

OFFICE OF THE GENERAL COUNSEL
Division of Operations Management

MEMORANDUM OM 86-49

21 May 1986

TO: All Regional Directors, Officers-in-Charge and
Resident Officers

FROM: Joseph E. DeSio, Associate General Counsel

SUBJECT: Referral of Subpoena Enforcement Proceedings by
District Court Judges to U.S. Magistrates

It has recently been called to our attention that, in certain district courts, proceedings to enforce Board subpoenas, both investigatory and trial, pursuant to Section 11(2) of the Act are being referred by district court judges to magistrates. The following is designed to provide basic guidance to Regional personnel regarding the practical consequences of such a referral and how to proceed in these circumstances.

The pertinent statutory provisions concerning the referral of district court proceedings to a magistrate without the consent of the parties are contained in 28 U.S.C. 636(b). 1/ Under 28 U.S.C. 636(b)(1)(A), a district court judge may have a magistrate decide any "pretrial matter" except certain

1/ The referral of district court proceedings to a magistrate by the consent of the parties is governed by 28 U.S.C. 636(c)(1). There will be no extended discussion of such consensual referrals since it is the agency's position that, absent extraordinary circumstances, it is not appropriate for Regional counsel to consent to the referral of a subpoena enforcement proceeding to a magistrate for disposition. As shown below, referral of a case to a magistrate will usually lengthen the overall proceeding and postpone its ultimate resolution, since it results in the creation of an additional level of review of the magistrate's rulings by the district court judge. Given the summary nature and purpose of a subpoena enforcement proceeding, it is preferable to avoid procedures that will unduly delay the resolution of the proceeding. In addition, consensual referral results in a more limited scope of review of the magistrate's findings and conclusions by the district court, or a court of appeals on direct appeal, and thus, in effect, gives the magistrate significant authority to determine the manner and extent to which a Board subpoena will be enforced. See 28 U.S.C. 636(c)(3) and (4). See also discussion infra, pp. 3-4.

enumerated motions. 2/ 28 U.S.C. 636(b)(1)(B) recites the magistrate's powers with respect to certain other specified matters including those excluded under 28 U.S.C. 636(b)(1)(A). 3/ In addition, 28 U.S.C. 636(b)(3) provides that: "A magistrate may be assigned such additional duties as are not inconsistent with the Constitution and the laws of the United States."

A petition to enforce a Board subpoena pursuant to Section 11(2) of the Act is a unique type of proceeding expressly entrusted by statute to the jurisdiction of the federal district courts. While not listed in 28 U.S.C. 636(b)(1)(A) as one of the excepted matters that a magistrate may not directly determine, the issue of whether and to what extent a Board subpoena may be enforced cannot be fairly characterized as a pretrial matter since the issue of enforcement is the only question that the district court has jurisdiction to decide. Similarly, the Board's subpoena enforcement proceeding is not explicitly included in the listing of matters covered by 28 U.S.C. 636(b)(1)(B). Accordingly, it is the position of the General Counsel that the referral of a Board subpoena enforcement proceeding for a ruling by a magistrate can only be accomplished pursuant to 28 U.S.C. 636(b)(3). See Aluminum Co. of America v. E.P.A., 663 F.2d 499, 501-502 (4th Cir. 1981) (district court's referral to a magistrate of motion to quash agency's administrative search warrant fell under coverage of 28 U.S.C. 636(b)(1)(B) or (b)(3)).

2/ 28 U.S.C. 636(b)(1)(A) provides:

Notwithstanding any provision of law to the contrary--

(A) a judge may designate a magistrate to hear and determine any pretrial matter pending before the court, except a motion for injunctive relief, for judgment on the pleadings, for summary judgment, to dismiss or quash an indictment or information made by the defendant, to suppress evidence in a criminal case, to dismiss or to permit maintenance of a class action, to dismiss for failure to state a claim upon which relief can be granted, and to involuntarily dismiss an action. A judge of the court may reconsider any pretrial matter under this subparagraph (A) where it has been shown that the magistrate's order is clearly erroneous or contrary to law.

3/ 28 U.S.C. 636(b)(1)(B) provides:

(B) a judge may also designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, of any motion excepted in subparagraph (A), of applications for posttrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement.

If the court refers the subpoena enforcement proceeding under 28 U.S.C. 636(b)(1)(A) the Region should file an opposition to such procedure. This is particularly important given that 28 U.S.C. 636(b)(1)(A) provides that the district court judge may reconsider the magistrate's order only when it is shown to be "clearly erroneous or contrary to law," thereby extremely limiting the scope of review. See, supra, p. n. 2. On the other hand, if the court refers the Section 11(2) proceeding to the magistrate under the 28 U.S.C. 636(b)(1)(B) or 636(b)(3), we should not oppose referral since the scope of review in both instances appears to be the same. See, infra, pp. 3-4.

The referral of a case to a magistrate has several important consequences with respect to the handling of subpoena enforcement proceedings brought under Section 11(2). A de novo determination by the district court judge is required with respect to matters referred to a magistrate under 28 U.S.C. 636(b)(3). See Aluminum Co. of America v. E.P.A., 663 F.2d at 502 n. 8; United States v. Miller, 609 F.2d 336, 339-340 (8th Cir. 1979). In addition, 28 U.S.C. 636(b)(1)(C) expressly provides that where objections are filed to the magistrate's proposed findings and recommendations under 28 U.S.C. 636(b)(1)(B), the district court judge is to make a de novo determination, and may also decide to receive further evidence or to recommit the matter to the magistrate with instructions. Given this broad scope of review of a magistrate's determination on matters referred pursuant to 28 U.S.C. 636(b)(3) or (b)(1)(B), Regions should not be reluctant to seek reversal or modification of unwarranted aspects of a magistrate's order in subpoena enforcement cases, or to defend the Board's position in cases where a favorable ruling of the magistrate is challenged by a respondent.

Further, since a magistrate's authority under 28 U.S.C. 636(b)(1)(B) is limited to making "proposed findings of fact and recommendations for the disposition," it follows that any ruling or determination made by the magistrate in a subpoena enforcement case referred pursuant to that provision is merely advisory in nature. There is no final, binding order until the magistrate's recommendations are acted upon by the district court judge. The same principles would presumably apply to subpoena enforcement proceedings referred pursuant to 28 U.S.C. 636(b)(3), given the district court's broad scope of review over a magistrate's rulings on matters referred pursuant to that section. 28 U.S.C. 636(b)(1)(C) provides that a party may serve and file written objections within ten days after service of the magistrate's proposed findings and recommendations, as provided by the rules of the court involved. Therefore, the Region should be prepared to file prompt objections to any unsatisfactory portions of a magistrate's ruling or decision, and be familiar with any pertinent local rules of the district court in which the subpoena

enforcement proceeding is pending. ^{4/} In addition, where no exceptions are filed to a magistrate's findings and conclusions, the Regions counsel should take steps to ensure that the district court enters a final order adopting the magistrate's decision.

Any questions concerning the substance of this memorandum or specific problems which may arise in subpoena enforcement cases referred to a magistrate should be directed to the Special Litigation Branch of the Division of Enforcement Litigation.

J.H.D.

cc: NLRBU

^{4/} It is noteworthy that Rule 6(a) of the Federal Rules of Civil Procedure now provides that in computing filing deadlines of less than 11 days, "intermediate Saturdays, Sundays, and legal holidays shall be excluded in the computation." These time computations, however, may be altered by local rule.