

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Office of Appeals Survey

Report No. OIG-AMR-53-06-03

September 2006

INSPECTOR GENERAL



NATIONAL LABOR RELATIONS BOARD

WASHINGTON, DC 20570

September 12, 2006

I hereby submit the *Office of Appeals Survey*, Report No. OIG-AMR-53-06-03. This survey was conducted to gather information about the Office of Appeals to determine functions performed by the office and internal controls that management exercises in carrying out its mission.

We did not identify potentially significant structural or procedural issues within the Office of Appeals and concluded that a more detailed review of the Office of Appeals was not necessary at this time. The procedures for processing cases include operating efficiencies such as providing decision-making authority to the lowest possible level.

Cases received, cases closed, and cases pending at year-end decreased significantly during Fiscal Year (FY) 2005. The time to process cases has decreased sharply since FY 2000. The percentage of cases sustained has ranged from 1 to 1.4 percent since FY 2000. Sustained appeals were processed in a median of 83 days and all appeals were processed in a median of 18 days.

The report used to calculate the Government Performance and Results Act statistic for the Office of Appeals understated the number of days to process sustained appeals in a few cases, but did not affect the overall calculation. In these cases, the time to process the original denial was excluded.

An exit conference was held on August 2, 2006, with representatives of the Office of Appeals. A draft report was sent to the Office of Appeals Director on August 16, 2006, for review and comment. The Director agreed with our findings and noted that the report calculating the statistic was corrected. The response is included as an appendix to this report.

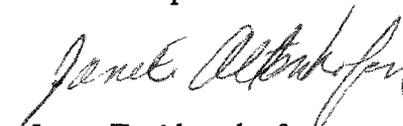

Jane E. Altenhofen
Inspector General

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BACKGROUND

The National Labor Relations Board (NLRB or Agency) administers the principal labor relations law of the United States, the National Labor Relations Act (NLRA) of 1935, as amended. The NLRA is generally applied to all enterprises engaged in interstate commerce, including the United States Postal Service, but excluding other governmental entities as well as the railroad and airline industries. The Fiscal Year (FY) 2006 appropriation authorizes 1,840 full-time equivalents (FTE) that are located at Headquarters, 51 field offices throughout the country, and 3 satellite offices for administrative law judges. NLRB received an appropriation of \$252,268,000 for FY 2006, less an across-the-board rescission of 1 percent, leaving a net spending ceiling of \$249,745,320.

Section 102.19 of the NLRB's Rules and Regulations states that if, after an unfair labor practice (ULP) charge is filed, the Regional Director (RD) declines to issue a complaint, or, having withdrawn a complaint, refuses to reissue it, the RD shall advise the parties in writing, accompanied by a simple statement of the grounds for the action. The person making the charge may obtain a review of the action by filing an appeal with the General Counsel within 14 days of the RD's written notice, setting forth the grounds for the appeal. The General Counsel may sustain the RD's refusal to issue or reissue complaint or may direct the RD to take further actions.

The Division of Enforcement Litigation's Office of Appeals reviews appeals of the RD's refusals to issue or reissue complaints on ULP charges and recommends the action to be taken by the General Counsel. This includes cases that are dismissals, *Collyer* deferrals, and informal settlements. The Office of Appeals is also responsible for reviewing compliance determinations and appeals of refusals to provide documents under the Freedom of Information Act processed by various General Counsel offices. In addition, pursuant to a request, the Office of Appeals hears informal oral presentations supporting or opposing the appeal. A description of the Office of Appeals' processes is included as an attachment to this report.

As of July 2006, the Office of Appeals consisted of a Director, Deputy Director, 7 supervisors, 18 attorneys, and 9 support staff. Staffing decreased by approximately 19 percent from FY 2000 to FY 2002, and has remained steady through FY 2005. The Office of Appeals incurred personnel costs of approximately \$3.9 million during FY 2005.

During FY 2005, the Office of Appeals received 2,465 appeals from RD refusals to issue complaint and disposed of 2,659 appeals. Thirty-four appeals were sustained. Sustained appeals were processed in a median of 83 days and all appeals were processed in a median of 18 days.

OBJECTIVES, SCOPE, AND METHODOLOGY

The objective of this survey was to gather information about the Office of Appeals to determine functions performed by the office and internal controls that management exercises in carrying out its mission.

We reviewed laws, regulations, and internal guidance relevant to the Office of Appeals to identify program requirements and procedures for processing appealed cases. We interviewed Office of Appeals managers for clarification and interviewed other staff to identify potential operating efficiencies. We also interviewed staff in the Division of Operations-Management (Operations-Management) to identify possible program improvements.

We obtained reports from the Appeals Case Tracking System (ACTS) for cases received, closed, pending, and sustained, and evaluated trends for the period from FY 1996 to FY 2005. We obtained data from ACTS for cases received from October 1, 1996 to September 30, 2005. We computed statistics and time lags for cases pending as of September 30, cases closed, and cases received from FY 2000 to FY 2005. We examined the percentage of cases sustained by Regional Office to determine whether certain Regional Offices had a disproportionate number of cases sustained.

We evaluated the Agency's Government Performance and Results Act (Results Act) measure for ULP appeals and recalculated the measure for FY 2005. We obtained staffing data on the Office of Appeals from FY 2000 through FY 2005 and compared the staffing trends to case intake and cases pending at the end of the fiscal year.

We selected a judgmental sample of 25 appeals received in FY 2005. We tested the data accuracy of nine data elements in ACTS to determine whether the Office of Appeals maintained proper documentation and case actions were properly approved and documented.

This survey was performed in accordance with generally accepted government auditing standards during the period of May through July 2006 at NLRB Headquarters in Washington, D.C.

FINDINGS

We did not identify potentially significant structural or procedural issues within the Office of Appeals and concluded that a more detailed review of the Office of Appeals was not necessary at this time. The procedures for processing cases include operating efficiencies such as providing decision-making authority to the lowest possible level. None of the nine data elements tested had an error rate greater than 10 percent, a rate we consider significant. The proper documentation was generally found in the case files.

The number of cases received by the Office of Appeals decreased in FY 2005. The decrease was proportionate to the number of cases closed in the Regional Offices. During this period, the average time to process a case and the number of cases pending at the end of the year also declined.

The report used to calculate the Results Act statistic for the Office of Appeals understated the number of days to process sustained appeals in a few cases, but did not affect the overall calculation. In these cases, the time to process the original denial was excluded.

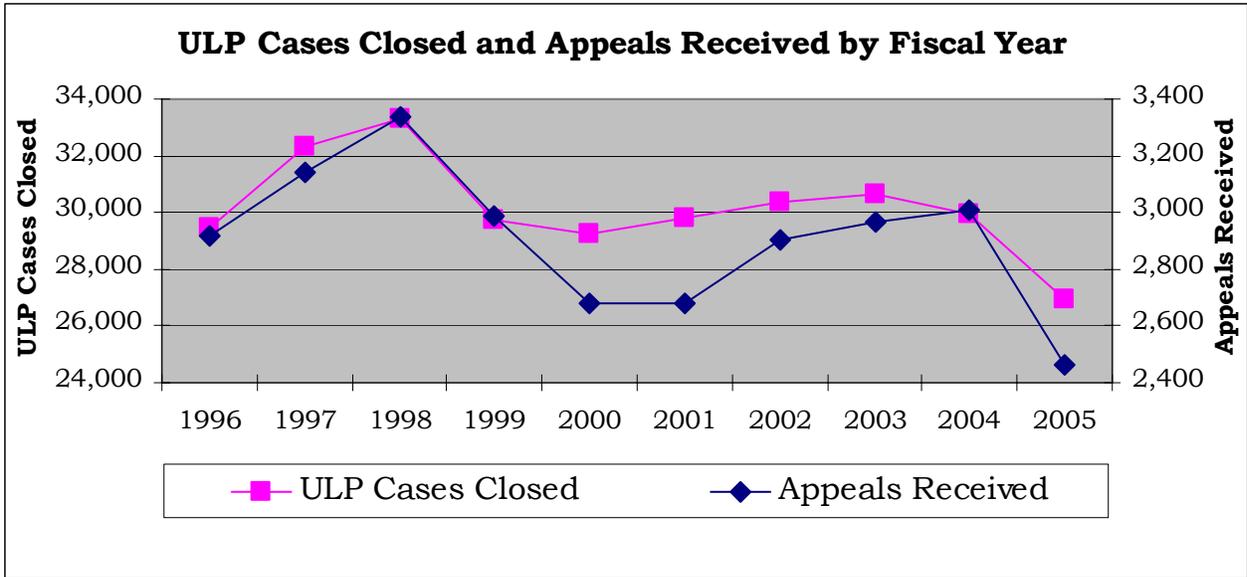
CASE STATISTICS

Cases received, cases closed, and cases pending at year-end decreased significantly during FY 2005. The time to process cases has decreased sharply since FY 2000. The percentage of cases sustained has ranged from 1 to 1.4 percent since FY 2000.

In July 2006, the office had a staff of 36 people. The Agency's FY 2007 Performance Budget Request to the Office of Management and Budget contained conflicting information regarding Office of Appeals staffing. One budget schedule allocated 32.6 FTE to the Office of Appeals, but another schedule allocated 36 FTE. Personnel in the Budget Branch said that the Agency projected 35 FTE for FY 2007. If the Office of Appeals' caseload continues to decline, the Agency will need to consider further decreases in staffing levels.

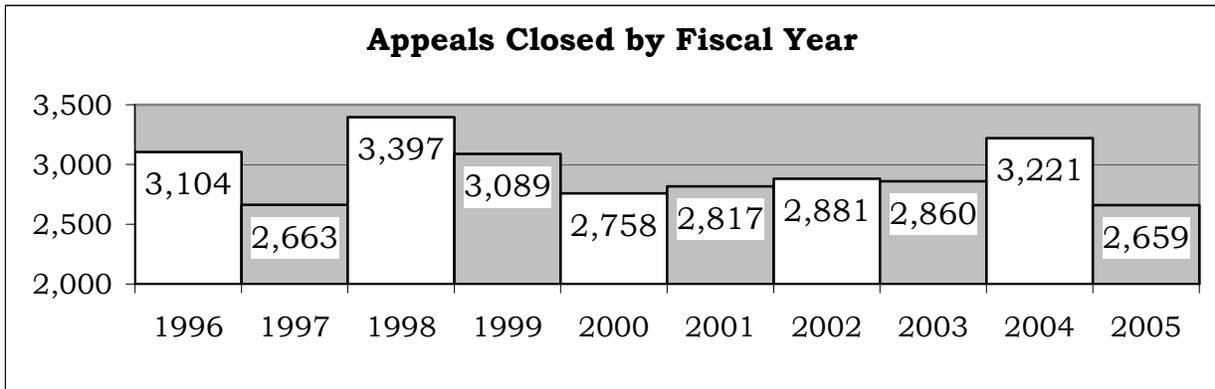
Appeals Received

The Office of Appeals has no control over its case intake, which is based on the actions of the charging party. The number of appeals received is directly proportionate to the number of cases closed by the Regional Offices, as shown on the chart on the next page.

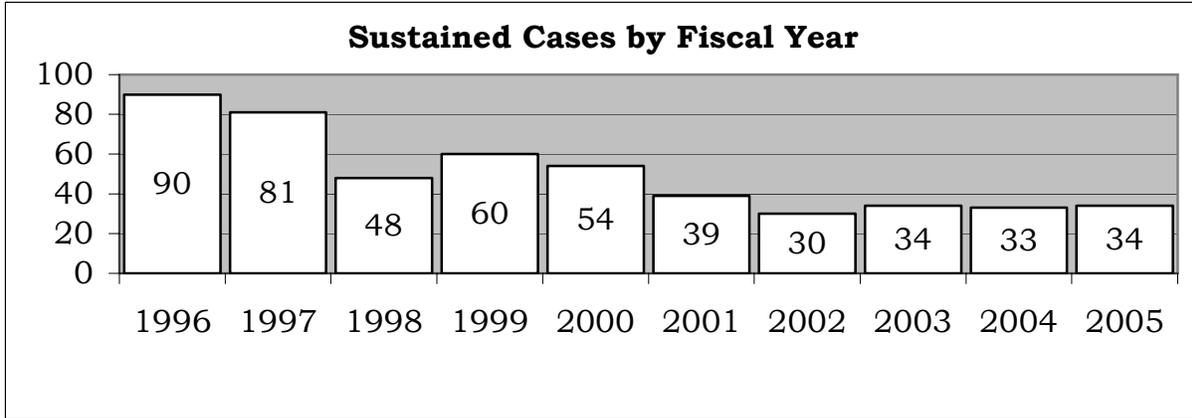


Appeals Closed

The Office of Appeals closes most cases without direct involvement from the General Counsel. Appeals that have the potential to be sustained or that involve novel or high profile cases are decided after an agenda meeting is held with the General Counsel. The following chart shows the number of appeals closed over the past 10 years.

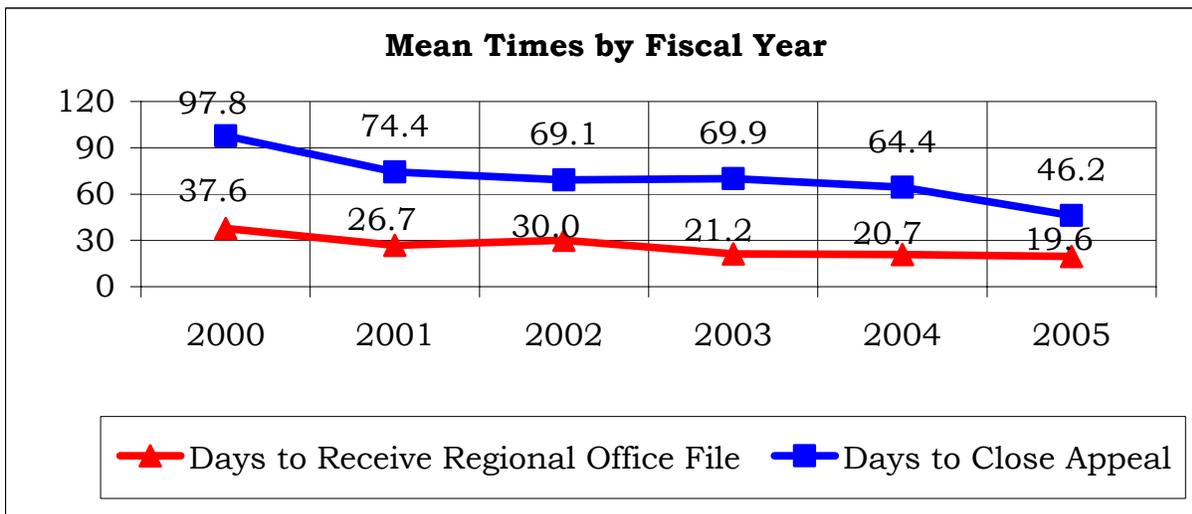


The number of appeals sustained generally decreased from FY 1996 through FY 2002. Since then, either 33 or 34 appeals were sustained each year. The chart on the next page shows the number of sustained cases over the last 10 fiscal years.



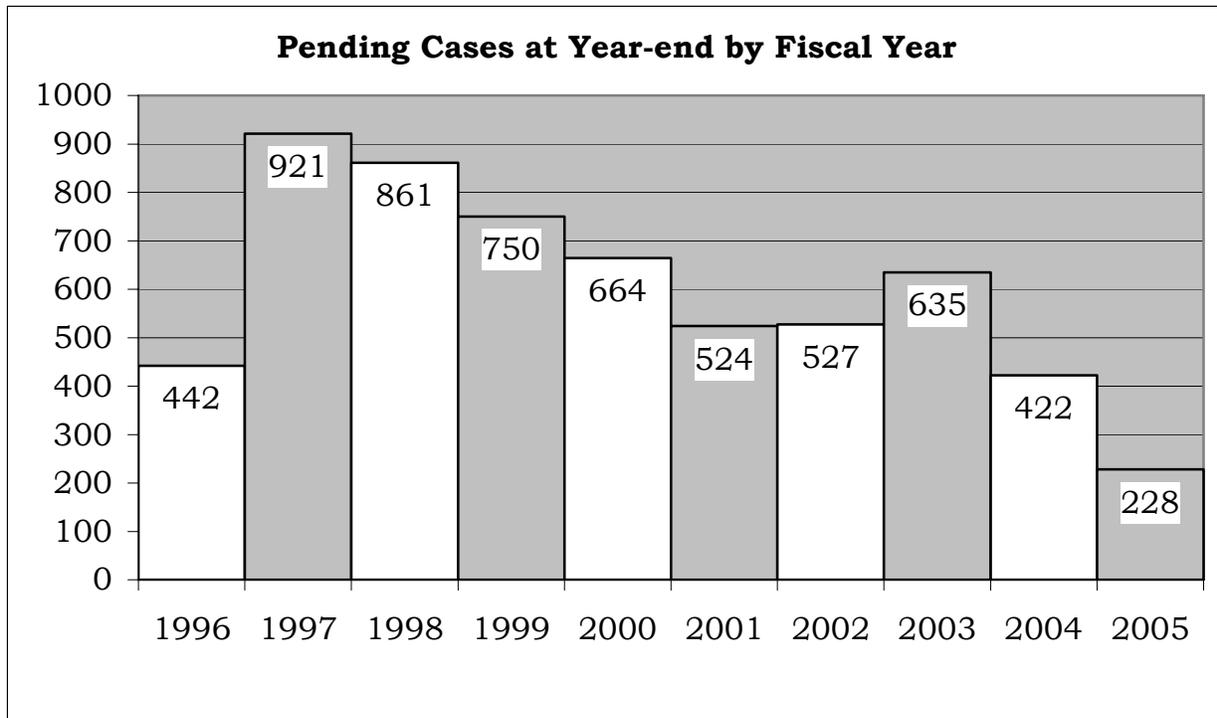
Processing Timeliness

The time to process cases decreased from FY 2000 to FY 2005. Some of this decrease is attributable to a decrease in the mean time for the Regional Offices to send the file to the Office of Appeals from approximately 38 days to 20 days. Additionally, staff noted that the decrease in the number of cases received contributed to eliminating the backlog, which allows for the cases to be assigned as they are received.



Pending Cases

As the number of cases received decreased, the number of cases pending at the end of the year also decreased. The cases pending at the end of FY 2005 represent about 1 month of cases received.



Of the 228 cases pending at the end of FY 2005, 161 either were suspended or were awaiting the Regional Office file. The mean amount of time that cases were pending at the end of the year decreased from 67.4 days in FY 2000 to 45.1 days in FY 2005. Fifteen cases were pending more than 6 months at September 30, 2005, as compared with 43 at September 30, 2000.

RESULTS ACT

The Agency's FY 2005 Performance and Accountability Report (PAR) states as a goal to "issue appeals decisions within 90 median days of receipt of the appeal of the [RD's] dismissal of the charge." The calculation measures the time to process sustained appeals from receipt of the Regional Office file to the closing of the case, including time to consider a motion for reconsideration, but excluding time that a case was suspended. Reasons that cases are suspended include remands to the Regional Office and related litigation.

Calculation

The report the Office of Appeals used to calculate the median understated the number of days for cases that were sustained after a motion for reconsideration. In those cases, the time to process the original denial was excluded. This affected two cases during FY 2005, but did not affect the median calculation. The Director stated that the problem was corrected.

Performance Measure

As shown in the table below, the Office of Appeals' performance measure reported in the PAR was changed in 3 of the last 4 years.

Office of Appeals Results Act Goal

FY	Goal	Result	Goal Attained
2005	90 Median Days	83 Median Days	Yes
2004	60% w/in 90 days	36% w/in 90 days	No
2003	60% w/in 110 days	63% w/in 110 days	Yes
2002	60% w/in 120 days	70% w/in 120 days	Yes
2001	60% w/in 120 days	68% w/in 120 days	Yes
2000	60% w/in 120 days	54.5% w/in 120 days	No

The PAR stated that the FY 2004 change was made to the measure to increase the expectations of the office. The Director stated that the goal was changed to a median in FY 2005 to parallel the Agency's other Results Act measures that use medians.

The Office of Appeals met its Results Act goal in 4 of the last 6 years. In FY 2004, the actual performance (36 percent) was significantly short of the goal. The PAR attributed this to an influx of controversial and legally complex cases requiring more time to consider and the importance of the cases to the public. The Director stated that the Office of Appeals does not control the complexity of the cases it receives.

The revised goal is easier to meet. The 83 median days is well below the goal of 90 median days. If the 2004 goal was used, the Agency would not have met the 60 percent within 90 days; only 56 percent of sustained appeals were closed within 90 days.

APPEALS PROCESS

When a ULP case is dismissed, the Regional Office sends a letter to the parties. A copy of the letter is sent to the Office of Appeals by e-mail. The letter states that the charging party may appeal to the General Counsel within 14 days of the letter and that the charging party may request an extension of time to file.

Extensions of time may be filed either by mail, fax, or through the Extension of Time System (EOTS). EOTS allows the charging party to enter a code and submit the request through the Agency's Web site. EOTS informs the Office of Appeals and the Regional Office by e-mail that a request has been submitted. The Office of Appeals then grants or denies the extension. During FY 2005, 56 percent of extensions of time requested were received through EOTS.

When an appeal is received, the Director's secretary opens it, identifies that an appeal was filed, and passes the appeal to the docket clerk. The docket clerk enters the appeal into ACTS. A member of the support staff prepares a letter acknowledging receipt of the appeal. This letter is sent to the Regional Office and all parties. Processing the appeal is then halted pending receipt of the Regional Office file. The Regional Office attaches a Comment on Appeal to the Regional Office file stating why the Regional Office believes that the appeal should be denied.

After the Regional Office file is received, the managing attorney, assisted by a staff attorney on a 2-month rotation, reviews the appeal and the Regional Office file and determines the case priority. If the decision to deny the appeal is obvious, the managing attorney has the authority to deny the appeal.

If the appeal is to be further investigated, the managing attorney assigns the appeal to a supervisor, who assigns the case to an attorney. The attorney reviews the appeal and entire contents of the Regional Office file, with particular attention to the Regional Office's Final Investigative Report and Agenda Minute. The attorney also does additional legal research.

If the review reveals that gaps exist in the Regional Office investigation, the supervisor has delegated authority to remand the case to the Regional Office. If the case is to be remanded, a memorandum is sent to the RD with the Regional Office file and an attachment discussing the information needed. The case is suspended pending the Regional Office's response.

At this point, the RD may determine that the charge has merit and revoke the dismissal. If the dismissal is revoked, the Office of Appeals closes the appeal and sends a letter to the parties informing them that the appeal is moot due to the revocation of the dismissal. Alternatively, the RD may return the Regional Office file and the additional information requested to the Office of Appeals for further processing.

After the completion of the investigation, the attorney prepares a letter and recommendation for the supervisor. If the case is a simple denial, the supervisor has the authority to execute the denial. A letter denying the appeal is sent to the parties.

If the attorney and supervisor determine that the appeal is to be sustained or is a novel or high profile case, a memorandum is prepared for the General Counsel explaining why the case should be sustained or denied. The memorandum is routed through the Director or Deputy Director. If the Director or Deputy Director agrees with the recommendation, the case is placed on an Agenda.

An Agenda meeting is tentatively scheduled with the General Counsel for every Thursday. The Agenda includes a quorum of the General Counsel and his staff and staff from the Division of Enforcement Litigation, Operations-Management, and the Office of Appeals. The Agenda participants are given a package containing the memorandum and a copy of the appeal, comment on appeal, Final Investigative Report, and the charge. The memorandum is also e-mailed to the Regional Office.

If the General Counsel agrees to deny the appeal, the final letter is prepared and sent to the parties. If the appeal is sustained, a General Counsel Minute is prepared, explaining the facts and the legal reasoning used in sustaining the appeal. The General Counsel Minute is sent to the Regional Office along with the Regional Office file. A separate letter is sent to the parties stating that the appeal was sustained. The Regional Office would then issue complaint if the case is not settled.

The charging party has 14 days from the date of the denial of an appeal to file a motion for reconsideration. If a motion is received, it is assigned to the supervisor and attorney that worked on the case. The supervisor and attorney make a recommendation that is reviewed and approved by the Director or Deputy Director. If the recommendation is to reverse the denial of the appeal, the case goes to an Agenda with the General Counsel. If the appeal decision was made in an agenda, the Director or Deputy Director decides whether the new information is novel enough to send to the General Counsel for a new agenda; otherwise, the decision is made by the Director or Deputy Director. If the motion is denied, a charging party may file additional motions only if new evidence is submitted that became available after the decision on appeal.

After the case is closed, the attorney or supervisor fills out a case progress sheet with dates to be entered into ACTS by the docket clerk. The Regional Office file is returned to the Regional Office. The documents are scanned into an electronic file and the case file is sent to the Case Records Unit 30 days after the appeal is closed.

APPENDIX

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Appeals



Memorandum

To: Jane E. Altenhofen, Inspector General

From: Yvonne T. Dixon, Director
Office of Appeals

Subject: Comments on Draft Report "Office of Appeals Survey"
(OIG-AMR-53)

Thank you for the opportunity to review this draft report. Our only comment relates to the problem identified with the calculation of processing days on cases which were sustained after a motion for reconsideration. As you point out, in two cases where the processing of the case was suspended after the motion was received, the Appeals Case Tracking System (ACTS) excluded time to process the original denial from the final calculation of processing days.

In December 2004 we asked ITB to correct ACTS so that processing days for cases sustained after a motion was filed would include both the time to process the original denial and the time elapsed after the motion was filed. The modification correctly calculated the total processing days for the one case at that time which involved a sustained motion. As it happened, that case was not suspended after the motion was filed. The two cases which you identify in the report, which were suspended after the motion was filed, arose later.

I am pleased to report that ITB has now corrected the problem which you identified, and ACTS now reports the correct processing days for cases sustained after a motion and where a suspension took place after the motion was filed.

Handwritten signature and initials YTD.