

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 14- 02

March 26, 2014

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

FROM: Richard F. Griffin, Jr., General Counsel



SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure  
Committee of the Labor and Employment Law Section

In late February, I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA Labor and Employment Law Section together with several senior Agency managers. As in years past, a primary purpose of this meeting was to respond to and discuss Committee concerns and questions about Agency casehandling processes. As prior General Counsels have done, I am sharing the P & P Committee members' concerns and the Agency's responses with you so that you can have the benefit of this important exchange. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed to me and my responses.

During my tenure as General Counsel, it is my intention to conduct the business of the Office of the General Counsel in a productive manner. Continuing a constructive, cooperative relationship with the organized Bar is an important element of this objective and one to which I am committed. At the Midwinter meeting, members of the Committee shared their appreciation of the constructive relationships enjoyed by members of many local P&P groups with individual Regional Directors. I encourage you to facilitate those exchanges where they do not exist and to continue and broaden those relationships where they do. Open communication with representatives of both management and labor who appear before us enhances the performance of our mission and benefits the public we serve.

Attachment  
Release to the Public

cc: NLRBU  
NLRBPA

MEMORANDUM GC 14- 02

## **I. Unfair Labor Practice Issues**

### **A. Statistics**

**Please provide the number of ULP charges filed, the settlement rate, the number of complaints issued, the litigation win rate, the number of alleged instances of default under settlement language, the number and type of cases sent to the Division of Advice, and the average length of time a case remains in the Division of Advice.**

In FY 2013, 21,394 ULP charges were filed, the settlement rate was 92.8%, 1272 complaints issued, and the litigation win rate was 85.7%. As to the cases sent to the Division of Advice in FY 2013, 559 were submitted with a median case-processing time of 21 days. The submitted cases involved novel/difficult legal issues, high-profile labor disputes, charges pending in multiple Regional Offices, or Section 10(j) authorization requests.

With regard to instances of default under a settlement, the Agency does not have data on the number of instances where a Region notified a charged party of an alleged default that was thereafter cured. However since January 2011, when GC 11-04 issued instructing regions to routinely include default language in all informal settlement agreements and all compliance settlement agreements, the Board has issued orders in 19 cases in which counsel for the General Counsel sought a default judgment because of failure to comply with an informal settlement agreement. In one case, the Board issued an order in a case where there was a failure to comply with a compliance agreement. Eight more cases are currently pending before the Board. Since January 2011, settlements have been approved in more than 3935 cases. Accordingly, counsel for the General Counsel has sought a default judgment in less than 1% of the cases in which a settlement was approved.

### **B. Section 10(j) Injunctions**

- 1. Please provide statistics concerning the number of 10(j) injunctions requested by the Regions, the number submitted to the Board, the number authorized by the Board, and the number granted by the courts.**

In FY 2013, 161 10(j) requests were received from Regional offices, both go and no go cases. The General Counsel submitted 43 cases to the Board requesting authorization for 10(j) proceedings, the Board authorized proceeding in 41 cases and the other two were withdrawn before Board consideration based on new case developments. Of those authorized by the Board, the Regions obtained settlements or adjustments in 15 cases. Of the 22 petitions filed in district court, 11 were litigated to conclusion by the end of the fiscal year. The Board won eight cases, one being a partial win, and lost three.

**2. Are there any trends and/or novel issues presented in 10(j) cases this past year?**

25 cases submitted involved first contract bargaining and 58 involved discharges during an organizing drive. See also response to Section IV.A. regarding litigation involving the Acting General Counsel's appointment, *Noel Canning*, and related issues.

**C. Settlement Issues**

**1. What is the policy on negotiating settlement terms with a Charged Party prior to notifying the Charging Party about the specifics of a settlement? Is there a uniform policy on the Regions discussing settlement concepts with counsel for a Charging Party earlier in the process and prior to negotiating terms with the Charged Party?**

NLRB Casehandling Manual Sections 10126 and 10128 provide guidance on the timing and techniques of settlement attempts. In the case of pre-determination settlement efforts, Section 10126.1 of the Manual provides that, "if it becomes apparent to the Regional Office, even as early as the initial contacts with the parties, that a settlement or non-Board adjustment might quickly be achieved, resolution should be explored, consistent with Regional Office policy." Regional Office policies include parameters regarding the scope of responsibility for individual Board agents. In cases where the Region has made a merit determination, Section 10126.2 of the Manual states that "the Board agent should pursue settlement before issuance of the complaint."

As to the manner in which settlement is pursued, Section 10128.5 of the Manual instructs that, "[a]bsent unusual circumstances, the initial settlement meeting should include only the charged party and its representatives." In this meeting, the Regional Office representative is to summarize the scope of meritorious allegations, describe the facts and law supporting the Regional Office's position, and explain the substance of the settlement, "noting that the elements of the proposal are based on standard Board policies with respect to the types of allegations found to be meritorious." *Id.* Section 10128.5 further instructs that the Regional Office representative should "listen carefully to the charged party's position and consider whether any accommodations can be made to address objections raised to the proposal. *Id.* Section 10128.7 of the Manual provides that the "Regional Office should keep the charging party apprised of the status of settlement efforts" and inform the "charging party of the advantages of settlement."

During the ABA meeting this February, this question was discussed in some detail. We believe it is the norm that Charging Parties are brought into the settlement discussions early in the process. However, in light of the comments made at the ABA meeting, we have reminded the Regional Directors of the importance of consulting with the Charging Parties early in the settlement discussions to ensure that the Regions are aware of the Charging Parties' positions on settlement issues, including what is an appropriate remedy in the case.

**2. What is the policy on enforcing settlement agreement default language where there are different management officials and/or different factual circumstances?**

The Agency does not have a specific policy regarding enforcement of default language in settlement agreements where different management officials or different factual circumstances are involved. A party could certainly argue that enforcement of the default language was inappropriate because the new conduct was sufficiently different from the conduct in the prior case or because the Charged Party's representatives were different from those in the prior case. Those arguments would be carefully considered. The decision on whether to seek a default judgment is left to the Regional Director's discretion, although oftentimes, the Regional Director will seek guidance from Headquarters.

At the ABA meeting, a question was raised with regard to the Regional flexibility when considering settlement agreement breaches where a rule that was modified in response to a merit finding is thereafter found to be violative in a subsequent case, particularly where the prior case was settled with default language. The Regional Directors have and use their own discretion to determine whether the settlement agreement has been breached and whether to proceed for a default judgment. Having said that, clearly a Charged Party's good faith attempt to re-write a rule previously found violative would weigh in favor of not pursuing default judgment.

**3. Are there plans to post settlement agreements on line?**

The Agency continues to increase transparency to the public through the posting of case pages with a docket that includes links to relevant documents. There is an ongoing effort to add more documents, such as settlement agreements, once they are appropriately redacted.

**4. Is there a standard percentage used by the Regions in calculating front pay, such as the 80% standard for back pay?**

At this time, there is not standard percentage used by the Regions in calculating front pay.

See: OM 99-79 *Remedial Initiatives* and 13-02 *Inclusion of Front Pay in Board Settlements* for further information about the Agency's approach to front pay.

**5. When and why has default language been eliminated or limited in scope or duration? What if any policies or approvals are required for this?**

Currently, Regional Directors have discretion to limit the default language in scope and duration, and to eliminate default language if the settlement agreement is entered into prior to the Region making any determination on the merits of the case. A

new guidance memo about default judgment parameters and procedures will issue shortly.

#### D. Deferral

##### **1. Are there any new trends or policy changes with respect to deferring cases pre-arbitration and/or deferring to arbitration decisions?**

At this time, the pre-arbitral and post-arbitral policies put forth by former Acting General Counsel Solomon related to both the Agency's handling of deferred cases involving lengthy delays in the grievance-arbitration procedures and its review of grievance settlements and arbitrator's awards in 8(a)(1) and (3) cases remain in effect.

##### **3. Can you please provide statistics on deferrals including the number of cases deferred and the length of time pending?**

There are currently between 1450 and 1500 cases in deferral status. Of the approximately 540 cases that have been in deferral status for over a year, only 223 and 110 have been in deferral status for over two years and three years, respectively.

##### **3. Are there circumstances under which certain types of cases are not being deferred?**

During the past year, the Agency has had the opportunity to apply the above described initiatives regarding both pre-arbitration and post-arbitration deferrals. With regard to delays in the arbitration process, in one case, it was determined that deferral was appropriate where the grievance procedure was slow moving but functional, all of the alleged violations were committed by a single supervisor, were directed at employees of one four-person department in a unit of approximately 1,200 and there were no unlawful discharges. In another case, it was found that deferral was not appropriate where the employer had demonstrated a pattern of denying employees' *Weingarten* requests and disciplining employees for exercising their *Weingarten* rights, the grievance procedure had become dysfunctional, the oldest grievance was over two years old, and none of the grievances had been submitted for arbitration. Similarly, in another case, it was found that continued deferral of a case involving the suspension of a union officer was not appropriate where the over two-year delay in reaching arbitration threatened to undermine his credibility and authority as bargaining representative.

As to a case involving post-arbitration review, the Agency evaluated whether deferral to an arbitrator's award was appropriate where it did not appear the arbitrator had correctly enunciated the statutory principle involved. In that case, it was determined that an arbitrator, in upholding the discharge of a union vice president, failed to correctly articulate the statutory principle involved when she found his actions in contesting the employer's assignment of overtime work was neither concerted nor protected. Her analysis concerning the complaints concerted nature was flawed as it did not correctly apply the Board's *Interboro* decision, and her finding that his conduct

was unprotected was flawed as she failed to consider the factors set forth in the Board's *Atlantic Steel* decision.

### E. Investigative Subpoenas

#### 1. Are there any new trends or policies with respect to the issuance or enforcement of investigative subpoenas?

There are no new trends or policies with respect to the issuance or enforcement of investigative subpoenas.

#### 2. Can you please share statistics concerning the use of investigative subpoenas to obtain testimony and documents, the frequency of petitions to revoke and the success of such petitions?

The following table shows the number of investigative subpoenas issued, by Region and by type of subpoena, during FY 2013. The table also shows whether the Region reached a merit, non-merit or other (deferred, pending, withdrawn prior to merit determination) determination in the case.

Investigative subpoenas were issued in 740 cases, comprising 3.4% of the total intake of charges.

Please see the two charts below.

REGION	No. CASES	A/T	D/T	TOTAL	MERIT	NON MERIT	OTHER	PTN REVK.	ENF.
1	24	13	17	30	10	9	5	4	0
SR 34	6	1	6	7	3	3	0	3	0
2	39	43	35	78	14	13	12	4	0
3	6	10	0	10	3	3	0	0	0
4	16	22	8	30	6	7	3	1	2
5	30	47	11	58	17	8	5	2	0
6	28	29	8	37	13	10	5		
7	30	35	13	48	16	11	3		
8	11	15	6	21	6	1	4	0	1
9	49	131	38	169	31	17	1	3	1
10	18	37	9	46	9	5	4	0	0
SR 11	27	42	11	53	15	9	3	5	0
Nashville	5	3	4	7	3	2	0	3	0
12	24	37	12	49	10	11	3	1	0
SR 24	27	18	21	39	16	5	6	1	1
13	21	29	12	41	8	9	4		
14	3	9	0	9	2	1	0		
SR 17	4	6	1	7	1	3	0		
15	36	51	24	75	18	5	13	1	1

SR 26	19	21	13	34	12	5	2	1	0
16	43	90	11	101	16	19	8		
18	16	22	12	34	9	5	2		
SR 30	19	28	15	43	9	8	2		
19	32	22	28	50	22	10	0		
SR 36	4	3	5	8	3	1	0		
20	16	10	27	37	11	2	3		
SR 37	1	0	1	1	0	0	1		
21	30	36	24	60	13	11	6		
22	29	21	24	45	10	7	12	8	5
25	4	4	3	7	2	1	1		
SR 33	3	9	2	11	0	1	2		
27	5	6	2	8	3	2	0		
28	18	33	10	43	12	1	5		
29	21	14	22	36	8	10	3	3	1
31	29	19	21	40	10	13	6		
32	47	66	40	106	19	15	13		
Totals	740	982	496	1,478	360 (48.5%) (59.7%)	243 (32.8%) (40.3%)	137 (18.9%)		

There were 40 petitions to revoke investigative subpoenas that were denied by the Board and 34 petitions to revoke investigative subpoenas that were ultimately resolved. The Regions began enforcement proceedings in 18 matters. In four of those cases, the Agency prevailed, and, in the remaining 14 cases, the disputed issues were resolved.

**3. Do you have any statistics on the impact of such petitions on the length of the investigation and the impact of such investigative subpoenas in making merit determinations?**

The Agency does not have statistics on the impact of petitions to revoke on the length of investigations or the impact of investigative subpoenas in making merit determinations. However, the issuance of an investigative subpoena(s) and/or the filing of a petition to revoke typically lengthen the investigation. When making a decision regarding issuance of investigative subpoenas, the Agency weighs the potential delays against the potential for more informed decision making resulting from obtaining relevant testimony or documents.

**4. Have you seen instances where the regions issued investigative subpoenas for the purpose of extending internal timelines? Is there a policy about this?**

We have not seen instances where the Regions issued investigative subpoenas to extend deadlines, nor have we seen instances where Regions have sought evidence through an investigative subpoena that was not relevant to the ultimate resolution of the matter. Our policy allows a Region additional time to subpoena and obtain necessary

and relevant information from an uncooperative party or third-party entity due to the inherent delays in completing the investigative process in those circumstances.

**F. For some ULP cases, the website lists the case number and employer name only. A user must file a FOIA request to obtain additional information regarding the case. What is the basis for this practice? Are there plans to list more information, and eventually move to a system like PACER used by the federal courts.**

After a recent review of our website case pages, a revision was made to the ULP case pages to ensure consistency with representation case pages such that all institutional entities are identified. The Agency plans to post more pre-hearing information on our website's case pages, similar to a court's on-line docket system, after appropriate redactions have been performed, and will continue its efforts to post unredacted post-hearing documents on-line.

### **G. Advice Memoranda**

#### **1. Are there plans for additional Advice Memoranda regarding employer work rules and handbooks?**

The Board has issued a number of recent decisions involving employer work rules and handbooks that should provide valuable assistance to practitioners. There are no immediate plans to issue new guideline memoranda regarding work rules and handbooks, but to the extent that new issues in this area come to our attention, we will consider publishing additional guideline memoranda or reports.

#### **2. Are there plans for additional Advice Memoranda in other areas?**

There are no immediate plans for guideline memoranda regarding other issues, but there are a number of significant issues pending before the newly-confirmed Board and it is likely that there will be guidance provided to the Regional offices once decisions issue in those cases. Some of those issues include: the application of *Specialty Healthcare*, 357 NLRB No. 83 (2011) to retail store bargaining units (*Neiman Marcus Group*, 2-RC-76954, and *Macy's Inc.*, 1-RC-91163); the proper test for determining whether religiously-affiliated educational institutions are exempt from the Board's jurisdiction (*Pacific Lutheran University*, 19-RC-102521); the question of which factors identified in *NLRB v. Yeshiva University*, 444 U.S. 672, are most significant in making a finding regarding managerial status of university faculty members (*Pacific Lutheran University*, 19-RC-102521); and the question of whether unions may charge nonmember *Beck* objectors for various types of legislative expenses (*United Nurses & Allied Professionals (Kent Hospital)*, 1-CB-11135).

## H. Case Processing Issues

- 1. What is the policy regarding counsel for a Charging Party being present while counsel for the General Counsel prepares a non-agent witness for an ALJ trial, where the Charging Party brought forward the witness during the investigation?**

Pursuant to Section 10058.4(c) of the Unfair Labor Practice Casehandling Manual and OM-02-36, an attorney or other representative of a party, who does not represent a non-agent witness, will ordinarily not be permitted to be present at the interview of such a witness. The underlying policy is designed to avoid the potential that the non-agent witness would feel restrained or uncomfortable in providing information adverse to the party whose attorney or agent is present during the interview. This policy is no less significant, and in some cases is even more significant, after complaint issues and during the trial preparation phase of the case, during which time the representative may be prepped to provide his/her own untainted testimony and/or evidence may be uncovered that is adverse to the Charging Party. Indeed, pursuant to Section 10334 of the ULP Casehandling Manual, in preparing for trial, counsel for the General Counsel is commended to seek any additional evidence bearing upon the allegations of the complaint, and where revealed, bring such evidence to the Regional office's attention whether it supports those allegations or undermines them. The only exception to the above is if the non-agent witness confirms in writing that the counsel for the party is the witness' counsel as well.

- 2. What is the General Counsel's policy on authorizing complaints and placing before the Board theories of violations contained in dissenting opinions in prior cases?**

The General Counsel continues the long tradition of former General Counsels, who have recognized that predictability through established precedent is helpful to parties in managing labor relations. However, in certain matters, after a thorough analysis of the facts and law, the General Counsel may conclude that the current Board should reconsider precedent and will bring those to the attention of the Board through litigation. The General Counsel has highlighted some areas of consideration in the most recent Memo on Mandatory Submissions to Advice. See GC 14-01.

- 3. Is there a policy concerning the kind and amount of information that should be contained in Regional Directors' long-form dismissal letters? Can more information be provided in dismissal letters?**

Pursuant to Casehandling Manual Section 10122.1, it has long been Agency policy to issue a long-form dismissal letter containing a detailed explanation of the reasons for refusing to issue a complaint once a determination to dismiss has been made and the Charging Party elects not to withdraw. Charging Parties have the option of electing to omit the detailed explanation from the dismissal letter, in which case the Region will issue a short-form dismissal letter. Section 10122.2 of the Casehandling Manual provides that the long-form dismissal letter should provide a detailed summary

of the basis for the Regional Office's determination, and should be sufficient to permit the Charging Party to direct an appeal to the dispositive aspects of the dismissal. The Manual further guides Regions to include the particular reason(s) for the determination; the material element of the charge that was found unsupported; and, if there are multiple bases for the disposition, directs they all be listed. There is no provision for long-form dismissal letters to be supplemented with additional information after they are issued. However, if a Charging Party is confused about the rationale for the dismissal, Regional personnel will certainly attempt to clarify further.

**4. Is there a policy regarding Regional offices dismissing charges without affording the Charging Party the opportunity to respond to a Respondent's evidence and/or position?**

The policy with regard to all investigations is to gather the relevant information so that an informed decision can be made by the Regional Director. In some cases, Charging Parties will have addressed the factual evidence and legal arguments of the Charged Party early in the investigation, and if there is no dispute once the Charged Party's evidence is obtained, no further response from the Charging Party would be sought. However, in situations where the Charged Party presents factual evidence or legal arguments that the Charging Party has not addressed, the Regions will seek further information from the Charging Party. Section 10068.1 of the Unfair Labor Practice Casehandling Manual provides guidance to Board Agents to ensure that any given investigation is complete. Specifically, the Manual states that the case file should contain all relevant evidence including that bearing on material credibility conflicts and that, if additional evidence is required, it must be expeditiously obtained prior to presenting the case for determination.

**5. Has the General Counsel's policy regarding travel in the field by Board agents in investigations changed due to budget pressures, staffing constraints, technology or otherwise?**

The general policy regarding travel for investigations is set forth in ULP Casehandling Manual Sec. 10054.2(a):

In Category II and III cases, the preferred method of obtaining affidavits is through a face to face meeting. \*\*\* On the other hand, in Category I cases where the issues are generally more straightforward, telephone affidavits may be appropriate.

This policy has been refined to allow for alternative investigative techniques, such as questionnaires and telephone affidavits, not only in Category I cases, but also in certain Category II cases, including those involving requests for information or duty of fair representation allegations. Moreover, Regional Directors have the discretion to use these techniques for other Category II and III cases, where appropriate. More specifically, where substantial travel will be necessary, alternative investigative techniques may be employed, particularly when the affidavit is a supplemental statement, corroborative evidence is being presented, or there is a very high probability that the case has no merit. See GC Memorandum 02-02.

OM Memo 13-37, Casehandling Cost Savings Instructions for Fiscal Year 2013, issued because the Agency was under a sequestration order that reduced our budget. In that memo, referring to the above policy, Regional Directors were advised to make full use, as appropriate, of alternative investigative techniques, including “questionnaires, telephone affidavits, videoconference interviews, where feasible, position statements and other techniques” that reduce or eliminate travel costs associated with travel outside the commuting area. Moreover, travel coordinators in each Region were advised to manage travel on a daily basis, including clustering travel assignments for Board agents. Interregional coordination of travel for investigations was encouraged so as to permit Board agents traveling in the outskirts of their Regions to assist in investigations (or elections) in the outskirts of a contiguous Region.

Notably, while our FY 2014 budget has allowed for more casehandling travel, the Agency still considers and implements cost savings measures, as appropriate.

**6. What is the Board’s policy concerning whether hearing officers should withdraw a subpoena after it becomes moot during the course of a hearing.**

Normally, a hearing officer would not have the authority to “withdraw” a subpoena since that right belongs to the party that has issued the subpoena. A hearing officer should resolve subpoena issues before closing a hearing.

**7. In the past, when a company’s policies were found to be overbroad in violation of Section 7, some Regions would both seek a remedy setting aside the policies and, at the same time, work with the employer to craft a lawful substitute policy. Other Regions have stated that they will only seek rescission of the overbroad policy. Is there a uniform policy governing this issue?**

Regions generally seek rescission of the unlawful rule, not modification. We would not specifically seek a “lawful modification” of the rule because the employer can choose not to have a rule on that subject at all if it cannot have the rule it wants. If an employer wants to settle a case by modifying a rule and seeks our approval of new language, a Region typically informs the employer that it cannot guarantee that a charge over a modified rule would be dismissed. If a case is litigated and the employer substitutes the unlawful rule with a modified one that is also unlawful, the Region would find that the employer has not complied with the order. If the modified rule appears to be lawful under existing Board law, the Region would find that the employer has complied with the order.

There are a number of excellent Advice memoranda addressing work rules that provide guidance in evaluating the legality of work rules.

**8. Can you please provide information on Backpay Tech and whether it can be accessed by practitioners?**

BackpayTec is a Microsoft Excel based program developed by Agency personnel to calculate backpay. Over the years, this program has been modified to calculate backpay as required by the Board. For example, the program was updated when the Board required the payment of daily compound interest in *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*. Most recently, the program was updated to calculate the excess tax liability payments required in *Latino Express*. In order to facilitate changes to the interest and tax rates in the program, BackpayTec has been linked to several interest and tax tables which are kept current by Agency personnel. While BackpayTec is not available to the public, all Regional staff members have been trained on BackpayTec and will be happy to provide backpay calculations upon request.

**9. Is there a policy or uniform practice concerning Board agents informally sharing with a Charged Party a summary of the Charging Party's factual and legal claims?**

When communicating with the Charged Party representative to obtain evidence, Board agents are expected to relate the contentions advanced with regard to all violations alleged. (see CHM 10054.4). It has long been the Agency's policy that, unless the Charged Party is extending full and complete cooperation, the Board agent should send a letter to its representative detailing the Regional office's request for such cooperation, including a deadline for compliance. See OM-06-54. The degree of detail contained in such a letter depends upon the nature of the allegations at issue. For instance, if an unlawful statement is alleged, the letter should contain (a) a general description of the statement; (b) the name of the supervisor or agent who is alleged to have made the statement; (c) the approximate date the statement is alleged to have been made; and (d) the location of the alleged conversation. In other cases, such as a discharge or a bargaining case, Board agents often disclose specific additional information to ensure a complete investigation, while protecting the confidentiality of the witnesses. Where the case includes pivotal questions of law, Board agents are urged to candidly disclose the legal theories under consideration and invite a position statement or memorandum of law addressing such issues.

**10. What is the policy on taking an affidavit from a person whose supervisory status is in dispute? What are the policies and procedures concerning determination of whether and when an interview can go forward?**

The policy for taking affidavits from a person whose supervisory status is uncertain is found in Section 10058.2(c) of the ULP Casehandling Manual. Pursuant to that provision, a Board agent is permitted to conduct an initial interview in an attempt to determine the person's status before proceeding with a substantive interview. Thereafter, the Board agent should proceed as follows: If the initial inquiry establishes that the individual is a supervisor or party agent, the Board agent cannot proceed with a substantive interview without the consent of the party's attorney. If after the initial

inquiry there remains uncertainty concerning the individual's supervisory or agency status, the Board agent is to suspend the interview and seek guidance from the Regional Office. The Regional Office often contacts Special Ethics Counsel in this situation. Thereafter, if it is determined that:

the individual is a supervisor or party agent, the Board agent may not resume the interview without the consent of the party's attorney. If, however, it is determined, based on the preliminary interview or thereafter, that the person is not a supervisor or party agent, the Board agent may conduct a substantive interview of the individual without informing or obtaining consent from the party's attorney.

**11. Have the Regions noticed a trend whereby investigators rely more on email communications and less on telephone or in-person interactions with charged Parties, Charging Parties and witnesses?**

There definitely has been an increase in the frequency of Board agents' use of email to communicate with parties and witnesses about logistical and procedural matters.

During the ABA conference in February, we learned that some Board agent e-mail communications with witnesses, parties, and representatives were focused on more substantive, as opposed to procedural, issues. We have addressed this issue with the Regions.

**12. In light of changes to technology, does the Board still believe that in-person affidavits are preferable to telephone, Skype or other remote affidavits. And, if so, why?**

We still believe that face to face affidavits are preferable. Our experience has been that the investigator is able to develop a better rapport with affiants if the communication is in person. In addition, this contact lends itself more to expanding the discussion with follow up questions relevant to a complete investigation. We have used videoconferencing from time to time to facilitate an investigation, yet our experiences have not been as satisfactory as face to face contact. However, we recognize that the growing availability of Skype and other technologies, as well as improvements in videoconferencing, may well lead us to re-evaluate our investigative techniques in the future.

## II. Representation Cases

### A. Statistics

- 1. Please provide statistics concerning the number of RC and RD petitions filed, the number of elections conducted in each category, and the union win rate.**

In FY 2013, the number of RC and RD cases filed were 1986 and 472, respectively.

For cases that closed in FY 2013, the number of elections for RC cases was 1330 and for RD cases was 202. The union's win rate was 64.06% and 39.11%, respectively.

- 2. Please provide statistics concerning the median number of days from petition election, as well as statistics on cases that took longer than median.**

The median number of days from petition to election in FY 2013 was 38 days. The Agency does not have statistics on the cases that exceeded the median.

### B. Election Rules

- 1. Can you comment on the status of new election rules?**

The NLRB is proposing to amend its rules and regulations governing the filing and processing of petitions relating to the representation of employees for purposes of collective bargaining with their employer. The Board explained when issuing the proposed amendments that these modifications would simplify representation-case procedures and render them more transparent and uniform across regions, eliminate unnecessary litigation, and consolidate requests for Board review of Regional Directors' pre- and post-election determinations into a single, post-election request. The proposed amendments would allow the Board to more promptly determine if there is a question concerning representation and, if so, to resolve it by conducting a secret ballot election.

The Board first made these proposals on June 22, 2011. 76 FR 36812. Although the Board issued a final rule on December 22, 2011 that adopted a number of the proposed amendments (and that deferred others for further consideration) 76 FR 80138, that final rule was set aside by the U.S. District Court for the District of Columbia on May 14, 2012, on procedural grounds relating to the voting process used by the Board for that rule. On January 22, 2014, the Board issued a final rule rescinding the amendments adopted by the December 22, 2011 final rule. 79 FR 3483. The present proposal is, in essence, a reissuance of the proposed rule of June 22, 2011.

Timeline for the Board's representation rulemaking:

<u>Rulemaking Action Description</u>	<u>Action Date</u>	<u>Federal Register</u>
Notice of Proposed Rulemaking (NPRM)	6/22/2011	76 FR 36812
NPRM Comment Period End	9/6/2011	
Final Rule (Selected Provisions)	12/22/2011	76 FR 80138
Final Rule Effective (Selected Provisions)	4/30/2012	
Final Rule Rescinding December 22, 2011 Amendments (Selected Provisions)	1/22/2014	79 FR 3483
NPRM	2/6/2014	79 FR 7317
NPRM Comment Period End	4/7/2014	
NPRM Reply to Comment Period End	4/14/2014	
Hearings on NPRM	4/10 & 11/2014	

**2. Are there any other rules being considered or drafted?**

Not at this time.

**C. Election Procedures**

**1. Is there a uniform policy regarding the time for scheduling a hearing after the receipt of a petition?**

The Agency has a number of policies that impact the time for scheduling a hearing after the receipt of a petition. Section 11082.3 of the Casehandling Manual for Representation Cases states that a Regional Director should set an early date for the hearing, consistent with the Agency's goals of expeditious processing. Under the Board's holding in *Croft Metals, Inc.*, 337 NLRB 688 (2002), the notice of hearing must issue no less than five (5) working days prior to the date of the hearing, absent a clear waiver from the parties. Consistent with the requirements set forth in Form NLRB-4338 (Notice Regarding Representation Case Hearings), a postponement request will not be granted unless good and sufficient grounds are shown and a request for postponement to a date more than 14 days after the filing of the petition will normally not be granted absent extraordinary circumstances.

**2. What qualifies as "good cause shown" for granting an extension for the hearing date?**

Good cause is a relative term that depends upon all the circumstances of each case.

## **D. Mail Ballots and Off-site Elections**

### **1. What is the current policy regarding mail ballot elections in both multi and single facility locations? Is there a new policy regarding mail ballots for government contractors whose employees are in government-controlled facilities?**

Board policy regarding mail ballot elections, whether in a single- or multi-facility location unit, was articulated in *San Diego Gas and Electric*, 325 NLRB 1143 (1998). In that case, the Board stated that a Regional Director should use his/her discretion in deciding which type of election to conduct, taking into consideration at least the following situations that normally suggest the propriety of using mail ballots:

- (a) Where eligible voters are “scattered” because of their job duties over a wide geographic area;
- (b) Where eligible voters are “scattered” in the sense that their work schedules vary significantly, such that they are not present at a common location at common times; and
- (c) Where there is a strike, lockout or picketing.

If any of the foregoing situations exist, the Regional Director should also consider the desires of the parties, the likely ability of voters to read and understand mail ballots, the availability of addresses for employees, and, finally, what constitutes the efficient use of Board resources. The Board further noted that there may be other relevant circumstances that a Regional Director may consider in deciding whether to conduct a mail ballot election.

There is no new Board policy regarding mail ballots for government contractors whose employees are in government-controlled facilities.

### **2. What is the current policy for conducting off-premises elections?**

The Board has accorded Regional Directors wide discretion on when and where to hold an election. However, it is the Agency’s view “...the best place to hold an election, from the standpoint of accessibility to voters, is somewhere on the employer’s premises. In the absence of good cause to the contrary, the election should be held there.” (See Section 11130.2 CHM).

However, there are some circumstances, such as when conducting a re-run election, which may cause the Regional Director to determine that an off-site election is warranted, e.g., when there are egregious or pervasive employer unfair labor practices that may compromise voter free choice if the election were to be held on the employer’s premises. In making a determination about the election location, a Regional Director should consider the following factors: 1) the preferences of all the parties; 2) the extent and nature of prior unlawful or objectionable conduct and whether the election is being held pursuant to a request to proceed; 3) the advantages that may accrue to the employer over other parties if the election is conducted on employer-owned or

employer-controlled premises; and 4) the suitability of alternative sites, including sites proposed by the petitioner. See OM 12-50. In addition, when there is a dispute among the parties about the location of the election, a Regional Director should issue to the parties a written explanation of the Region's determination regarding the location of the election.

**3. Please provide statistics concerning the use of mail ballots and the holding of off-site elections.**

During FY 2013, the Agency conducted a total of 1,620 elections, with 172 mail ballot elections and 14 mixed manual/mail ballot elections. The Agency does not maintain statistics on the holding of off-site elections.

**III. Budgetary and Operational Issues**

**A. Are budgetary limitations preventing the replacement of retiring employees and/or employees on long-term leave?**

In FY 2013, due to budgetary constraints compounded by the sequester order, we were forced to engage in significant and substantial cost cutting measures, including very limited hiring wherein we only filled vacant positions that were deemed critical at the time. We are currently assessing our FY 2014 budget allocation and anticipate that we will continue our system of filling only those vacant positions deemed critical.

**B. Discuss the impact on the NLRB of challenges in 2013, such as sequestration, staffing and the government shutdown.**

As noted above, the impact of sequestration caused the Agency to engage in very limited hiring in the field and headquarters, and to reduce funding for or completely curtail other significant programs and measures, such as training, awards, travel, and IT expenditures, to name a few. This, of course, affects operational efficiencies, professional development, and employee morale, and causes inconvenience to the public. As to the government shutdown, while we take great pride in the fact that we were able to handle urgent matters with a skeleton crew in order to ameliorate significant workplace disputes, such as a 10(l) case in Region 19 and a 10(j)/contempt case in Region 34, the shutdown obviously caused delays in the casehandling of a number of matters from the investigative through the litigation stage as we were required to postpone affidavits, hearings, and oral arguments.

**IV. Miscellaneous**

**A. Please provide an update on litigation concerning the Acting General Counsel's appointment, *Noel Canning* and related issues.**

The Supreme Court held oral argument in *Noel Canning* on January 13, and a decision is expected by the end of its term (June 30, 2014). In addition to addressing the issues decided by the D.C. Circuit, i.e., (1) whether the President's recess-appointment power may be exercised during a recess that occurs within a session of

the Senate, or is instead limited to recesses that occur between sessions of the Senate, and (2) whether the President's recess-appointment power may be exercised to fill vacancies that exist during a recess, or is instead limited to vacancies that first arose during that recess, the Court asked the parties to brief and argue the question of whether the President's recess-appointment power may be exercised when the Senate is convening every three days in pro-forma sessions.

There are approximately 107 pending cases in the courts of appeals in which a party or the court has raised a question as to the validity of the recess appointments of Members Griffin, Block, or Flynn, and another 35 questioning the validity of Member Becker's appointment. There is one outstanding district court case (S.D. OH) that has been stayed since last July awaiting *Noel Canning*. It was filed by National Right to Work on behalf of an individual seeking declaratory and injunctive relief that the Board's order dismissing his certification petition was *ultra vires*.

These issues also continued to affect our 10(j) litigation program. Although the validity of President Obama's appointment of three members to the Board on January 4, 2013, was challenged in some district courts in response to 10(j) petitions, respondents primarily challenged the Board's 2011 delegation to the General Counsel of the authority to initiate 10(j) proceedings, either at its inception or that it lapsed when the Board fell below a quorum. After *Noel Canning* and some of the other circuit court enforcement cases, respondents challenged the 2001 and 2002 Board delegations, as well as continuing to challenge the validity of the 2011 delegation. This defense was raised in response to 14 10(j) petitions in FY 2013. Every court that addressed the issue upheld the validity of the Board's delegations of the General Counsel's authority to initiate 10(j) proceedings, avoiding the constitutional issue of the validity of the recess appointments. For the first time, respondents also raised challenges this year to Regional Directors that had been appointed by the recess Board, and President Obama's designation of Acting General Counsel Lafe Solomon. The district court in the Western District of Washington dismissed a 10(j) petition on the basis that former Acting General Counsel Solomon's designation was invalid under the Federal Vacancies Reform Act (FVRA). That case is now on appeal in the 9<sup>th</sup> Circuit. On the other hand, the district court in the District of Alaska denied a motion to dismiss and granted injunctive relief after considering the FVRA and determining that the employer brought an impermissible collateral attack or a direct attack that failed pursuant to the *de facto* officer doctrine. Similar challenges were litigated in three other cases, one of which is still pending in district court and two of which were rejected with one being appealed to the 2<sup>nd</sup> Circuit.

**B. Please provide an update on the General Counsel and Mexico signing a cooperation agreement concerning outreach to workers.**

On July 23, 2013, nearly all of the NLRB field offices invited Mexican consular officials to witness, over closed-circuit television, the signing ceremony of the Letter of Agreement (LOA) between former Acting General Counsel Solomon and Mexican Ambassador Medina Mora. Upon the conclusion of the signing ceremony, NLRB staff at each of those offices conducted an outreach session designed to introduce consular officials to the Board's jurisdiction, protections afforded by the NLRA, and NLRB procedures. Since that date, approximately 32 NLRB field offices have conducted additional outreach and training sessions with Mexican nationals under the terms of the LOA. In addition, six NLRB field offices have entered into local LOAs with the Mexican consulate in their jurisdiction, embodying similar provisions to that of the national agreement.

**C. Please provide information on the Regions seeking and obtaining U-Visas for undocumented workers whose testimony is necessary in an unfair labor practice case.**

In FY 2013, two Regional offices forwarded requests from advocates that former Acting General Counsel Solomon certify employees' U-visa applications for their submission to US Customs and Immigration Service (USCIS). The Acting General Counsel approved these requests. He signed certifications on behalf of 18 individuals who have been helpful to NLRB investigations, and returned the applications to the employees' advocates. The current General Counsel has also approved a request to certify employees' U-Visa applications on a new basis in one of the cases previously certified by former Acting General Counsel Solomon. The applications remain pending with USCIS.

**D. Please provide an update on the NLRB's agreement with the Justice Department in collaborating in certain employment cases.**

Since the NLRB and the Office of Special Counsel for Immigration-Related Unfair Employment Practices (OSC) entered into a Memorandum of Understanding (MOU) on July 8, 2013, there have been no instances in which the MOU has formally been invoked. Both in-person and web-based training efforts for staff at NLRB Regional offices and OSC headquarters in Washington, DC is ongoing.

**E. Please provide an update on the mediation program with the FMCS**

The Board has maintained its inter-agency agreement with the FMCS to provide mediators for the Board's Alternate Dispute Resolution program and continues to refer ADR cases to FMCS commissioners for mediation. After the ABA conference, the Agency and FMCS engaged in productive discussions aimed at developing a more robust ADR program both internally and externally.