

Property of
MARTIN P. CATHERWOOD LIBRARY
NEW YORK STATE SCHOOL
INDUSTRIAL AND LABOR RELATIONS
Cornell University

Hot Topic "Future Worker
Management"

**TESTIMONY OF FREDERICK L. FEINSTEIN
GENERAL COUNSEL
NATIONAL LABOR RELATIONS BOARD
BEFORE THE
COMMISSION ON THE FUTURE OF
WORKER-MANAGEMENT RELATIONS
SEPTEMBER 29, 1994**

Thank you for your invitation to testify before the Commission. I have closely followed your deliberations both as Chief Counsel to the Subcommittee on Labor-Management Relations of the House of Representatives and since March of this year as General Counsel of the National Labor Relations Board.

I have now dealt with the critical issues before the Commission from two perspectives. As a chief counsel to the Subcommittee, for many years I advised members of Congress in their consideration of legislative reform of our nation's labor law. Now, for the last six months as General Counsel, I serve in an enforcement capacity as the NLRB's chief administrative officer and prosecutor.

President Clinton, in directing the Secretaries of Labor and Commerce to establish this Commission, has taken an extremely important step. Your charge is vital not only to employees and employers but ultimately to the health and success of our economy. Your initial report lays out eloquently what is at stake.

As suggested in your report, nearly all will agree that public policy can serve the workplaces of this nation better. Employers and employees have legitimate concerns about the legal framework created by existing labor law. It is a legal framework that in many instances has failed to keep pace with significant changes in workplace practice and economic realities.

Having worked for Congress for many years, I know how important is the approach you have adopted in addressing these issues. Far too often the debate about reform of our labor laws has been obscured by narrow policy and political interests that have kept us from moving forward. You have the enormous challenge of developing proposals for change in existing policy that will better encourage our workplaces to flourish and prosper; to identify and define the common interests and concerns that will allow us to transcend the often rancorous argument that has far too frequently characterized the debate on these critical issues. Your task is truly of enormous significance.

As General Counsel of the NLRB, I have left behind my responsibilities to consider legislative reform of the law and now am faced with a different challenge -- of

helping to assure that the law as currently written achieves the fundamental purpose that underlay its passage in 1935. That fundamental purpose is to protect the rights of workers to organize a union; to guarantee that workers have a chance to decide, free of fear or coercion, whether or not to have union representation; to resolve questions concerning representation quickly and fairly; and, where workers have so chosen, to encourage and support the process of collective bargaining.

I arrived at my new job with great respect for what the NLRB has accomplished in the nearly sixty years of its existence. Originally created by the Wagner Act in 1935, the basic framework of the law enforced by the Agency has changed little since the Taft-Hartley amendments of 1947. Nevertheless, in response to the significant changes that have occurred in our economy since Taft-Hartley was enacted 47 years ago, the Board has evolved over time, adapting and developing its interpretation and enforcement of the law in response to changing workplace conditions. It is in this tradition that I have initiated, since arriving at the Agency, a thorough and still very much ongoing review of the way the General Counsel's side of the Agency goes about carrying out its important responsibilities of prosecuting and implementing the law. I have worked closely with the Chairman and the other Board Members in this effort, and they have likewise been examining how the Board itself can streamline and improve upon its own procedures.

We have examined how the Agency can reach beyond the input-based measures of counting the number of cases we process in how many days and looking more at the outcomes of our enforcement efforts. Given the reality of limited resources and our inability to give every case maximum effort, how can we better prioritize our enforcement efforts? How do we recognize that some cases are more time sensitive than others, some affect far more people, some come at a critical stage of the collective bargaining process? One of our focuses has been to become more oriented toward the real world effects of our actions. The approach we have adopted is based on Vice President Gore's National Performance Review, which as you know is a government-wide initiative in which all government agencies are required to participate.

After extensive consultation with the excellent career staff of the Agency, I have developed and implemented three operational priorities. The first priority is a renewed emphasis on quality in our investigations. Each of our 33 regional offices receives on average approximately 1,000 new unfair labor practice charges per year. Overall, as the Commission noted in its report, about 40 percent are found to have merit. Of these, the great majority result in adjustments or settlements. Of those that don't settle promptly, we issue about 3,000 unfair labor practice complaints per year, of which about one-fifth end up going to trial and the remainder settle before trial. You can see that the merit determination--the point at which my representatives decide that an unfair labor practice probably was committed--is critical in the life of a case.

For this reason, I am committed to ensuring that no case is improperly dismissed because of our failure to conduct a thorough and fair investigation.

The second priority is representation cases. There is no responsibility the NLRB undertakes that is more important than conducting elections to determine whether or not employees will be represented by a union. The effectiveness of our statute is grounded on our ability to swiftly and fairly resolve the fundamental issue of representational status.

Employees and employers must be able to rely on the Agency to bring the election process to a prompt and fair conclusion. As is true in other contexts, the delay, and attendant uncertainty, that often characterizes the representation process imposes a real burden on all involved. A workplace at which an unresolved representation question has lingered is frequently a workplace in turmoil, where productivity and job satisfaction have suffered.

The Board and the General Counsel share responsibility for the representational process. The Board is responsible for procedural rules and setting the standards under which the election campaign can proceed. The General Counsel has supervisory authority over the Agency's field operations and, as a practical matter, some ability to determine how representation cases are processed at the regional level. Together with the Board, I am looking at all aspects of the representation case process to see where unnecessary delay can be reduced.

The NLRB over the years has done well in conducting a majority of its elections within about seven to eight weeks from the filing of a petition for an election. The problem has been that a party in any election case has the ability to undermine the expression of employee free choice by manipulating Board procedures to create delay. Parties can insist on a hearing, prolong it with insubstantial issues, and be assured of delaying the holding of the election. Through merely taking advantage of available procedures, a party can safely assume that it would take a Region a minimum of 3 months, and possibly as much as 6 months or more, to resolve R-case issues. If the Board reviews the matter, it can take even longer before the question of representation is resolved. Compounding this concern, it is often the most hotly contested which take the most time to resolve.

This ability to delay the process through the exercise of readily available procedures affects the circumstances under which virtually all elections are held. Currently, to conduct an election within two months of the filing of a petition the parties must agree or stipulate to the conditions under which the election will be held. The employees seeking an election know that either they must accept the conditions proposed by the employer concerning an appropriate unit, the eligibility of voters, and other important issues, or they risk significant delay in the conduct of the election because the employer can insist on a hearing and lengthy review procedures.

Agreements for stipulated elections, which cover more than eighty percent of the elections conducted by the Board, are often reached only because of the fear that delay would result from failure to reach an agreement. The focus of our concern in the representational area has been to close off the potential for extended delay in all election cases. Our key objective is to assure that all elections will be held within the time frame that now obtains to more than half of the elections we conduct.

We have started this process by altering our traditional method of using median time targets to measure results in this area. Median time targets place undue emphasis upon the midpoint of performance, and thus de-emphasize the 50 percent of cases that are postmedian. Specifically we have implemented the following goals in representation cases :

- The holding of all stipulated elections within 6-7 weeks of the filing of a petition, rather than in a median time target of 50 days.
- In cases where hearing is warranted, the holding of a prompt hearing, typically within 14-17 days from the filing of a petition, and the prompt development of a complete record to permit the timely resolution of the issues.
- In cases where a pre-election hearing is held, the issuance of a Regional Director's decision, in all but the most exceptional of cases, within 45 days from filing of the petition, rather than a median time target of 45 days.
- Ultimately, the holding of all elections--even those where a hearing is held--within 8 weeks of the filing of the petition. This step will require the Board to develop ways to more rapidly process hearing cases.
- For those cases involving post-election issues, quick identification of those issues requiring hearing; prompt conclusion of the hearing; and steps to ensure that all post-hearing decisions issue within 95 days from the election, rather than a median time target of 95 days.
- In situations where the resolution of the representation case is blocked by a related unfair labor practice case, to give the highest priority to the resolution of all issues.
- Finally, after Board certification of a union's election victory, to expedite the resolution of the test of certification case. At present the Regions issue complaint in such cases in a median time of 44 days after the charge is filed. We have set a goal to complete the investigation of all of these cases and to issue a complaint, where appropriate, within 21 days of the filing of the charge.

These initiatives, while still in their early stages, are showing promising results. For example:

- We have reports of stipulated elections being held in 40 days or less—one, in fact, as early as 29 days after the petition.
- Another Region, by use of such techniques as faxing the petition to the employer, holding a prompt hearing with no postponements and issuing a prompt decision, issued a direction of election about 23 days after the petition was filed, with an election to be held on the 49th day after the petition.
- And, in a technical 8(a)(5) case, we expect within the next several days a Board decision and order directing bargaining only about 45 days after the charge was filed. Last year, the median time for such action was over 120 days.

The third priority is the effective use of interim injunctions under Section 10(j) of the Act. Congress enacted 10(j) as a mechanism by which the Board can obtain, from a federal district court, a temporary injunction barring the commission of unfair labor practices and ordering restoration of the status quo, pending the Board's full consideration of the case.

As alluded to in the Commission's report, there has been considerable discussion about the inadequacy of the NLRA's remedial scheme, because too frequently remedies are not implemented until it is too late to undo the harm caused by the unlawful conduct. Indeed, the time it takes for final decisions to issue is sometimes so extended that when remedies are finally ordered the original dispute is but a vague memory. Section 10(j) was enacted because certain kinds of unlawful conduct cannot be effectively remedied if all we do is wait for a final order to issue.

In recognition of these concerns, we have begun to stress that Section 10(j) relief be considered in all cases where such relief is necessary and appropriate. It should be emphasized that we have not changed or modified the standards under which we will seek 10(j) relief. Rather, the change has been to assure that we systematically identify all cases in which 10(j) relief is appropriate and then move the case through the process quickly.

Several specific steps have been taken to implement the prioritization of 10(j) cases:

- We are informing the public of our willingness to consider 10(j) relief and under what circumstances such relief is appropriate.
- We have prepared and distributed an extensive 10(j) manual to provide specific assistance to the regional offices on how to investigate and litigate 10(j) cases. Most of the manual has been made available to the public.

- We have issued guidelines to assist regions in identifying 10(j) cases as early as possible, either on intake, or as early as possible during the course of the investigation.
- We have conducted training sessions in Washington and three other cities which were attended by a senior trial attorney from each regional office. The attorney in attendance was charged with the responsibility of training the balance of the legal staff in his or her respective regional office.
- Each Region has designated a senior attorney or supervisory attorney to coordinate all aspects of 10(j) activity in that Region.
- We have instructed the Regions that, once a potential 10(j) case is identified, it becomes a priority matter. The expeditious processing of the case should be a team effort with enhanced supervisory involvement. Supervisors have been sensitized to the possible need of reassigning other work so that maximum focus may be placed on the 10(j) case.
- We have emphasized that 10(j) work should be included in our measurements of performance and quality.

This initiative has already resulted in a dramatic increase in 10(j) injunctions. In the six months since we first began to implement these changes, the Board has authorized more 10(j) cases than were authorized in the entire preceding year (61 authorizations since March 1994; 42 for FY 1993; 27 for FY 1992). It is important to note that in spite of this significant increase in the number of cases, we have maintained our historical success rate of over 80% in Section 10(j) cases. Let me share a few examples of the successful outcomes we have obtained through the appropriate use of injunctive relief.

- In one case, shortly before scheduling a representation election, an employer announced the closure of the facility and the transfer of the work to another facility. A district court issued a temporary restraining order under §10(j), and the employer agreed to keep the facility open, pending the outcome of the litigation before the Board.
- In another case, an employer had relocated its facility without adequate bargaining. Following the Board's authorization of 10(j) proceedings, the employer and the union returned to the bargaining table, where they reached an agreement under which the employer completed its move, and the employees received over half a million dollars in compensation.
- In several cases, district courts have issued bargaining orders on the basis of an authorization card majority and employer ULPs that prevented the holding of a fair election. In another case the filing of a 10(j) petition led to a settlement

whereby the employer ceased recognizing a union that lacked majority support and recognized the union that the majority of employees supported.

- In other cases, district courts have directed employers to reinstate employees who had been discharged for union organizing activities, or for concertedly seeking to improve their working conditions, pending the final outcome of their cases.

Having identified these three operational priorities, we are actively considering additional ways in which the Agency can work smarter and shift our focus to a more outcome-based measure of success, as required by the President's "reinvention" initiatives. Some of the specific changes I have implemented include:

- Giving Regions greater discretion to "cluster" cases on a geographic basis to minimize travel;
- Giving Regional Directors greater discretion to issue investigatory subpoenas;
- Permitting Regions to use telephone affidavits for those witnesses where the quality of the investigation would not be substantially compromised.
- Reducing the amount of paperwork between the Regions and Headquarters.
- Working with the Board to develop procedures for expediting those cases where time is of the essence, such as cases in which post election objections or challenges are consolidated with unfair labor practice allegations.
- Developing policies whereby we are better able to defer to other statutory or contractual remedies.
- Developing a far more sophisticated internal system of electronic data processing including steps to improve the timeliness, and public availability of our case-handling statistics.
- Streamlining managerial functions to better organize our managerial structure and decrease levels of review.

Through these measures and others we are determined to work more efficiently, and to further improve the effectiveness of our work. Ultimately our ability to succeed will also depend on funding. Since 1980, the NLRB has lost about a third of its staffing. While cases have declined somewhat over that period, the staffing decline has been far steeper than the decline in cases. Productivity per employee

has increased by about 25% since 1985. Funding will of course influence the extent to which we will be able to implement the new priorities I have described.

More aggressive and effective implementation of the Act will have an impact on some of the issues the Commission discussed in its preliminary report. Assuming adequate resources, I believe it is ultimately possible to conduct elections in all instances within two months of the filing of a petition and in most cases within six weeks or sooner of the filing of a petition. Conducting all elections within these time frames addresses the first question you pose at the end of Chapter 3 of your report. As suggested by your analysis, our success in conducting elections within these time frames could result in less acrimonious campaigns, fewer violations of the law, and a greater likelihood that regardless of the outcome of the election, the parties will be able to proceed in developing constructive labor-management relations. However, while expediting the conduct of elections could decrease the acrimony of campaigns, the essential nature of those campaigns will remain. In nearly all cases, elections will continue to be a contest played out in the workplace, between employee advocates of unionization and employer-led opponents to unionization.

More effective utilization of the injunctive provisions of the Act has already begun to assure greater success in remedying violations of the Act. At the current rate, we will be processing 150 injunction cases a year, which is a sharp increase from the limited use that this provision of the Act received in the past.

However, we currently issue more than 3,000 complaints per year. In addition, it is clear that the settlements we achieve in the more than 12,000 cases we settle in a year are significantly influenced by the fact that most cases would take years before a remedy could be effectuated. The great majority of our case load will remain outside the reach of the injunctive provisions of the Act. While I believe that more systematic and thorough implementation of the injunctive provisions of the Act can significantly enhance our ability to remedy violations, the nature of the remedies themselves, the circumstances under which they are applied and the kind of conduct they are intended to deter or encourage will remain a legislative issue.

The six months that I have served as General Counsel of the NLRB have been busy and challenging. In the short time since my arrival, I along with the Board members have begun to consider a number of important ways to improve our operations and build on the success that the Agency has enjoyed in the past. We are still at the early stages of our consideration. I am not yet sure what will succeed but remain committed to continue working with the fine career staff at the Agency as well as with the public served by the Agency to develop ways to assure the most effective implementation possible of the very important Act we administer. We expect to continue to make progress. Nevertheless the many significant issues you identify in your report remain largely beyond our capacity to address administratively.

I want to conclude by wishing you all possible success in your effort to develop proposals and approaches to improve workplace legislation and policies. I, along with my colleagues at the NLRB, eagerly await your conclusions.