

R-2513

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 04-01

December 5, 2003

TO: All Employees, Office of the General Counsel

FROM: Arthur F. Rosenfeld, General Counsel

SUBJECT: Summary of Operations (Fiscal Year 2003)

Attached is a copy of the Summary of Operations for Fiscal Year 2003. Based upon the accomplishments reported in this Summary of Operations, all employees of the Office of the General Counsel, Field and Headquarters, deserve great praise for outstanding performance. Most importantly, you continued to produce a quality product for those who sought our assistance. You have my gratitude and, I am certain, the gratitude of the labor-relations community for a job well done.

I am also pleased to report that the FY 2003 information contained in this Summary was generated from our Case Activity Tracking System (CATS). This system has been a longer time coming than we originally anticipated, but major budget cuts impacting on the system resulted in uncontrollable delays. I am most appreciative to you for your efforts in getting CATS up and running.

Again, my sincere appreciation and congratulations for the excellent manner in which you carry out the mission of the Agency year after year.

A.F.R.

Attachment
cc: NLRBU
NLRBPA

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Regional Offices
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MEMORANDUM GC 04-01

SUMMARY OF OPERATIONS
FISCAL YEAR 2003

INTRODUCTION

This summary continues the General Counsel's practice of providing an annual overview of the operations of the Office of the General Counsel.

As the summary reflects, the record of performance achieved by the staffs of the Headquarters and Regional Offices of the General Counsel in Fiscal Year 2003, based on preliminary statistical reports, was once again outstanding.

Of special note in FY 2003:

- A 92.8% settlement rate was achieved in the Regional Offices in merit unfair labor practice cases.
- Initial elections in union representation elections were conducted in a median of 40 days from the filing of the petition, with 92.4% of such elections conducted within 56 days, both an improvement over last year.
- The Regions promptly responded to over 188,751 inquiries from the public through the Public Information Program, an increase of 19.9% over last year. Under this program we provided immediate assistance to members of the public regarding workplace disputes and saved Agency resources by discouraging the filing of charges that clearly lack merit.
- The Regions won 84.1 percent of Board and ALJ decisions in whole or in part.
- A total of \$92,395,514 was recovered on behalf of employees as backpay or reimbursement of fees, dues, and fines, with 3,511 employees offered reinstatement.
- The Regions successfully implemented a special project designed to reduce the inventory of cases deferred for more than 3 years under the Board's Collyer policy. The project achieved a reduction in the number of such cases from over 2000 to 356.

I extend my sincere appreciation to all staff members for their continued hard work and dedication to public service and for the cooperative manner in which they have responded to the priorities in case handling. My thanks also to those who practice before us for the cooperation and assistance that they extended to us in our efforts to administer the Act effectively and efficiently.

Arthur F. Rosenfeld
General Counsel

ORGANIZATION OF THE OFFICE OF THE GENERAL COUNSEL

The Office of the General Counsel is composed of six major components. These components are responsible for the various casehandling, administrative and personnel functions of the office. The six components are: the Division of Operations-Management and Regional Offices, the Division of Advice, the Division of Enforcement Litigation, the Division of Administration, the Office of Equal Employment Opportunity and the Office of Employee Development.

The Division of Operations-Management includes Headquarters and Regional Office staffs. The Headquarters staff has the responsibility on behalf of the General Counsel for the operations of the Regional, Subregional and Resident Offices, and the coordination of the casehandling of those offices with the Washington Divisions of the Office of the General Counsel and the Board.

There are 32 Regional Offices, 3 Subregional Offices and 17 Resident Offices. Each Regional Office is headed by a Regional Director who is responsible for the management of the office and any attached Subregional or Resident Offices and for the investigation and initial determination of the merits of unfair labor practice cases and representation cases. The Regional Director is also responsible for resolving through settlement or litigation the unfair labor practice charges found to warrant further proceedings, and for the conduct of representation elections.

The Division of Advice has the function of rendering substantive legal advice to the General Counsel and to Regional Offices in cases presenting novel or complex issues, cases of national interest or cases which involve developing and changing areas of the law. The Division also processes requests for injunctive relief under Section 10(j) of the Act, litigates injunction cases in Federal appellate courts under Section 10(l) and 10(j) and indexes and classifies Board and Court decisions under the Act.

The Division of Enforcement Litigation is responsible for the Agency's litigation in the United States Court of Appeals and the Supreme Court of the United States as well as for contempt and miscellaneous litigation in Federal and State Courts.

The Office of Appeals is a major component of the Division of Enforcement Litigation. This office reviews appeals from Regional Directors' refusals to issue complaint in unfair labor practice cases and recommends proposed action to be taken thereon by the General Counsel. It also processes appeals from the Regional Directors' denial of requests for documents under the Freedom of Information Act.

The Division of Administration is under the general supervision of the General Counsel and has been delegated responsibility for the development, direction and coordination of administrative staff support functions for both the Board and the General Counsel.

The Office of Equal Employment Opportunity is dedicated to giving managers, supervisors, and employees timely professional assistance and advice in understanding and promoting diversity in the workplace. Its mission includes providing assistance to all Agency employees to avoid or resolve discrimination and harassment complaints. In so doing, the OEEO serves as EEO counselor to Agency employees and manages the EEO complaint processing system for the Agency.

The Office of Employee Development reports directly to the General Counsel and is responsible for the training needs of Agency employees. It is the mission of the OED to develop an agency-wide approach to training, to assist managers in providing employees with needed development opportunities and to help managers and supervisors manage their own careers and obtain developmental opportunities.

General Information

The information set forth below reflects the work of the various case handling Divisions during the past fiscal year (FY 2003) based on preliminary statistical reports.

Regional Offices

Case Intake

The NLRB has no authority to initiate proceedings on its own. Its processes can be invoked only by the filing of an unfair labor practice charge or a representation petition by a member of the public. Total case intake during FY 2003 was 33,738, compared to 35,873 cases in FY 2002, representing a 5.9 percent decrease in intake. Unfair labor practice case intake was 28,794, a 4.6 percent decrease from the FY 2002 intake of 30,177. Representation case intake was 4,677, a decrease of 11.8 percent over the FY 2002 intake of 5,301. In other types of cases filed (UD, AC and UC¹), there was a decrease of 32 percent from the previous year's intake with the filing of 268 such cases compared to 394 cases the previous year. In FY 2001 total case intake was 33,534.

Regional Professional Staff

The average professional staff handling the workload in the Regional Offices during FY 2003 was 927.56 employees compared to 971.84 in FY 2002, a decrease of 4.56 percent. As of the end of September 2001 the professional workforce in the Field was 1004. As a result of severely restricted budgets in Fiscal Years 1994 through 1999 the NLRB was not able to hire sufficient numbers of investigators and attorneys and as a consequence the average professional staffing level for the Regional Offices declined from 930 to 874. In FY 2000 and FY 2001 more substantial budgets were provided to the Agency supporting hiring increases to process both current case intake and the backlog of cases that had developed during the years of budget shortfalls. Only limited hiring took place in FY 2002 and FY 2003 because of delay in the enactment of our final budget. In fact, in FY 2003 Agency funding, along with funding for a number of other

¹ Unit deauthorization, unit amendment and unit clarification petitions.

government agencies, was delayed until February, when a final appropriation was approved by Congress. As a result of this delayed and reduced hiring, we experienced an increase in situations pending under investigation from 4796 at the end of FY 2002 to 4893 at the end of FY 2003.

Information Officer Inquiries

The General Counsel's Public Information Program continued to prevent a large number of nonmeritorious cases from being filed with the Agency while continuing to provide assistance to members of the public by referring them to the appropriate agencies or organizations. In FY 2003, the total number of inquiries received through the Public Information Program was 188,751, an increase of 19.9 percent from the 157,485 inquiries received during FY 2002.

The rate of charge acceptance (percent of instances in which the contact results in a charge being filed) was 4.2 percent, down from the 5 percent in FY 2002. Since the inception of this program in 1978, the Agency has reduced its charge acceptance rate by 5 percent from 9.2 percent to the current 4.2 percent rate. In terms of cases, in fiscal year 2003 this program saved the Agency from having to investigate what would have been approximately 9,400 no-merit cases.

Unfair Labor Practice Cases

Settlements

The Agency's effectiveness and efficiency in administering the Act is greatly enhanced by its ability to effect a voluntary resolution of unfair labor practice cases, cases which, after investigation, are deemed worthy of prosecution. (See merit factor, *infra*). Over the years, the Agency has had an excellent settlement record due to the efforts of staff and the cooperation of the Bar. In FY 2003, 9,247 settlements of unfair labor practice cases were obtained, representing a rate of 92.8 percent of total merit cases, as compared to 9,156 settlements in FY 2002 and a rate of 93.6 percent. Over the last 10 years the settlement rate has ranged from between 91.5 and 99.5 percent.

Complaints

In FY 2003 the Regional Offices issued 2,171 complaints as compared to 2,181 in FY 2002. The median time to issue complaints was 104 days in FY 2003, as compared to the median of 93 days in FY 2002.

Merit Factor

The percentage of unfair labor practice cases in which a Regional Director determines that formal proceedings are warranted is called the merit factor. In FY 2003 that factor was 37.9 percent, compared to the merit factor of 36.1 percent in FY 2002. Since 1980, the merit factor has fluctuated between 32 and 40 percent.

Litigation Results

The Regional Offices won 84.1 percent of Board and Administrative Law Judge decisions in whole or in part in FY 2003, up from 80.4 percent in FY 2002.

Remedies

Amounts recovered on behalf of employees as backpay or reimbursement of fees, dues, and fines in FY 2003, was \$92,395,514, compared to \$60,132,046 in FY 2002. In FY 2003, 3,511 employees were offered reinstatement, as compared to 1,689 in FY 2002.²

Cases Deferred to Arbitration

During Fiscal Year 2003, a special project undertaken by the regional offices resulted in a large reduction in the number of cases deferred pursuant to the Board's Collyer deferral policy (Collyer Insulated Wire, 192 NLRB 837 (1971)). This project saw the Regional Directors communicating with the parties to those cases in deferred status for 3 or more years and inquiring as to the status of the dispute. If the charging party was not cooperating in securing an arbitral resolution to the dispute, the charge was dismissed. If the charged party was at fault for the delay in reaching arbitration, the deferral was revoked and the investigation pursued. As a result of this more aggressive policy, the number of cases Collyer-deferred for 3 year or longer was reduced from approximately 2000 to 356.

Representation cases

Elections

The Regions conducted 2,659 initial elections in FY 2003 of which 88.5 percent were held pursuant to agreement of the parties, compared to 2,871 initial elections and an 86.1 percent election agreement rate for FY 2002. The median time to proceed to an election from the filing of a petition was 40 days, a slight decrease from the 41 day median in FY 2002. 92.5 percent of all initial representation elections were conducted within 56 days of the filing of the petition.

Regional Director Decisions

In FY 2003, Regional Directors issued 414 decisions in contested representation cases after hearing in a median of 39 days. In FY 2002, Regional Directors issued 478 decisions in a median time of 36 days.

² Remedies secured often vary greatly from year-to-year because occasional cases involve extraordinarily large amounts of money or large numbers of employees.

Division of Enforcement Litigation

Appellate Court Activity

In FY 2003, the Appellate Court Branch received 85 cases. Private parties filed petitions to review the Board's order in 44 of the 85 cases, and the Regional Offices referred the remaining 41 cases for court enforcement. By filing briefs in 74 cases and closing 54 cases on compliance, default judgment, or dismissal of the court proceeding, the Branch disposed of 128 cases in FY 2003. In FY 2002, total intake of enforcement and reviews cases was 159 cases and dispositions totaled 192. Oral arguments were presented in 103 cases in FY 2003, compared with 106 cases in FY 2002. The median time for filing applications for enforcement was 21 days in FY 2003, compared with 88 days in FY 2002. The median time for both enforcement and review cases, from receipt of cases to filing of briefs, was 215 days for FY 2003, compared with 210 days in FY 2002.

In FY 2003, the Branch filed petitions for rehearing in two cases and filed responses to petitions for rehearing in three cases. The Branch also handled 71 summary enforcement cases and 44 consent cases. By contrast, in FY 2002, the Branch handled 52 summary enforcement cases and 18 consent cases.

In FY 2003, the United States Courts of Appeals decided 115 enforcement and review cases involving the Board, compared with 106 cases in FY 2002. Of these cases, 87.0 percent were won in whole or in part, and 75.7 percent won in whole, compared with success rates in part and in whole in FY 2002 of 70.8 percent and 60.4 percent, respectively. In FY 2003, 6.1 percent of cases were remanded entirely compared with 7.5 percent in FY 2002. Also, in FY 2002, 7.0 percent of cases were total losses, down from the 21.7 percent in FY 2002.

Supreme Court Activity In FY 2003, the Supreme Court did not decide any Board cases on the merits. In FY 2002, the Supreme Court decided two Board cases on the merits. In FY 2003, as in FY 2002, the Board did not formally participate as amicus in any cases; however, in one federal case that required the lower courts to harmonize the NLRA with other federal statutes, the General Counsel transmitted the Agency's view respecting certiorari to the Solicitor General.

In FY 2003, the Court denied nine private party petitions for certiorari and granted none compared to FY 2002, when the Court denied nine private party petitions for certiorari and granted one. In FY 2003, as in FY 2002, 33 memoranda respecting certiorari were submitted to the Board.

Special Litigation Branch Activity In FY 2003, the Special Litigation Branch had an intake of 167 cases and closed 171 cases. This compares with an intake of 121 cases and the closing of 107 cases in FY 2002. Fiscal year 2003 intake includes ethics cases, which the Branch started counting as part of its intake towards the end of fiscal year 2002. These are cases addressing State Bar issues presented by Board agent contacts

with represented persons during investigations. Ethics cases comprised 103 of the 167 cases received and 109 of the 171 cases closed.

In FY 2003 the Branch filed 66 briefs: 6 appellate court briefs, 23 district court briefs, 30 bankruptcy court briefs, 1 state court brief, and 6 briefs to federal agencies. The Branch also sent 111 memos to the Board and Regional offices, including 89 ethics memos. This compares to FY 2002 when the Branch filed 42 briefs, 12 to the appellate courts, 15 to the district courts, 14 to the bankruptcy courts, and 1 to the state courts. In FY 2002 the Branch also sent 75 memos to the Board and Regional offices, including 51 ethics memos.

In FY 2003, the Branch participated in 11 oral arguments and received 9 decisions, all wins, as follows: 4 district court decisions, 2 bankruptcy court decisions, and 3 appellate court decisions. This compares with FY 2002 when the Branch participated in 12 oral arguments and received 11 decisions, 8 wins and 3 losses, as follows: 3 district court decisions, 2 wins, 1 loss, and 8 appellate court decisions, 6 wins, 2 losses.

Contempt Litigation and Compliance Branch Activity. In FY 2003, 367 cases were referred to the Contempt Litigation and Compliance Branch for consideration for contempt or other appropriate action to achieve compliance with the Act, compared to 307 cases in FY 2002. Of the 123 contempt or other formal submissions, voluntary compliance was achieved in 23 cases during the fiscal year, without the necessity of filing a contempt petition, or other initiating papers and 18 other cases settled after the filing of a formal pleading in court, but before trial. In 48 other cases, it was determined that contempt or other proceedings were not warranted. The remaining 34 cases continue to be processed. In FY 2002, voluntary compliance was achieved in 18 of the 87 formal submissions without the necessity of filing a contempt petition or other initiating papers, and 8 cases were settled after the filing of a formal pleadings in court, but before trial. In 36 other cases, it was determined that contempt or other proceedings were not warranted.

Twelve civil contempt or equivalent adjudications were awarded in favor of the Board in FY 2003, including three writs of body attachment, compared to fourteen in FY 2002. During FY 2003 the Branch also obtained nine other court orders in aid of compliance efforts. During FY 2003, the Contempt Litigation and Compliance Branch collected \$46,250 in fines and \$13,585,418 in backpay, while recouping \$18,153 in court costs and attorneys' fees incurred in contempt litigation. In FY 2002, the Contempt Litigation and Compliance Branch collected \$6,000 in fines and \$995,667 in backpay, while recouping \$37,672 in court costs and attorneys' fees incurred in contempt litigation. In FY 2003, the Branch also conducted 202 asset/entity database investigations pursuant to requests from the Regions, as compared to 239 in FY 2002.

Appeals Activity. In FY 2003, the Office of Appeals received 2,961 appeals from Regional Directors' refusals to issue complaints, a slightly more than 2 percent increase from the 2,887 appeals received in FY 2002. In FY 2003, the office disposed of 2,861 appeals, a slight decrease from the 2,874 decided in FY 2002. The percentage of

reversals of Regional Directors' dismissals was 1.2 percent, an increase from the 0.9 percent in FY 2002. Median time to process appeals in FY 2003 was 47 days, an increase from FY 2002, where the median was 31 days. Median time to process 35 sustained appeals was 94 days in FY 2003, up from 83 days in FY 2002 to process 27 sustained appeals. In FY 2003, the Office of Appeals also received 25 appeals under the Freedom of Information Act, and closed 25, compared with 42 appeals received under the Freedom of Information Act in FY 2002 with 44 closed.

Division of Advice

During FY 2003, the Division of Advice processed its cases in a median of 22 days, compared to 21 days in FY 2002. Also, during FY 2003, the Division received 866 cases and closed 845 cases, compared to 744 cases received and 761 cases closed in FY 2002. The median age of cases pending at the end of FY 2003 was 28 days, as compared to 23 days in FY 2002.

Section 10(j) Injunction Activity

In FY 2003, the Injunction Litigation Branch received 90 cases, as compared to the 87 cases received in FY 2002. Section 10(j) relief was authorized in 17 cases, or 19 percent of the cases in FY 2003, as compared to 16 cases, or 18 percent of the cases in FY 2002. In addition, the success rate, i.e., the percentage of authorized 10(j) cases in which the Agency achieved either a satisfactory settlement or substantial victory in litigation for cases, was 100 percent, as compared to the success rate of 80 percent in FY 2002.

Section 10(l) Activity

The Regional Offices filed 7 petitions for 10(l) injunctions with the appropriate district courts in FY 2003, as compared to 4 petitions filed in FY 2002. Three of those petitions resulted in orders or settlements, three were dismissed and one was pending at the end of the fiscal year.

Injunction Litigation Branch

In addition to requests for Section 10(j) authorization, during FY 2003 the Injunction Litigation Branch handled 90 other cases, compared to 93 such cases in FY 2002. These cases involved appeals from district court decisions in 10(j) or 10(l) cases, contempt of district court decrees, and litigation advice to regions in their litigation of 10(j) and 10(l) cases. The Branch handled 4 appeals that were pending at the beginning of the fiscal year and 7 appeals that were filed during FY 2003, compared to 8 appeals that were pending at the beginning of FY 2002 and 6 appeals that were filed during FY 2002. Of these 11 cases in FY 2003, the Branch lost 1 decision, satisfactorily resolved 5 others before decision and 5 were pending decision at the end of FY 2003, as compared to 14 cases in FY 2002, in which the Branch won 4 and lost 1 court decision, satisfactorily resolved 5 others before decision and 4 were pending decision at

the end of FY 2002. The Branch also authorized the Regions to institute contempt proceedings in 2 cases during FY 2003, as compared to 1 case during FY 2002.

The Office of Equal Employment Opportunity (OEEEO)

At the beginning of FY 2003, there were 11 complaints of alleged workplace discrimination brought by Agency employees under investigation in the OEEEO, with a median age of 198 days. At the end of the fiscal year the number of cases pending investigation had been reduced to 3, with a median age of 47 days.

Date: December 5, 2003