

OFFICE OF THE GENERAL COUNSEL**MEMORANDUM GC 03-02**

April 21, 2003

TO: All Regional Directors, Officers-in-Charge, and Resident Officers**FROM:** Arthur F. Rosenfeld, General Counsel**SUBJECT:** Practice and Procedure Committee Mid-Winter Meeting - 2003

Recently, the Board and I met with the ABA NLRB Practice and Procedure Committee. As you know, this Committee's focus is on Agency practice, particularly in the Regional Offices. The collegial and productive relationship long maintained with the ABA Practice and Procedure Committee over the years has proved beneficial to the Agency in many ways and I will continue to support it. This was my second mid-winter meeting with this Committee and as is their practice, they raised a number of questions about Regional Office practices. I have summarized those questions and our responses to them below.

I was particularly encouraged by the absence of any general complaints that the Regions do not enforce the Act evenhandedly. Of course, in an organization as large as ours and in the course of processing 36,000 C and R cases a year there will be some mistakes. But the paucity of complaints clearly indicates that you are doing an excellent job enforcing the law in often highly charged circumstances. I commend you and thank you for the record you turned in last year. As I said in my February 4, 2003 cover memo to the Summary of Operations, we handled more cases in less time and with less staff last year. My meeting with the P&P Committee demonstrated that we did it evenhandedly as well. I came away from this meeting with increased respect for the fine work that is done daily in the Regions.

The attached document lists the questions asked by the Committee and summarizes our answers.

/s/
A. F. R.

cc: NLRBU
Release to the Public

MEMORANDUM GC 03-02

Responses to Questions From the ABA Practice & Procedure Committee Mid-Winter Meeting 2003**QUESTION: What time targets apply to representation petitions after the disposition of blocking charges?**

RESPONSE: Representation cases receive priority handling by the Regions and this priority is not altered when the case has been blocked. Although these cases are not specifically included when we calculate our representation case processing medians, our time targets still guide the processing of the cases. Thus, removing the time that the case has been "blocked," it remains the Agency's goal to attempt to schedule elections within six weeks of the time the petition was filed. Of course, investigation of an unfair labor practice charge that blocks a representation petition is accorded the highest priority under the Impact Analysis Casehandling System.

One committee member reported being told by a Board agent that there is no target for an "R" case that has been blocked and as a result his case would be delayed. This agent also reportedly suggested withdrawing and refileing the petition in order to obtain priority treatment. We responded that we considered such a suggestion, if made, to be most inappropriate.

QUESTION: Is there any policy limiting the issuance of large numbers of subpoenas for representation hearing?

RESPONSE: Parties are entitled to the number of subpoenas that they need to assist them in presenting all relevant testimony and developing a complete record at a representation case hearing. On occasion Regions are confronted with requests for large numbers of subpoenas, relative to the issues and number of employees in a given employee unit, sometimes encompassing all of the employees in the unit. Such requests potentially can be so disruptive to an employer's operation that accommodations need to be made. Regional practices regarding such accommodations vary, but it is the goal of every Regional Office to avoid unnecessary disruption of employer operations, while not unduly impacting on the requester's ability to present its case.

QUESTION: **What is considered confidential in the processing of R-cases? For example, is a party's position as to whether a union demanded recognition in the context of a RM petition confidential? What if the matter goes to hearing? Are parties' positions regarding a manual or mail ballot election confidential?**

RESPONSE: The efficient and effective processing of representation cases requires an open and frank discussion of the issues. Parties are encouraged to take informed and considered positions on the issues before the Regional Director. These positions are thoroughly examined by the Regional staff and often discussed with the other parties to the case. Accordingly, very little of a party's position on the issues is regarded as confidential. Of course, the identity of card signers and the number of cards submitted in a showing of interest are closely guarded against disclosure.

A party's position as to whether a union demanded recognition in the context of a RM petition is not normally confidential and is an important element in determining whether a QCR exists. The parties' positions regarding a manual or mail ballot election also are not typically confidential.

In response to a follow-up question about whether position letters are given over to other parties to the case, we advised that they are not.

QUESTION: **Are hearing officers made aware of the authority given them in the Case Handling Manual (Section 11244.2) to grant additional time for the filing of post-hearing briefs? Or are they instructed to refer all requests for extensions to the Regional Director?**

RESPONSE: Hearing officers are well aware of their discretion in ruling on requests for extensions of time for filing of briefs in representation cases.

Hearing officers are made aware of this section of the manual during their initial training as new employees and reminded of it during subsequent training sessions over the course of their careers. They are instructed that if a party does not "show cause" for the grant of additional time to file its brief, its request should be denied. They are also made aware of the Agency's desire to avoid delays in the processing of representation cases. This policy should influence the hearing officer's exercise of discretion when ruling on a request for an extension. Parties dissatisfied by the hearing officer's ruling on requests for extensions have the opportunity to, and commonly do, request additional time from the Regional Director.

QUESTION: **What is the policy on providing interpreter assistance during the taking of foreign language affidavits? Does the witness have the benefit of an interpreter during the Region's taking of an affidavit or interview? Does it matter if a representative of the party offering the witness is present to provide needed technical assistance (as, e.g., with such terms as "impasse" or "ratification" in a bargaining case)? Does the Agency have any plans to add additional bilingual agents?**

RESPONSE: It is the policy of the Agency, when obtaining sworn Board affidavits, to provide affiants with appropriate interpreter assistance when requested or when a need for such assistance is discerned.

It is not our policy to permit representatives of the parties to offer their witnesses assistance with technical terms because the interpreters employed or provided by the Agency can do so. This policy reinforces the authenticity and integrity of witness affidavits and testimony.

The Agency continues its efforts to actively recruit additional bilingual agents.

QUESTION: Is there a policy requiring a party to commit to providing witnesses for Board affidavits before the Board will interview its witnesses?

RESPONSE: The preferred method for taking evidence from all witnesses is an affidavit prepared by the Board agent. If a charged party agrees to make a witness available for an interview but refuses to allow an affidavit to be taken from the witness, the Region has discretion to decide whether to proceed with the interview on a case-by-case basis. Factors to be considered are the charged party's proffer of the information to be supplied by the interviewee, its relevance, the Board agent travel required to conduct the interview and delay. As a follow up, the Committee advised that some Regions appear to have a flat policy against conducting non-affidavit interviews. We advised that no Region should have such a policy. Rather, the Regions should exercise discretion in each case based on the circumstances present.

QUESTION: Can a policy be developed to avoid sudden deadlines and lack of sufficient information for a party to meaningfully respond (without intending to delay on-going investigations or disclosing witness identities)? Also, this sudden need to respond seems to be more prevalent in non-impact cases, which have remained dormant for some time.

RESPONSE: The time goals for the completion of investigations contemplate providing a charged party with an adequate time to respond to the charge allegations. Last minute deadlines should be avoided. Of course, there will be differences of opinion between parties and Board agents about what constitutes an "adequate" amount of time to respond. Experience shows that these differences can usually be resolved in a mutually satisfactory manner. Parties or their representatives should contact the Regional Director if a dispute over scheduling the presentation of evidence cannot be resolved with the agent.

QUESTION: While there is no committee consensus on this issue, what is the Agency's thinking concerning a "comprehensive reexamination" ("with the assistance of amici briefing") of its current practice of admitting a party's position statement into evidence, as urged by Board Members Cowen and Bartlett in Roman, Inc., 339 NLRB No. 24 (September 30, 2002) at footnote 2?

RESPONSE: We advised that we believe that a party should be held to its position and we noted that this policy is included in the Region's opening letter.

QUESTION: Is there a policy of issuing complaint or seeking enforcement when charged parties refuse to comply with investigative subpoenas? Are subpoenas necessary when the respondent is cooperating?

RESPONSE: There is no policy of issuing complaint against a charged party if that party refuses to comply with an investigative subpoena. These are fact bound decisions and every case is different. An investigative subpoena should be utilized in the initial investigation of an unfair labor practice charge only when evidence required to decide whether to issue complaint is not otherwise reasonably available. Ultimately, a complaint will issue in a case only after a determination, based upon an assessment of all the evidence obtained during the investigation, that a charge has merit. Clearly, if a party voluntarily and cooperatively provides requested evidence a subpoena is not necessary.

QUESTION: Regarding Section 10(j): What accounts for the reduced number of cases for which Board authorization has been sought (as reported in the General Counsel's November 8, 2002 Report on Selected Cases of Interest and Section 10(j) Cases)? Has the ratio of Regional submissions and GC requests to the Board changed? If so, what accounts for the change? What accounts for the reduced number of 10(j)'s being authorized by the Board? What types of cases are likely to warrant Section 10(j) relief?

RESPONSE: We informed the Committee that on August 9, 2002, General Counsel Rosenfeld issued a memorandum (GC 02-07) in which he stated that the Section 10(j) program is an important tool in administering the Act. As instructed in that memorandum, the Division of Operations-Management has continued to actively monitor the cases identified by the Regional Offices as being considered for Section 10(j) injunctive relief. Since FY 2000, the number of cases for which Regions concluded that Section 10(j) relief was not warranted increased and the number of cases in which Regions requested Section 10(j) relief declined. Thus, in FY 2002, the Regions recommended 10(j) injunctions in 87 cases as compared to 99 cases in FY 2001.

There was also a decline in the number of recommendations for Section 10(j) authorization made by the General Counsel to the

Board. In FY 2002, the General Counsel recommended that the Board authorize 10(j) proceedings in 26 cases, as compared to 43 cases in FY 2001. This decline resulted in large measure from the General Counsel's view, as articulated in GC Memorandum 02-07, that the allegations of the complaint must be sufficiently strong that the Board likely will enter the final relief sought on a temporary basis in the Section 10(j) proceeding and there is a real threat of remedial failure if the violation goes unremedied until the entry of a Board order. Fewer submitted cases met these criteria, and therefore fewer were recommended for Section 10(j) proceedings.

Of the 26 cases recommended by the General Counsel for Section 10(j) proceedings in FY 2002, the Board authorized injunction proceedings in 16 cases. In GC Memorandum 02-07, the General Counsel also noted several types of cases for which he is particularly interested in utilizing Section 10(j): in organizing campaigns to protect employee rights to vote under the protection of a Section 10(j) court order, employer assistance to and recognition of unions that represent a minority of unit employees, a successor employer's refusal to recognize a union that represented a majority of its employees hired from the predecessor employer; unfair labor practices committed by recidivist respondents, and serious cases of union picket line violence. These types of cases, as well as others within the 15 categories, are most likely to demonstrate the threat of remedial failure that warrants injunctive relief.

QUESTION: Is it the General Counsel's policy to allow Regional Directors to comment in dismissal letters on the appearance of inappropriate behavior and to caution against engaging in unlawful conduct in the future, even though no violation of the Act has been found?

RESPONSE: The Informal Revised ULP Casehandling Manual, at Section 10122.2 outlines the substantive requirements for a long-form dismissal letter. Such a letter must provide a detailed summary of the basis for the Regional Office determination. It should also be sufficient to permit the charging party to direct an appeal to the dispositive aspects of the dismissal and should not be merely a statement of the ultimate conclusion. Regional Directors have discretion to determine what information is necessary to satisfy these requirements.

In limited circumstances, most recently discussed in Memorandum GC 02-08 dated September 18, 2002 and found on the Agency Website, Regional Directors have the authority in exercising their prosecutorial discretion to issue what we call a "merit dismissal" letter in an ulp case. RD's will issue such a letter announcing a decision to hold a meritorious charge in abeyance for 6 months when it is determined that the Board remedy available does not warrant the expenditure of the Board resources required to obtain it. The letter that would issue from the Director in these cases would usually include a discussion of the allegation deemed by the Region to have merit. The Regional Director will inform the charged party that the charge will be dismissed if, within 6 months, no additional charge is filed that is determined by the Regional Director to warrant further proceedings.

QUESTION: Is it the Agency's policy to disallow non-admission clauses in settlement agreements reached after the close of an unfair labor practice hearing but prior to the Administrative Law Judge's decision? If so, is the position of the Charging Party considered? Are any other factors considered?

RESPONSE: It is the policy of the General Counsel to provide a full opportunity to the parties to reach a mutually satisfactory resolution of issues by settlement as an alternative to litigation. Regional Directors have wide, but not limitless, discretion in establishing standards for the settlement of unfair labor practice cases. The Casehandling Manual states that "[n]onadmission clauses should not be routinely incorporated in settlement agreements." Section 10130.8. The strength of a case is always a factor in determining settlement requirements. Similarly, the fact that litigation is complete is another factor. It is the duty of the Regional Director to consider these factors, as well as the particular allegations in the case and the unfair labor practice history of the charged party/respondent when considering the inclusion of nonadmissions language to achieve a settlement that otherwise effectuates the purposes of the Act.

QUESTION: Is it the Agency's policy that all settlement agreements, not just those involving recidivists, contain provisions required of formal Board settlements, including reinstatement of the complaint, agreement not to contest the Region's allegations in the subsequent motion for summary judgment and enforcement by the appropriate appellate courts? If not, what is the General Counsel's policy? Are the Region's aware of the Agency's policy?

RESPONSE: The standard Agency settlement agreement form is generally used in cases where an informal settlement is

proposed. The standard settlement agreement form provides that approval of the agreement by the Regional Director constitutes withdrawal of any complaint and notice of hearing as well as any answers filed in response. It does not contain provisions as to reinstatement of the complaint, an agreement not to contest the Region's allegations in a subsequent motion for summary judgment or enforcement by the appropriate appellate courts. Regional Directors, however, have the discretion to modify the settlement agreement form when they believe it is warranted. In accordance with Memorandum OM 02-44, available on the Agency's Website, default language can be included in the settlement agreement where the Region concludes that there is a substantial likelihood that the charged party will be unwilling or unable to fulfill its settlement obligations. Again we advised the committee that because these decisions are left to the sound discretion of the Regional Director, a flat policy to have such clauses in all cases, would be inconsistent with the exercise of discretion.

QUESTION: Is there a procedure in place to ascertain recidivism in considering informal settlement agreements in or among Regions?

RESPONSE: Regions check their records, including the electronic Case Activity Tracking System, to identify cases in which a charged party executed settlement agreements before deciding whether to approve an informal settlement agreement in a current case. They also can check the Appellate Court "look-up" system and contact other Regions.

QUESTION: What has been the Agency's experience in applying the mid-February 2002 "skip counsel" memorandum? What are the Agency's plans for issuing the further guidance indicated in its memo?

RESPONSE: "Skip Counsel" issues are handled by the Special Litigation Branch of the Division of Enforcement Litigation at the Agency's headquarters in Washington, D.C. Since Special Litigation started keeping statistics late in calendar year 2001, the Branch has handled almost 200 requests for assistance from Regional Offices. Most of those cases concerned contacts with former supervisors of represented parties during unfair labor practice investigations. Different jurisdictions employ different rules governing attorney ex parte communications with former supervisors of a party represented by an attorney. Therefore, operating guidelines require Regional Offices to call Special Litigation for clearance before interviewing a former supervisor without prior consent from the party's attorney. As we develop additional experience working with "skip counsel" rules in different jurisdictions we will issue further general guidance to the Regions.

QUESTION: How can the Committee assist the Agency in its ongoing efforts to improve the quality of court reporting and translating services?

RESPONSE: The Agency is continuing its efforts to improve the quality of court reporting. The Agency has explored other types of reporting technologies this year, including modified "real time" reporting services. Although it appeared that such technologies might have the potential for improving the accuracy and timeliness of transcripts, the Agency ultimately determined that such technologies were prohibitively costly for the Agency's limited resources this year.

However, in an effort to increase the pool of companies bidding on our reporting contracts this year, the Agency revised the contracts specifications to make them shorter and easier to understand. The Agency also provided pre-bid teleconferenced information sessions to prospective contracting candidates to explain our specifications and to address any questions. Some new contractors were present at these information sessions and we are hopeful that the sessions will generate additional participants in the bidding process.

The ABA Committee was informed that it can assist the Agency to ensure compliance with reporting contract specifications by contacting our point person, Paula Roy, Chief, Contract and Procurement Section, with reports of deficiencies and timeliness problems with the transcripts. The Agency can only move to correct transcript errors and to replace unsatisfactory contractors when deficiencies are brought to our attention. Our Regional Directors also are closely monitoring reporter performance.