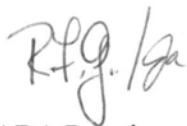


OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 16-02

March 22, 2016

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 Under the
National Labor Relations Act Committee of the Labor and Employment Law Section

In late February, I attended the Annual Midwinter meeting of the Practice and Procedure Under the National Labor Relations Act Committee (P&P Committee) of the American Bar Association (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 meetings, we have included all the questions posed to the Agency and the Agency's responses.

During my tenure as General Counsel, I intend 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 stated 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 to broaden those relationships where they do. Open communication with representatives of both management and labor who appear before us enhances the Agency's performance and benefits the public we serve.

Attachment
Release to the Public

cc: NLRBU
NLRBPA

MEMORANDUM GC 16-02

I. Unfair Labor Practice Issues

A. Statistics

- 1. Please provide the number of ULP charges filed, the settlement rate, the number of complaints issued, the litigation win rate, the number and type of cases sent to the Division of Advice, the median and/or the average length of time a case remains in the Division of Advice.**

In FY 15, the number of unfair labor practice (ULP) charges filed was 20,199; the settlement rate was 92.4%; the number of complaints issued was 1,272; and the litigation success rate was 88%. In addition, there were 454 submissions to the Division of Advice. The median case-processing time was 17 days. The submitted cases involved novel/difficult legal issues, high-profile labor disputes, charges pending in multiple Regional Offices, and Section 10(j) authorization requests. A few of the key and/or recurring issues included: whether a successor that intends to retain all the predecessor employees should have an obligation to bargain with the union before setting initial terms of employment, even if it is not a perfectly clear successor under the narrow test enunciated in *Spruce Up*; whether the Board's holding in *Purple Communications* should apply to company internet and other electronic communications systems; whether to urge the Board to overrule *Oil Capitol* and return to the allocation of evidentiary burdens set forth in *Dean General Contractors*; application of the principles discussed in the *Noel Canning* Board decision in *Alan Ritchey*, such as what should suffice for purposes of good faith pre-discipline bargaining and application of those principles during a contract-hiatus period; and whether employees in a non-union setting should have *Weingarten* rights.

- 2. Please provide the same statistics for cases which involve a claim of interference with Section 7 rights, including social media and handbook cases, where no union is involved. How do these numbers compare to prior years? If possible, please also break down the statistics by the nature of the issue (e.g., Facebook posting, *D.R. Horton* issue, confidentiality policy, etc.).**

The Agency does not track statistical information related to specific allegations or legal theories.

- 3. In FY 2015, how many Motions for Summary Judgment (MSJs) were filed as a result of an alleged default in a settlement agreement that included a default provision? What were the results of such MSJs?**

The Agency does not have specific statistical information on the number of cases in which the default language is triggered. However, an informal inquiry and document search disclosed that there was one Motion for Summary Judgment filed and granted as a result of an alleged default in a settlement agreement that included a default provision.

- 4. Regarding time and geographic limits placed on default provisions, is this information available by Region, and if so, can you please include such statistics by Region?**

The Agency does not keep statistics regarding this information.

5. Since OM 14-48, has there been any further guidance to Regions regarding default language; if not, is any planned?

The Division of Operations-Management and the Regions regularly consult regarding default language in settlement agreements. There is no plan to issue another OM Memorandum on this topic at this time.

6. Have Regions been given any guidance regarding discretion to include non-admissions clauses in settlement agreements; if not, is any such guidance planned?

The Division of Operations-Management has advised Regions to consider progressively increasing the formality required for the resolution of cases in situations where the Region has found merit to successive ULP charges filed against the same respondent. For instance, an informal settlement, rather than an adjusted withdrawal, would be appropriate if one or more ULP charges had been found to be meritorious after the Region had accepted non-Board settlements resulting in adjusted withdrawals. Thus, the first informal settlement thereafter, which would include default language, might include a non-admissions clause depending upon the facts and violations. However, a non-admissions clause would likely not be acceptable in future informal settlements. In addition, formal settlements will be seriously considered in cases where the Region finds merit to ULP charges filed after informal settlements have been approved. In cases where the Region believes that it is dealing with a recidivist, the Region could reject any proposals involving non-admissions clauses in formal settlements. An exception to this requirement could be to include "proclivity" language, whereby the respondent agrees for the purposes of settlement that, in any future proceeding, the formal settlement would have the same force and effect as a fully litigated case finding the respondent engaged in the conduct resolved by the formal settlement.

This progression is not mandated in settling recurring meritorious cases involving the same respondent, as each case is factually distinct. For instance, there may be compelling situations where a Region may insist on a formal settlement even if only one meritorious charge has been filed against a respondent. Conversely, a Region may approve an informal settlement despite the fact that there have been merit findings against a respondent in prior cases.

7. Can you please provide statistics on pre-arbitral and post-arbitral deferrals, including the number of cases deferred and the length of time the cases have been pending? Does this represent a change from prior years?

There are about 1400 cases in pre-arbitral deferral status with 800 of those deferred during FY 15. Another 370 have been in deferral status between one and two years, which is about the same as in previous years. The Agency does not keep statistics on the number of post-arbitral deferrals.

8. 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? Can you please break down the statistics as between subpoenas directed at respondents and non-parties?

In FY 15, 1363 subpoenas were issued – 876 ad testificandum and 487 duces tecum. The cases in which they issued resulted in merit findings in 362 cases and non-merit findings in 214 cases, with others still pending. There were 127 petitions to revoke subpoenas, and, in 27 cases, we sought and obtained enforcement.

Please see the following table, which provides a Region-by-Region breakdown of the number of (1) cases in which investigative subpoenas were issued, (2) subpoenas ad testificandum (3) subpoenas duces tecum, (4) total subpoenas, (5) cases in which an investigative subpoena was issued and there was a merit determination, (6) cases in which an investigative subpoena was issued and there was a non-merit determination, (7) cases in which an investigative subpoena was issued and there was neither a merit nor a non-merit determination, (8) number of petitions to revoke an investigative subpoena, and (9) number of cases in which the Region sought enforcement of an investigative subpoena in District Court. The Agency does not track the other information sought.

Region	# Charges	AT	DT	Total	Merit	Non-Merit	Other	Petition to Revoke	Enforced
1/34	34	16	30	46	16	14	4	6	0
2	35	36	23	59	15	11	9	2	2
3	10	26	1	27	8	1	1	2	0
4	12	23	7	30	8	0	4	0	1
5	28	40	18	58	14	10	4	1	1
6	26	28	5	33	18	7	1	1	0
7	35	40	27	67	20	10	5	6	3
8	20	49	39	88	11	6	3	5	2
9	26	40	14	54	12	5	9	5	6
10/11	41	88	24	112	17	12	12	9	1
12/24	49	40	45	85	27	12	10	20	6
13	32	42	19	61	17	15	0	2	0
14/17	19	25	13	38	10	8	1	2	0
15/26	61	85	50	135	38	21	2	42	0
16	17	30	2	32	12	4	1	0	0
18/30	11	21	10	31	4	5	2	0	0
19/36	33	14	29	43	19	12	2	1	0
20	11	20	14	34	7	4	0	0	0
21	20	26	14	40	10	8	2	0	0
22	29	28	36	64	17	6	6	1	1
25/33	12	12	10	22	3	8	1	1	0
27	2	1	1	2	2	0	0	0	0
28	19	60	3	63	14	4	1	1	0
29	17	15	9	24	9	7	1	2	0
31	40	34	22	56	20	9	11	6	3
32	38	37	22	59	14	15	9	12	0
Total	677	876	487	1363	362	214	101	127	27

9. Are statistics kept on the number of cases in which a compliance hearing is needed after a Board remedial order has issued? If so, please provide.

Below is the number of compliance hearings held since FY 10:

FY 10	9
FY 11	8
FY 12	6
FY 13	11
FY 14	4
FY 15	4

10. How many dismissed cases were appealed to the Division of Appeals; what percentage of cases were overturned, and what are the median and average time a case is pending in Appeals?

During FY 15, the Office of Appeals received 1591 appeals. Of these, 1.4% (23) were sustained. The median processing days for all cases was 22 days. With respect to sustained cases, the median processing days were 84. The average number of days that an appeal was pending in the office was about 30 processing days.

11. Does the Board plan to publish statistics in its Annual Reports, as it has done in the past?

No. The statistical information that was published in the Annual Reports can now be found on the Agency's website; many of the statistics are contained in the Agency's annual Performance and Accountability Report (PAR).

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.**

The Division of Advice received 128 10(j) requests from Regional offices. The General Counsel submitted 41 cases to the Board requesting authorization for 10(j) proceedings, but 3 of those cases were subsequently withdrawn from the Board's consideration due to developments in the cases. The Board authorized 36 cases during the fiscal year.¹ Of those, 1 case was not filed due to developments in the case after Board authorization, 9 cases were pending resolution at the end of the fiscal year, 10 were litigated to conclusion by the end of the fiscal year (with 9 wins (7 full/2 partial) and 1 loss), and 16 cases resulted in a settlement/adjustment. The overall success rate was 96%.

- 2. Please also provide statistics regarding the average time between the filing of the charge and when the Region submits a request to Advice, when the Region makes a determination**

¹ Two submitted cases were pending with the Board at the close of the fiscal year.

to issue a complaint, when the complaint is filed, when the case is filed in federal court, and the date of any injunction determination.

Filing of Charge to:	# of Median Days
Determination	104
Issuance of Complaint	113
Submission to Advice	123
Filing in Federal Court	147
Date of Injunction Determination	284

3. Please describe any trends and/or cases of first impression presented in 10(j) cases this past year

The General Counsel sought injunctions this past year in a wide range of contexts, including to remedy discharges that occurred during an organizing campaign, egregious violations that precluded the holding of a fair election (obtaining interim *Gissel* bargaining orders), successor failures to hire and/or bargain, transfer of unit work to a non-union alter ego to avoid a bargaining obligation, and surface bargaining and/or other misconduct occurring during the initial year of a union's certification. There were no observable trends or recurring novel issues.

4. Please discuss your views on the recent case *Ohr v. Arlington Metals Corp.*, where the court held that the Board's delay in seeking 10(j) relief precluded the grant of such relief.

The General Counsel believed that the district court in *Ohr v. Arlington Metals Corp.* abused its discretion when it found no likelihood of success on the merits in the face of an ALJD finding that Arlington Metals committed the alleged violations. But he determined that difficulties in overturning the court's analysis of irreparable harm weighed against an appeal. Specifically, the district court concluded that, given the passage of time and evidence that there had been long-standing loss of support for the union, an injunction was not necessary to prevent irreparable harm. However, because there was reasonable factual support for the district court's interpretation, we concluded that it would be difficult to establish that the court's interpretation of the evidence, which was significantly different from ours, was an abuse of discretion.

5. Please provide any feedback given as a result of the video-conference sessions with the 10(j) coordinators and Regional management regarding best practices and 10(j) training materials.

The feedback received in response to the 10(j) training sessions was unanimously positive.

6. Before proceeding with 10(j) injunction requests, how often does the Board wait for: (a) affidavits; (b) ALJ transcripts; or, (c) ALJ decisions? What is the reasoning for making a particular choice in a particular case?

The Agency does not maintain statistics on the number of cases tried on affidavits, hearing transcripts or ALJ decisions. As a general matter, there is not a wait for affidavits because those are obtained during the investigation of a case and before a region makes a merit determination and sends the case to Headquarters with a recommendation to seek an injunction.² Thus, once the Board authorizes injunction proceedings, any 10(j) case can be tried on the basis of affidavits. The Injunction Litigation Branch (ILB) might authorize a region to wait for the transcript if the hearing will occur imminently, and/or if the case presents close or complex factual issues for which a district court judge would benefit from the transcript of a full administrative hearing. Regions are rarely authorized to wait until after the issuance of an ALJ decision; those instances are reserved for cases that are so close or highly complex that the benefit to a district court judge of having an administrative decision outweighs the delay in seeking injunctive relief.

C. Deferral

1. Are there any new considerations with respect to deferring cases pre-arbitration and/or deferring to arbitration decisions after *Babcock & Wilcox* and GC Memo 15-02?

We have not encountered any new considerations beyond those contemplated within General Counsel Memorandum 15-02.

2. What kinds of cases concerning deferral are being sent to Advice?

General Counsel Memorandum 15-02 specifies a number of types of issues Regions may encounter, which they are to submit to the Division of Advice for determination. The *Babcock & Wilcox* cases, which the Division of Advice has considered thus far, have included determining whether the *Babcock & Wilcox* standard applies to a pre-*Babcock* collective-bargaining agreement based on the statutory right being included in the agreement, and whether joint labor-management board's or committees' decisions adequately considered the statutory issue or rendered a result "reasonably permitted" under Board law.

3. To what extent has the direction to the Regions to make "arguable merit" determinations resulted in more cases being dismissed rather than deferred under *Collyer*?

The "arguable merit" standard is not a new requirement. Former General Counsel Nash first identified this requirement in General Counsel Memorandum 73-31, which explained:

The region should first determine preliminarily whether the allegations of the charge and the evidence submitted by the charging party in support of the charge and any other evidence at hand establish an arguable violation of the Act. If this preliminary determination does not establish such a violation of the Act, i.e., the charge is determined to be frivolous or clearly lacking in merit, the charge should be dismissed in accordance with Section 102.19 of the Board's Rules and Regulations.

² Charging parties should be providing "just and proper" evidence during the initial stages of the investigation.

Further, Section 10118.1 of the Casehandling Manual (CHM), detailing *Collyer* deferral, has begun with the phrase "Upon a determination of arguable merit" at least since the 2005 edition. See OM Memorandum 05-77 (attaching 2005 version of that Section); see also General Counsel Memorandum 12-01 (citing 2011 version of that Section), as well as the 2015 version of the CHM. Thus, there has been no change to the General Counsel's policy in this regard during the last 30 years. While there was a loosening of those requirements about 20 years ago in light of resource issues, the standard remains in place. We have not observed any change in the number of dismissals under this standard.

4. What guidance has been given to the Regions to ensure that the new 8(a)(3) deferral standards are being implemented properly?

General Counsel Memorandum 15-02, which provides guidance on implementing the new standards, was directed to the Regions. Additionally, new training materials that address deferral generally, and which includes significant information on the new 8(a)(1) and 8(a)(3) deferral standards, have been distributed to Regional Offices and were used during a training at the National Academy of Arbitrators conference. The training materials can be found on the Agency's website. The Division of Operations-Management has distributed flowcharts for Regions to use in assessing whether the *Babcock & Wilcox* or *Spielberg/Olin* standard applies, and has designated a point person to field questions on the new standard. As can be noted in General Counsel Memorandum 15-02, Regions are instructed to submit a number of different types of issues that might arise to the Division of Advice. The Division of Operations-Management checks for compliance with the guidance in periodic reviews of Regional cases.

5. Are there any pending cases raising *Babcock & Wilcox* issues?

Regions have been authorized to issue complaint in two cases where the *Babcock & Wilcox* deferral standard applies and the Division of Advice concluded that the respective employers had not met their burdens of proving that deferral to joint labor-management committees was warranted. In one case the Division of Advice concluded the employer had failed to show that the joint labor-management committee considered the statutory issue. In the other case, the employer showed that the joint labor-management committee had considered the statutory issue, but the Division of Advice concluded that the decision was so cursory that it could not be determined that the result was "reasonably permitted" under Board law.

D. Investigative Subpoenas

1. Are there any new considerations 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. Please provide FY 2015 statistics regarding the number of investigative subpoenas issued as a percentage of total charges filed.

The number of investigative subpoenas issued as a percentage of the total 20,199 charges filed is 3.35%.

3. What guidance, if any, is provided to the Regions in connection with the issuance of charges where there are not corroborating witnesses and/or documents?

The response presumes you meant issuance of complaints. There is no specific guidance, per se; however, Regions are directed and endeavor to obtain corroborative testimonial and documentary evidence through voluntary means, and sometimes through involuntary means, i.e. an investigative subpoena, as referenced directly below.

4. What guidance, if any, is provided to the Regions concerning the issuance of investigative subpoenas?

Pursuant to CHM Section 11770.2 and General Counsel Memorandum GC 00-02, Regions have authority to issue investigative subpoenas ad testificandum and duces tecum to charged parties and third-party witnesses whenever the evidence would materially aid in the determination of whether a charge allegation has merit and whenever such evidence cannot be obtained by reasonable voluntary means.

E. Access to Information

1. GC Memo 15-07 provides that the public must submit a FOIA request to obtain certain information about employees. Are the redaction and FOIA standards referenced in GC Memo 15-07 applied to both supervisory and non-supervisory employees' information? If these standards are different for supervisory employees, then what is the basis for the distinction? Is there a process to challenge the determination of whether someone is deemed a "supervisor" in this context before the information is made publicly available without redaction?

With respect to FOIA redactions, there is no difference between employees and supervisors, all names are redacted, including any other personal information that would identify the individual. Since there is no difference, there is no process whereby you can challenge the status of someone, i.e., whether they are an employee or supervisor.

2. Are the foregoing FOIA requirements applied to representation petitions and, if so, please provide the rationale for doing so.

The same policy is applied to representation cases. All filer names are redacted, as is other personal information, such as address and phone number. There are exceptions where the filer's name is not redacted: in a RM context if the filer is an employer official/representative/lawyer, or in a RC context if the filer is a Union organizer/business agent/representative/lawyer, i.e. s/he is filing in a professional capacity.

3. What is the Board's preferred mechanism to facilitate counsel for represented parties obtaining copies of charges and petitions without having to submit a FOIA request?

An attorney or other representative of a party to a Board proceeding, who has filed a notice of appearance (Form NLRB-4701) with the Regional office, may contact the Regional office to request a copy of the charge or petition. If an attorney or other representative wishes to receive copies of charges or petitions when they are filed, they may submit to a Regional Director an Annual Notice for Receipt of Charges and Petitions (Form NLRB-4702), or its equivalent, for all matters involving a particular client coming before the Regional Office. Additionally, an attorney or other representative may submit a request for a national notice to the Division of Operations Management. All such requests for notices will be honored for the fiscal year in which the request is made. See OM Memorandum 15-32 and CHM Section 10058.1(c).

4. Has the Board considered creating an online mechanism for counsel to obtain charges and other filings akin to PACER's password and registered user system?

Similar to our e-filing system efforts, the Office of the CIO is leading the effort to enhance the website to enable counsel to obtain charges and other filings.

5. Has the Board considered adding a page to its website to publish petitions for review, applications for enforcement, or monthly appellate reports?

This is currently under active consideration.

6. Is the Board considering publishing settlement agreements with redacted party and witness names, case numbers, and other identifying information?

Yes, the Agency plans on publishing redacted settlement agreements and other redacted pre-hearing documentation on its website.

7. Have instructions been provided to the Regions and staff regarding updates to the NextGen system? If so, please share.

OM 15-43	<u>NxGen FY 2015 Features</u>	09/30/201
OM 16-08(NxGen)	<u>NxGen January Release 10 1</u>	01/22/2016
OM 16-08(NxGen)	<u>Attachment 1 Signed Charge Against Employer</u>	01/22/2016
OM 16-08(NxGen)	<u>Attachment 2 Additional Information Supporting Charge</u>	01/22/2016

8. Charges filed under the Board's updated online charge filing system permit employees to check online boxes and choose various violations and create a charge. Are these charges reviewed before they are assigned to an agent and served on the employer? If so, are the Regions provided with guidance on handling such charges?

Regions review e-filed charges before docketing, assignment to an agent, and service on the parties. In conducting this review, Regions apply the following guidance from Section 10012.7 of the Board's Casehandling Manual:

10012.7 Assistance in Remedying Defects in Charge

If the Regional Office receives a charge that is facially incorrect (e.g., a charge that uses the wrong numbers of the sections alleged to have been violated or that incorporates supporting affidavits by reference), the Regional Office should assist the charging party in remedying the defect.

In such cases, docketing should be delayed pending a prompt communication with the charging party. If, however, the filing party insists that the charge be docketed as is or delay will render the filing of the charge untimely under Section 10(b) of the Act, the Regional Office should docket and serve the charge.

Regions have also been instructed to accept wizard-filed charges that meet the Board's Rules and Regulations Section 101.2 "signature" requirement through the e-filer's selection of the wizard's signature prompt.

9. Have the Regions reported any of the following issues with the new filing system?

A number of the issues identified were reported by Regions or practitioners, and addressed by revisions to the website effectuated on January 22, 2016. To the extent practitioners or other users encounter other issues in the interface, we encourage you to alert the Agency of these either by e-mail to e-filing@nlrb.gov or by calling 866-667-6572. Your feedback will continue to help us improve user experiences.

a. Practitioners must choose between filing "on behalf of a union" and "as a legal representative." What should parties do if both apply? If a party chooses filing on behalf of a union, the legal representative's name appears as the name of the party filing the charge along with the union.

We have addressed this issue. See below screen shot.

Are you filing this charge for yourself or on behalf of someone else? *

☐ I am an individual filing for myself (or on behalf of myself and others)
☐ I am an agent/official filing on behalf of a union or labor organization
☒ I am a Legal Representative filing on behalf of a client

Is your client an individual or union/labor organization? *

☐ Individual
☒ Union

Please enter the union/labor organization you are filing this charge for

Organization *

Organization

Please enter the contact information for the union/labor organization you are filing this charge for

Prefix First Name * Middle Name Last Name * Suffix

 Middle

Union/Labor Organization Address *

Address Line 1 Address Line 2

City * State * Zip *

City Zip code

b. The “name of union” and “name of employer” are formatted as if they were names of individuals, with prefixes (e.g., Mr. or Ms.), first name and last name and suffixes (e.g., Jr.).

We have addressed this issue. See below screen shot.

Step 3 - Employer

Employer Name *

Employer Name

Contact Information

Prefix First Name Middle Name Last Name Suffix

 Middle

Title Email

Title sample@organization.com

Address *

Address Line 1 Address Line 2

City * State * Zip *

City

Phone * Mobile Fax

Phone Mobile Fax

In which State and City did the alleged unfair labor practice occur?

Dispute State *

c. Does the information entered in Step 5 “Additional Details,” fully become part of the charge (this is the information that appears on the second page with additional information)? Is it sent to the employer?

The steps have been changed and renumbered.

For Charge Against Employer: Step 4 is “Basis of Charge” and it is completed by simply checking off from listed potential allegations (there is no free-form entry of data); Step 5 is now “Signature”; and Step 6 is “Additional Information in Support of Charge.” The information entered in Step 6 does not become part of the charge. It migrates into a separate pdf, which will be accessible to the Region as a “Documentary Evidence” document. This document is not sent to the charged party (whether union or employer) in the ordinary course of case processing. The Agency contemplates that the document is a statement by the charging party, however, and may be disclosed under *Jencks* if the filer testifies in a subsequent Board proceeding.

For Charge Against Labor Organization: Step 4 is “Employer Information”; Step 5 is “Basis of the Charge”; Step 6 is “Signature”; and Step 7 is “Additional Information in Support of Charge.”

d. Is there a mechanism for amending or withdrawing charges?

There is no wizard assistance or other mechanism for automated amending or withdrawing of charges at this time.

e. Is the public at large able to view the charge? If so, is it viewable immediately upon filing?

The NLRB’s system automatically creates a redacted version of charges and petitions, which omits individuals’ names, addresses, and other personally identifiable information. The redacted version is what will post to the website, but not immediately after filing. Two antecedent events must occur first: (1) a member of the Regional Office staff must manually toggle the document’s properties to trigger public posting of the redacted version of the charge, and (2) cycling of the next day of automatic updates to the web-site (currently, this happens in the 12:01 a.m. – 2:00 a.m. Eastern Time window).

f. What is the relationship between the filing confirmation number and the traditional case docket number?

There are actually three numbers that are related to this inquiry: 1. the filing confirmation number, 2. an inquiry number, and 3. the traditional case docket number (or “case number”).

1. The filing confirmation number is merely a tracking number generated at the e-filing web portal immediately upon successful e-filing. A confirmation e-mail that the e-filing has been processed successfully into the Agency’s case-management system occurs typically 10-15 minutes after each e-filing. In the event of problems with the automatic migration of documents from the Agency’s e-filing web portal to the case-management system, for example stemming from mechanical or software error, cyber-attack, or disaster-related system problems, the filing confirmation number

serves as an electronic receipt that the document was filed and provides a unique identifier that the Agency can use to track what happened to the document.

2. An inquiry number is generated when a user e-files a charge or petition. This number represents a holding place within the Agency's electronic case management system where data and associated documents can be tracked before docketing. Any data and documents associated with an inquiry will automatically migrate to the case number after docketing. When a party e-files a charge or petition, a subsequent e-mail will identify the inquiry number and the e-filer can use the inquiry number to e-file additional documents until a case number has been assigned through docketing.
3. Upon docketing, each case is assigned a unique case number, e.g. 50-CA-123456, and all documents and data associated with the inquiry migrate to that case number such that continued use of the filing confirmation number or inquiry number is no longer necessary.

g. Can parties no longer e-file a pdf? If they do so, will it be converted to a web formatted charge?

Parties can still e-file a completed PDF charge or petition form. See below screen shot.

The screenshot shows the NLRB E-File application interface. At the top is a navigation bar with links: Home, Rights We Protect, What We Do, Who We Are, Cases & Decisions, News & Outreach, and Reports & Guidance. Below the navigation bar is a heading "Welcome to NLRB E-File". The main content area contains the following text: "You are filing a Charge or Petition using the NLRB's electronic filing (E-File) application. To successfully complete and submit the filing, you must follow all steps, fill in all required fields, and accept the declaration. After you submit the form, you will receive a confirmation email from the NLRB E-File system with your completed Charge or Petition in an automatically generated PDF form." Below this is a paragraph: "The NLRB strongly encourages you to use this E-File application to file a Charge or Petition. But if you wish to:" followed by two bullet points: "• E-File an already completed and signed Charge or Petition PDF form, click here" and "• Access the blank fillable PDF Charge and Petition forms, click here". Below the bullet points is a paragraph: "If you have questions about filing a charge or petition, please contact your local Regional office for assistance. You can find the office nearest you at Regional Offices or dial 1-866-667-NLRB." At the bottom of the screenshot is a section titled "E-File Terms and Conditions" with a scrollable text area containing the following text: "The National Labor Relations Board strongly encourages parties or other persons to use the Agency's E-Filing Program to file selected documents in unfair labor practice and representation cases with the Board's Office of Executive Secretary, the Division of Judges, the General Counsel's Office of Appeals, and Regional, Subregional and Resident Offices."

h. If parties fax in a charge, will it be converted to a web formatted charge?

No. Faxed charges will be docketed as they are filed and will be processed no differently than before the introduction of wizard-assisted filing.

F. GC Memo 15-04

1. Has the Board seen a reduction in the number of charges related to employer work rules and handbooks since the issuance of GC Memo 15-04?

The Agency does not track or keep statistics on this information.

G. Noel Canning

1. Please provide an update on the status of cases affected by *Noel Canning*. Has the result changed in any of the cases that have been reconsidered? Please provide a list of any remaining cases that have not yet been re-reviewed.

103 *Noel Canning* cases were returned from the federal courts. The Board issued decisions in 95 cases, 2 cases were withdrawn, 5 settled, and 1 was just returned to the Board for decision after an unsuccessful mediation. Of the 95 decisions that the Board re-issued, it appears that three resulted in a different outcome than the prior decision. Those cases are: *Fresenius USA Manufacturing, Inc.*, 362 NLRB No. 130 (2015); *Chickasaw Nation d/b/a Winstar World Casino*, 362 NLRB No. 109 (2015); and *Sodexo America LLC and Keck Hospital of USC*, 361 NLRB No. 97 (2014).

2. In light of *SW General, Inc. dba Southwest Ambulance*, what actions has the Board taken or does it plan to undertake in cases in which the authority of the General Counsel or a Regional Director has been called into question?

Following the denial of its petition for rehearing en banc, the government has determined to seek Supreme Court review in *SW General*. In the Courts of Appeals, the Board continues to defend the Acting General Counsel's appointment in circuits other than the D.C. Circuit, with cases fully briefed in the Second, Third and Sixth circuits. Where the challenge was raised belatedly (often for the first time in court), the Board is arguing that the challenge was waived, as well as defending the appointment under the Federal Vacancies Reform Act (FVRA). Further, the General Counsel, upon receipt of a recommendation by a Regional Director, has undertaken review of case actions and determinations in cases currently pending before the Board where this issue has been raised, and has ratified the underlying actions and determinations to date. See, *The Boeing Company*, 362 NRB No. 195, fn. 1 (August 27, 2015).

The Board has responded to *SW General* based challenges to the authority of the General Counsel and Regional Directors in the following cases:

D.C CIRCUIT

SW General, Inc. v. NLRB D.C. Circuit No. 14-1107

Marquez Brothers Enterprises v. NLRB D.C. Cir. No.14-1305

Bread of Life v. NLRB D.C. Cir. No. 15-1179

Newark Electric v. NLRB D.C. Circuit No. 15-1111

Midwest Terminals v. NLRB D.C. Cir. No. 15-1126

SECOND CIRCUIT

Pier Sixty v. NLRB 2nd Cir. No. 15-1841

THIRD CIRCUIT

1621 Route 22 West Operating Co., LLC v. NLRB 3rd Cir. No. 15-2466

FOURTH CIRCUIT

NLRB v. Bluefield Hospital Co., LLC 4th Cir. No. 15-1203

SIXTH CIRCUIT

The Ohio Edison Company v. NLRB 6th Cir. No. 15-1783, 15-1929

NINTH CIRCUIT

Hooks v. Kitsap Tenant Support Services, Inc. 9th Cir. No. 13-35912³

H. Time Targets

1. What are the current time frames for case dispositions?

The General Counsel's Impact Analysis program provides the analytical framework for classifying cases in accordance with their impact on the public and significance to the achievement of the Agency's mission. Pursuant to this program, there have been no changes to the time frames for ULP case dispositions since modifications were implemented on October 1, 2014. The current time frames for case dispositions are as follows:

Category III	7 weeks
Category II	11 weeks
Category I	14 weeks

2. In FY 2015, did you meet the overall goal of issuing at least 50% of all decisions within 90 days of the close of the hearing and within 45 days of receipt of briefs or other submissions?

In FY 15, ALJs issued half of their decisions within 102 days from the close of hearing and within 51 days from receipt of briefs or submissions.

3. Has there been a change to allow for more flexibility in settlements, and if so, please describe?

The NLRB's Casehandling Manual Sections related to settlements have not changed. The General Counsel continues to encourage and actively facilitate settlements. While the vast majority of settlements are achieved before trial, efforts to settle continue throughout the course of litigation.

4. Practitioners would appreciate an in-depth explanation of how time targets and their exceptions are applied.

The time targets set forth above in response to question 1 are incorporated into each Regional Director's performance plan. Upon the filing of a charge, the Regional Director or Assistant Regional Director will assign the case an Impact Analysis category. Any case still pending disposition on the last day of the month in which the time target is exceeded is reported as "overage". Cases that cannot be processed within the time targets for reasons that are outside the control of the Regional office are excused, and therefore, not considered overage. The time

³ The Ninth Circuit recently found Mr. Solomon's continued service as Acting General Counsel after his nomination to be invalid under the FVRA.

targets themselves are fixed; however, depending on the given situation, a case may be excused. The Division of Operations-Management determines whether any given case should be excused and conducts a monthly review of overage cases to determine whether any should be excused. Acceptable reasons for cases going overage are discussed in response to question 7.

5. To what extent do time targets impact the quality of investigations and deliberations?

The Agency has been very successful in processing cases promptly without sacrificing quality as the public deserves efficient and effective service. We have no reason to believe that the time targets have any negative impact on quality. Quality in Regional office casehandling is ensured in a number of ways. First, Agency process and procedure itself places a strong check on Regional quality through the settlement/litigation process for meritorious cases and through Office of Appeals' review of non-merit cases. In addition, the General Counsel's Quality Review process for Regional office cases, conducted by the Division of Operations-Management, also works to ensure case processing is conducted consistent with the highest quality standards. Achieving the balance between meaningful performance goals and high quality investigations is a challenging one, but continues to be one of the General Counsel's highest priorities.

6. What are the consequences of allowing a case to go "over age"?

Overage statistics for ULP cases are kept monthly, but are measured on an annual basis. Under the current standards, Regions have an overage allowance of up to 10% in each of the three categories of cases. Accordingly, up to 10% of the Region's ULP cases in a given category may go overage without excuse. Should any Region exceed the 10% allowance in any given category for the year, such would have an impact on the Regional Director's performance evaluation for that given year.

7. How often do cases go "over age" across the Agency?

There are few cases in Regional offices that exceed the time targets without excuse. In FY 15, 1.19% of Category I, 1.42% of Category II, and 3.42% of Category III cases were overage and unexcused.

8. What are acceptable reasons to allow a case to go "over age"?

Where a case cannot be disposed of within the time targets for reasons outside of the control of the Regional office, it is excused. There are a variety of reasons a case might not meet the Impact Analysis time targets, but which would be outside the Region's control. This list, while not exhaustive, underscores that, in addressing whether a case is excused, the Division of Operations-Management gives serious consideration as to what is outside of the Region's control. For example, a new charge alleging violations that have occurred after the initial charge was filed, and where both are so intertwined that a common analysis and determination is required, represents one situation in which failure to meet the time target for the first case is deemed outside of the Region's control. Similarly, where the charging party raises additional allegations that pre-date the subject charge, an amended charge adding the earlier allegation would excuse the charge from failing to meet the time target. The issuance of an investigative

subpoena to obtain testimony or documents necessary to enable the Region to make a decision excuses the case from being considered overage for a reasonable period – usually one month. In situations where there has been a Regional determination and serious settlement negotiations are underway, the Region is excused from issuing a complaint for one month. In certain circumstances, charges held in abeyance pending the outcome of related proceedings in other cases may also be excused from meeting the time target.

9. What events will toll or suspend the time targets?

As explained above, the time targets are fixed and are not suspended per se.

I. General Case Processing Issues

1. Please provide an update on the current approach to the handling of *D.R. Horton/Murphy Oil* cases.

We continue to litigate, in the courts of appeals, cases in which the Board has applied *D.R. Horton* and *Murphy Oil*. We plan to file a petition for rehearing *en banc* in *Murphy Oil* itself. While *Murphy Oil* remains unresolved, we have been moving to hold in abeyance other cases filed in the Fifth Circuit, while generally litigating cases in other circuits as they are filed. In addition to litigating cases arising directly from Board orders, the Board has participated as amicus in cases presenting *Horton/Murphy Oil* issues in the Second, Seventh, and Ninth Circuits.

As to Regional handling, the current approach is to continue to issue a complaint if a Region determines, based upon *D.R. Horton/Murphy Oil* precedent, that the employer has violated the Act. There have been some cases that have proceeded based on stipulated records.

2. Please provide a list of the pending cases involving *D.R. Horton/Murphy Oil* issues, the status of such cases, and the Regions in which they are pending.

A detailed list of *D.R. Horton/Murphy Oil* cases in the courts of appeals in which the Board is a party or amicus is attached.

II. Remedies

1. Following HTH, 361 NLRB No. 65, have there been any submissions in which Advice has recommended seeking an HTH remedy or the General Counsel has sought an award of front pay?

Since the Board's decision in *HTH Corp. d/b/a Pacific Beach Hotel* (361 NLRB No. 65), in which the Board opined on its authority to impose the previously-unused remedy of front pay and indicated that it would consider it in an appropriate case, the Division of Advice has not yet considered seeking an award of front pay. However, Regions have handled settlement agreements involving front pay.

As to remedies ordered by the Board in *Pacific Beach Hotel*, Regions are issuing complaints seeking such remedies. For example, in *Preferred Building Services*, the Region is seeking a number of additional remedies, in light of the Employer's coercive conduct premised on immigration status. These remedies included: a training for employees on their rights under the Act and a training for supervisors and managers on compliance with the Act, conducted by a Board agent on paid working time; a notice mailing; and Union access to employee contact information. See, also, the response to question 3.

2. Does the Agency have any plans to increase Regional staff training with regard to the deferred action process under the Department of Homeland Security policies?

In General Counsel Memorandum 15-03, the General Counsel announced his intention to seek partnerships with federal immigration agencies in appropriate circumstances where immigration status issues may impact the NLRB's ability to remedy or litigate a potential ULP violation. As envisioned by that memorandum, the Division of Operations-Management has conducted training with Regional staff on the potential options available. Further training may occur, as necessary.

3. Are Regions seeking additional remedies where Hoffman Plastic bars back pay? If so, please describe. How many formal settlements have resulted where Hoffman Plastic bars back pay?

Under General Counsel Memorandum 15-03, the Office of the General Counsel will consider whether additional remedies should be sought to address remedial issues that arise in cases where immigration status may impact the ability to remedy or litigate a potential ULP violation. The memorandum outlined a number of non-exclusive examples of remedies that may be considered in cases where immigration issues threaten remedial failure. Under this mandate, Regions have conferred with Headquarters' offices as to the propriety of seeking additional remedies on a case-by-case basis. For example, in a few cases, counsel for the General Counsel is seeking an order which mandates, in part, a Board agent to conduct separate trainings for employees on their rights under the Act and for supervisors and managers on compliance with the Act. To date, no formal settlements have been taken in these circumstances.

4. Since GC memo 15-03 was released, have there been any cases where the Board has sought contempt to ensure compliance with the terms of these formal settlement agreements?

No.

III. 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, the results of such elections by types of petition, and the union win rate.

	<u>4/14/2015 to 1/14/2016</u>	<u>4/14/2014 to 1/14/2015</u>
Total R Cases	2,262	2,329
RC Cases	1,818	1,790
RD Cases	284	363
Total Elections	1,284	1,444
RC Elections	1,135	1,243
RD Elections	108	163
Certified Elections	1,166	1,421
RC Win Rate	68.9%	70.2%
RD Win Rate	39.2%	37.5%

2. Please provide statistics for both FY 2015 as a whole and for 2015 following implementation of the new election rules, compared to prior years or comparable periods (mid-April to year end), concerning the median number of days from petition to election, as well as statistics on cases that took longer than the median.

Election Median

FY 15	33 Days
FY 14	38 Days
4/14/2015 to 9/30/2015	25 Days
4/14/2014 to 9/30/2014	37 Days
FY15 Number of cases over median	876 Cases
FY14 Number of cases over median	778 Cases
4/14 to 9/30/2014	381 Cases
4/14 to 9/30/2015	382 Cases

The FY numbers do not include blocked cases.

3. Please provide statistics concerning the average unit size sought in RC petitions and the average unit size determined to be appropriate. How do these statistics compare to the years before *Specialty Healthcare*?

The median size of unit sought in RC petitions for petitions filed 4/14/2015 to 2/14/2016 was 22.
The median size of unit sought in RC petitions for petitions filed 4/14/2014 to 2/14/2015 was 25.

The median size of the unit determined to be appropriate for elections filed 4/14/2015 to 2/14/2016 was 24.
The median size of the unit determined to be appropriate for elections filed 4/14/2015 to 2/14/2015 was 27.

The numbers are consistent with those in years prior to the issuance of the *Specialty Healthcare* decision.

4. Please provide statistics concerning the use of mail ballots and the holding of off-site elections. Have mail ballot elections increased since the decision in *2 Sisters Food Group, Inc.*? Please share similar statistics for DDEs and stipulated elections.

For cases filed from 4/14/2015 to 2/14/2016, the number of mail ballot elections was 151 of 1284 total elections.

For cases filed from 4/14/2014 to 2/14/2015, the number of mail ballot elections was 163 of 1444 total elections.

The percent of mail ballot elections in past years has remained around 10%. The Agency does not maintain statistics on off-site elections and there have been no changes to the standards for mail-ballot elections.

B. Election Rules

1. Are any other rules or modifications to the election rules being considered or drafted?

No.

2. Specific questions about the new rules:

a. Both Practitioners and Regional management expressed interest in further guidance in light of *Danbury Hospital*, Case 01-RC-153086, which addressed Voter List compliance. Please provide information regarding the standard to determine whether personal email addresses and telephone numbers are deemed “available” to an employer. Have Regions been given any guidance on whether they are permitted to require employers who are preparing Voter Lists to provide individual employees' phone numbers or emails that are not contained in any official employer database and only possessed by supervisors without the knowledge of upper management or human resources?

Section 102.62(d) of the Board's Rules and Regulations provides that:

Absent agreement of the parties to the contrary specified in the election agreement or extraordinary circumstances specified in the direction of election, within two business days after the approval of an election agreement pursuant to paragraphs (a) or (b) of this section or issuance of the direction of election pursuant to paragraph (c) of this section, the employer shall provide the regional director and the parties named in the agreement or the direction a list of the full names, work locations, shifts, job classifications, and contact information (including home address, available personal email addresses, and available home and personal cellular telephone numbers) of all eligible voters. The employer shall also include in a separate section of that list the same information for those individuals whom the parties have agreed should be permitted to vote subject to challenge or those individuals who, according to the direction of election, will be permitted to vote subject to challenge.

The Board did not provide a standard against which Regions are to judge whether personal email addresses or home and cellular telephone numbers are available or further define available in the Rule. In the above cited case, the Regional Director determined in a Decision and Direction of Election that the employer did not exercise reasonable diligence when it relied on a single database to provide voter list information, despite the fact that it utilized other databases. The Request for Review in this case was determined moot after the petitioner withdrew its petition, and thus, it was not ruled on by the Board.

b.. What are the first quartile and fourth quartile periods of time between petition and election?

The Agency does not keep statistics regarding this information.

c. Under the new election rules, are Regions conducting elections sooner after a hearing or where there is a stipulated election agreement? Please provide details.

For cases filed since the new rule implementation (4/14/15 to 2/14/16):

Median time from filing to election overall: 24 days

Median time from filing to election in Stipulated Agreement cases: 23 days

Median time from filing to election in DDE cases: 34 days

d. What is the total number and percentage of stipulated elections under the new election rules? How does that compare to prior years or comparable time periods?

Election Agreement Rate (percentage of stipulated elections):

Cases filed 4/14/15 to 2/14/16 – 91.6%

Cases filed 4/14/14 to 2/14/15 – 91.6%

FY 15 – 91.5%

FY 14 – 91.1%

e. What is the total number and percentage of withdrawn petitions under the new election rules? How do those compare to prior years and comparable periods?

For cases filed from 4/14/15 to 2/14/2016, the percentage of cases withdrawn out of all cases closed was 34.7%.

For cases filed from 4/14/15 to 2/14/2015, the percentage of cases withdrawn out of all cases closed was 32.9%.

FY 14: percentage of cases withdrawn out of all cases closed was 32.3%.

FY 15: percentage of cases withdrawn out of all cases closed was 32.5%.

This statistics have remained constant over the years. It is noted that, for cases filed from 4/14/15 to 2/14/2016, many of those cases are still being processed.

f. What is the total number and percentage of blocking charges filed under the new election rules? How do those compare to prior years and comparable periods?

For cases filed from 4/14/15 to 2/14/16, there were 89 cases blocking petitions out of 2,262. For cases filed from 4/14/14 to 2/14/15, there were 162 cases blocking petitions out of 2,329.

g. Under the new election rules, is there a targeted range of days in which you aim to schedule an election? Some Regions reported the targeted range is from the “high teens to the high twenties.”

No. General Counsel Memorandum 15-06 provides guidance on this issue to the Regions, as follows:

The Board has said that the election should be held at the earliest date practicable consistent with the Board’s rules. At this point, because there is no experience processing cases under the final rule, it is not possible to express a standard in terms of a specific number of days from the filing of the petition to the election. Rather, I expect that regional directors will exercise their discretion and approve agreements where the date agreed upon by the parties is reasonably close to the date when an election would likely be held if it were directed. Factors that will influence the date when a directed election would occur include the number of likely days of hearing, the length of time required to write the decision, and whether the parties entitled to the voter list have waived some or all of the time to have the list. As suggested by the Board, regional directors’ discretion in selecting an election date should continue to be guided by the factors listed in CHM Section 11302.1: the desires of the parties, operational considerations, the desirability of facilitating employee participation, and the prompt and timely conduct of the election.

h. Please provide statistics on the Union win/loss ratio in elections under the new rules. How do these compare to Union win/loss ratios in prior years or comparable time periods?

See response to III.A.1.

i. Please provide statistics on election petitions supported by electronic signatures.

While we have seen one or two cases where electronic signatures have been gathered, we do not have statistics regarding petitions supported by this means.

j. What does the Board consider to be substantial compliance with respect to service of a petition?

The Board’s comments on the new rule stress that the new “service” requirement for the petitioner is primarily for the purpose of affording the parties the earliest possible notice of the petition. See Federal Register, Vol. 79, No. 240, Sections II and V, pgs. 74327.

As issues of imperfect service come before the Board, a greater understanding of the Board’s view in these matters will evolve. For example, in *Avis Budget Group, Inc.*, 12-RC-153554, issued on January 11, 2016, the Board denied the Intervenor’s Request for Review of the Regional Director’s Decision and Direction of Election concerning the Petitioner’s negligent failure to effectuate service of the petition. In that Order, the Board stated:

The Petitioner's negligent failure to effectuate service of the petition as required by Section 102.60(a) of the Board's Rules and Regulations did not require dismissal of the petition. We note that the petition named the Intervenor as the incumbent representative, the petition was served on the Intervenor and the Employer by the regional office, the request for review does not allege prejudice resulting from the Petitioner's failure to effectuate service, and the evidence does not establish intentional falsification of the certificate of service of the petition.

C. Joint Employer

1. **How many cases have raised the issue of joint employment and, therefore, implicate the recent *Browning-Ferris* decision? Are Regions applying the *Browning Ferris* standard (articulated in an R-Case) to C-Cases? Does the Agency intend to distribute further guidance with regard to the impact of the *Browning-Ferris* decision?**

We do not have a report reflecting this information. However, an informal search revealed that there were about 301 such charges in FY 15 and 95 thus far in FY 16. The Regions are applying the *Browning Ferris* standard to C cases. At this point, there is no plan to distribute further guidance with regard to the impact of the *Browning Ferris* decision.

2. **Are *Browning-Ferris* cases considered mandatory submissions to Advice?**

Even before *Browning Ferris*, joint employer cases were not mandatory submissions to Advice cases, and similarly, *Browning Ferris* cases are not, in general, mandatory submissions to Advice. If such cases present novel legal issues (as opposed to merely requiring application of the new standard to a detailed factual record), Regions are expected to submit them.

3. **How has Advice interpreted *Browning-Ferris* and are the Regions instructed on how to apply the decision?**

Given the clarity and comprehensiveness of the *Browning Ferris* decision, the Division of Advice has not done a guideline memo instructing Regions on its application. The Division of Advice has had only one case since the decision issued where the new joint-employer standard was applied. In that case, *Ashford TRS Nickel, LLC*, Case 19-CA-147032, there was ample evidence that the hotel and management company jointly controlled essential terms and conditions of employment for the hotel employees such that, in addition to being a single employer, they were joint employers under *Browning Ferris*.

4. **Is there coordination between the Board and other agencies (including the FTC) regarding franchise agreements? If so, please describe.**

There has been no coordination between the Board and other agencies regarding the joint employer standard or, specifically, franchise agreements.

5. **Has the Board provided any guidance on whether *McDonald's*-type cases can be settled by franchisees without admission of "joint employer" status?**

No. Where it has been found that one charged employer is a joint employer of another charged employer's employees and jointly liable to remedy the other employer's unfair labor practices, both charged employers would ordinarily be party to a settlement agreement that remedies those unfair labor practices. In the particular circumstances where it has been found that a franchisor is jointly liable to remedy unfair labor practices based on a joint employer relationship with the franchisee, the General Counsel has provided no general guidance regarding settlement by the franchisee without the franchisor also being a party to the settlement agreement.

6. Are investigative subpoenas being used to determine joint employer status? If so, please describe the circumstances under which they are being used.

Yes. Investigative subpoenas are issued to investigate joint employer status consistent with the guidelines articulated in CHM Section 11770.2 and General Counsel Memorandum GC 00-02.

IV. Miscellaneous

1. Are there any cases in which the General Counsel has authorized the Regions to argue for reconsideration of *Spruce Up* and, if so, what is the status of such cases? Has the General Counsel instructed the Regions to send potential *Spruce Up* issues to Advice?

There are a number of cases in which the General Counsel has authorized the Regions to argue for reconsideration of *Spruce Up*. See attached list with the status of those cases. Pursuant to General Counsel Memorandum 14-01, Mandatory Submissions to Advice, Regions had been instructed to send all of these cases into the Division of Advice, but this will no longer be required.

2. Are there any plans for further Regional reorganizations? For example, it was reported that the Des Moines Regional Office is closing and its jurisdiction will be part of Region 18. This includes most of the State of Iowa. However, the Quad City area is part of the Peoria, Illinois Region.

There are no plans for further Regional reorganizations at this time; however, as is standard practice, upon notification of a Regional Director retirement, an assessment is performed regarding potential office consolidations. Des Moines, a Resident office, was overseen for a number of years by the Minneapolis Regional office. At the time of the Resident office's closure, only one professional remained. The geographic area covered by the Des Moines Resident office continues to be covered by the Minneapolis Regional office. Peoria is a satellite office of the Indianapolis Regional office and it covers cases arising in the Quad City area.

3. How does the Agency identify a case as a "merit case"? If there are numerous allegations, but only one allegation is determined to have merit – is that a merit case?

Merit cases are those in which a Regional Director has determined that formal proceedings are warranted. If any of the allegations in a charge are ones in which the Regional Director has determined that formal proceedings are warranted, the case is deemed a "merit case." The General Counsel tracks the percentage of ULP cases in which Regional Directors make merit determinations. In FY 15, the nationwide merit factor was 37.8%.

4. Is the Agency sufficiently funded to meet its mission? What would be the optimum funding level? If a lack of funding is affecting Agency operations, what areas are impacted?

The Agency's FY 16 appropriation was \$3.776M less than our submitted budget request, and our FY 17 appropriation is expected to be at around current level funding. With cost of living increases and increases to our rent and security, to name just a few expenses, we are required to do more with less. This will impact our staffing levels and our technological efforts, both of which impact public service.

5. Does the Agency have any plans to increase Regional staff training with regard to collective bargaining in 8(f) contexts? In that regard, has the Agency seen an increase or decrease in the number of cases arising in 8(f) environments?

The Agency does not have any plans to increase Regional staff training with regard to collective bargaining in 8(f) contexts. The Agency does not track 8(f) cases in NxGen; however, based on an informal inquiry, the Agency has not seen an increase in the number of cases arising in 8(f) environments.

6. Does the Agency intend to circulate any guidance regarding the standard to determine whether conduct constitutes picketing? For example, does the GC advocate for (and has the GC, therefore, directed the Regions to evaluate allegations of picketing in light of) a standard that requires conduct to be either confrontational *or* disruptive, or confrontational *and* disruptive?

The Agency does not intend to circulate any guidance regarding the standard determining whether conduct constitutes picketing. We note that Board law indicates that conduct rises to the level of picketing where it is confrontational, regardless of whether or not it is "disruptive."

7. How are the Regions implementing the new policies outlined in the GC's memo on Updated Procedures in Addressing Immigration Status Issues that Arise during ULP proceedings? Are the Regions assisting discriminatees in seeking deferred action? If so, please describe.

As set forth in General Counsel Memorandum 15-03, Regions are directed to immediately contact the Division of Operations-Management as soon as they become aware, in any stage of a case, that immigration issues may impact the ability to remedy or litigate a potential ULP violation. In accordance with this directive, Regional staff has been conferring with staff in the Division of Operations-Management to develop investigation and litigation strategies. Since issuance of the memorandum, Regions are attempting to assist discriminatees in appropriate cases, and one Region successfully partnered with an immigration agency to provide deferred action and work authorization for a discriminatee who was returned to work pursuant to a Section 10(j) interim reinstatement order.

8. In light of the Fair Play and Safe Workplace Executive Order, has the Board or GC's office adopted or considered a process for reporting labor law violations to the DOL?

Though this is under active consideration, a process has not yet been finalized or implemented.

9. The Board had previously mentioned that it was considering a model rule of ethics for practice before the Board. What is the status of that rule?

It remains under consideration.

10. Please provide a list of cases pending before the Board that involve an *Alan Ritchey* issue

Total Security Management (13-CA-108215)
Paragon Systems (12-CA-105275)
UPS Supply Chain Solutions (12-CA-113671)
Security Walls (13-CA-114946)
Latino Express (13-CA-122006)
SMG Puerto Rico (12-CA-130436)
Adams and Associates (20-CA-130613)
Ready Mix (10-CA-140059)
Western Cab Company (28-CA-131426)
High Flying Foods (21-CA-135596)

SPRUCE UP CASES, February 17, 2016

Providence Group Inc., d/b/a San Francisco Nursing Center, 20-CA-153571	Withdrawn Adjusted 12/8/2015 (settled non-Board)
Technology Ventures, Inc., Case 07-CA-143648	Pending Hearing scheduled 4/11/2016
Majestic Rehabilitation and Nursing Center, Case 22-CA-150848	Pending Hearing scheduled 3/22/2016
GateHouse Media, LLC a/k/a CA Daytona Holdings, Inc. d/b/a The Daytona Beach News-Journal, Case 12-CA-153531	Withdrawn Adjusted 8/25/2015 (settled non-Board)
Exemplar Enterprises, Case 20-CA-151054	Informal Settlement 10/26/2015
DSS-Integrity, LLC, Case 05-CA-133760	Withdrawn Adjusted 9/21/2015
American Paragon, Case 05-CA-140862	Informal Settlement 8/28/2015
Pomptonian Food Service, 22-CA-136044	Withdrawn Adjusted 10/1/2015 (Union and successor negotiated cba)
American Security Programs, Inc., Case 05-CA-138801	Withdrawn Adjusted 3/31/2015
Paragon Systems, Inc., Case 05-CA-127523	ALJ Decision finding 8(a)(1)(5) violations 9/30/2015; pending before Board on exceptions
AEPS Corp. and Paragon Systems, Case 05-CA-126739	Automatic Board Order 11/4/15 upholding ALJ Decision finding 8(a)(1)(5) violations 9/22/2015
Montecito Heights Healthcare & Wellness Center, 31-CA-129743 and 31-CA-129747	Withdrawn Adjusted 10/14/2015 (Non-Board settlement)
Americraft Carton, 10-CA-130244 et al.	Withdrawn Adjusted 11/17/2015
Paragon Systems, Inc., Cases 08-CA-125740 & 08-CA-125795	Withdrawn Adjusted 11/13/2014
Clean-Tech Services, Inc., Case 04-CA-124224	Closed 2/17/2015 Informal Settlement

Lexington Center for Nursing and Rehabilitation, Case 01-CA-127836	Withdrawn Adjusted 8/20/2014 (parties entered into cba)
Autumn Health Care, Cases 01-CA-144823 & 01-CA-152930	Pending Hearing scheduled on 2/23/2016
Intec Building Services, Case 09-CA-144156	Informal Settlement 12/15/2015
Data Monitor Systems, Inc., 09-CA-145040	Hearing Closed 11/30/2015; Lost before ALJ; exceptions due 2/23 (Region excepting to ALJ's failure to overturn Spruce Up)
Fuel Services DL Joint Venture, A Joint Venture of DAE Venture Sung & LB&B Associates, 09-CA-143137	Withdrawn Adjusted 7/24/2015
MaxSent Security Cases 19-CA-139976, 19-CA-143322 and 19-CA-145058	Closed Informal Settlement 10/2/2015
Riccelli Enterprises, Inc., Case 03-CA-130137	Won before the ALJ. Request for EOT to file exceptions to 03-04-16 granted. Region reviewing non-Board settlement/withdrawal request.
MV Transportation, Inc., Cases 02-CA-129873	ALJ Decision 9/21/2015 finding 8(a)(1)(5) violations / Closed adjusted withdrawal
MV Transportation, Inc., 02-CA-133474	Withdrawn 3/17/2015/ Closed adjusted withdrawal
Ahtna Facility Services, Inc. and G4S Government Solutions, Inc., Cases 07-CA-122165 and 07-CA-122185	Informal Settlement 6/12/2015
MVM, Inc., 28-CA-120679	Closed Informal Settlement 6/23/2015
TRI Management Solutions, 05-CA-162060	Pending Hearing scheduled 4/14/2016
Parallel Employment Group, 09-CA-148072	Informal Settlement 11/05/15
Intec Building Services, Case 09-CA-144156	Informal Settlement 12/28/15
200 STL Holdings d/b/a Crowne Plaza St. Louis, 14-CA-143760	Withdrawn Adjusted 6/12/15

Cases Related to D.R. Horton by Circuit

Case	Circuit	Brief Filed	Argument	Judgment
Patterson v. Raymours Furniture Co.*	2d Cir., 15-2820	12/23/2015		
The Rose Group d/b/a Applebee's Rest.	3d Cir. 15-4092			
AT&T Mobility Service, LLC	4th Cir., 16-1099			
D.R. Horton	5th Cir., 12-60031	9/4/2012	2/5/2013	12/3/2013
Murphy Oil	5th Cir., 14-60800	4/1/2015	8/31/2015	2/18/2016
Chesapeake Energy	5th Cir., 15-60326	9/30/2015		Pending**
Neiman Marcus	5th Cir., 15-60572	Abeyance		
PJ Cheese	5th Cir., 15-60610	Abeyance		
Leslie's Poolmart	5th Cir., 15-60627	Abeyance		
On Assignment Staffing Servs.	5th Cir., 15-60642	Abeyance		
Amex Card Services Co.	5th Cir., 15-60830	Abeyance		
Citigroup Tech., Inc.	5th Cir., 15-60856	Abeyance		
Prof. Janitorial Serv. of Houston	5th Cir., 15-60858	Abeyance		
Brinker Intl. Payroll Co.	5th Cir., 15-60859	Abeyance		
U.S. Xpress Enterprises, Inc.	5th Cir., 15-60871	Abeyance		
Kmart Corp.	5th Cir., 15-60897	Abeyance		
RPM Pizza, LLC	5th Cir., 15-60909	Abeyance		
Citi Trends, Inc.	5th Cir., 15-60913	Abeyance denied		
Domino's Pizza, LLC	5th Cir., 15-60914	Abeyance		
Ross Stores, Inc.	5th Cir., 15-60916	Abeyance		
SolarCity Corp.	5th Cir., 16-60001	Abeyance		
24 Hour Fitness USA, Inc.	5th Cir., 16-60005	Abeyance		
MasTec Services Co.	5th Cir., 16-60011	Abeyance		
GameStop Corp.	5th Cir., 16-60031	Abeyance		
Employer Resources	5th Cir., 16-60034	Abeyance denied		
Waffle House, Inc.	5th Cir., 16-60077	Abeyance		
RGIS, LLC	5th Cir. 16-60129			
United Health Group	5th Cir. 16-60122			
Labor Ready Southwest, Inc.	5th Cir. 16-60149			
Lewis v. Epic Systems Corp.*	7th Cir. 15-2997	12/16/2015	2/12/2016	
Cellular Sales of Missouri	8th Cir., 15-1620	9/10/2015	1/13/2016	
Advanced Services, Inc.	8th Cir., 15-3988	Abeyance		
Morris v. Ernst & Young LLP*	9th Cir. 13-16599	11/6/2015	11/17/2015	
Countrywide Financial Corp.	9th Cir. 15-73921			
Hoot Winc	9th Cir., 15-72700			
Nijjar Realty, Inc. d/b/a Pama Mgt.	9th Cir., 15-72839			
Philmar Care, LLC	9th Cir., 16-70069			
CPS Security (USA), Inc.	9th Cir. 16-70488			
Century Fast Foods, Inc.	9th Cir. 16-70686			
Network Capital Funding Corp.	9th Cir. 16-70687			
Machinists Lodge 1173 v. NLRB (FAA Concord Honda)	9th Cir. 16-70637			
Everglades College, Inc.	11th Cir. 16-10341			
Franks v. NLRB (Samsung Electronics, Inc.)	11th Cir 16-10644			
Cowabunga, Inc.	11th Cir. 16-10932			
Price-Simms, Inc. d/b/a Toyota Sunnyvale	D.C. Cir., 15-1457			

* Non-Board case in which Board is participating as amicus.

** Although the court issued its opinion on February 12, 2016, it has not entered judgment