases would be given higher priority treatment, the usual characteristics of these investigations remain the same, e.g., there is typically a lack of material factual disputes.

⁴ See the Impact Analysis Training Manual, dated November 1995, pages 14-17.