



UNITED STATES GOVERNMENT

NATIONAL LABOR RELATIONS BOARD

1099 14TH STREET NW, SUITE 11600
WASHINGTON DC 20570

November 10, 2011

The Honorable John Kline, Chairman
Committee on Education and the Workforce
House of Representatives
2181 Rayburn House Office Building
Washington, DC 20515-6100

Dear Chairman Kline:

I write in response to your October 27, 2011, letter to National Labor Relations Board Chairman Mark G. Pearce, requesting information on the Board's proposed regulation concerning amendments to its representation case procedures (the "R-Case Procedures Rulemaking"), which was published in the Federal Register on June 22, 2011. 76 Fed. Reg. 36812.

History of Board Rulemaking Procedures

As you know, during its 76-year history, the NLRB has administered and interpreted the National Labor Relations Act ("NLRA") primarily through adjudication. When rulemaking has been undertaken, the process followed has varied depending on the nature and subject of the rulemaking. The Board follows the Administrative Procedure Act ("APA"), 5 U.S.C. sec. 551 et seq., and has sometimes engaged in notice-and-comment rulemaking pursuant to that statute.

Neither the National Labor Relations Act nor the Board's own Rules and Regulations and Statements of Procedure establish any procedures or timetables for rulemaking by the Board. It is conceivable that the Board may have adopted such procedures and timetables on an ad hoc basis for particular rulemakings at some point during its history, but we have not been able to identify such an instance.

The Board, established in 1935, has issued rules since before the APA was enacted in 1946. The primary subjects of the Board's rules have been the procedures to be followed in unfair labor practice cases and in representation cases under the NLRA. Other rules establish certain jurisdictional standards or implement statutes that apply to the Board, such as the Freedom of Information Act and the Equal Access to Justice Act. In their current form, denominated "Series 8" (and preceded by Series 1-7), the Board's Rules and Regulations and Statements of Procedure can be traced to a

Federal Register publication date of November 4, 1959. 24 Fed. Reg. 9095. These rules have been amended many times since then.

One of the most notable and complicated notice-and-comment rulemaking initiatives by the Board was the adoption of a rule addressing appropriate bargaining units in the health care industry (Sec. 103.30). The Board published an initial notice of proposed rulemaking ("NPRM") on July 2, 1987, with Chairman Dotson and Member Johansen dissenting. 52 Fed. Reg. 25142. Four public hearings followed. The Board also met in open session to discuss the subject of the rulemaking. A second NPRM then was published on September 1, 1988, with Member Johansen dissenting. 53 Fed. Reg. 33900. A final rule was published on April 21, 1989, with Member Johansen dissenting. 54 Fed. Reg. 16336. We have been unable to determine whether, in connection with the Health Care Rulemaking, the Board adopted any internal operating procedures addressing the process or timetable by which public comments were to be considered; a final rule was to be drafted, circulated, and voted upon; and dissenting opinions (if any) were to be prepared.

Member dissents from rulemaking by the Board seem to be rare. In addition to the dissent from the Health Care Rule, we have identified two dissents from final rules:

In 1972, the Board issued a final rule (Sec. 103.3) declining to assert jurisdiction over the horseracing and dog racing industries; Member Fanning dissented briefly, citing his dissent in an earlier Board decision on the issue. 38 Fed. Reg. 9537.

Earlier this year, Member Hayes dissented from the Board's final rule requiring employers to post a notice of employee rights under the NLRA (the "Notice Posting Rulemaking"). 76 Fed. Reg. 54006 (Aug. 30, 2011).

Since at least the early 1960s, a Rules Revision Committee ("Revision Committee") consisting of high-level career officials has met from time to time to review existing procedural rules and regulations and propose revisions or modifications if needed. That committee currently consists of the following members:

- Assistant General Counsel, Legal Research & Policy Planning Branch
- Associate General Counsel, Division of Operations-Management
- Chief Administrative Law Judge
- Deputy General Counsel
- Executive Secretary
- Inspector General
- Solicitor
- Director, Office of Representation Appeals

Proposed regulations, however, have not always gone through or originated with the Revision Committee. For example, as described above, the Revision Committee

did not participate in producing the rule addressing appropriate bargaining units in the health care industry. Likewise, the Revision Committee did not initiate a recent effort to review NLRB rules related to filing and service, among other matters. Instead, a committee comprised of field and headquarters personnel undertook that review. The committee's recommendations involve eliminating requirements to file multiple copies and outdated references, as well as pursuing revisions in light of technological advances. They also involve codifying existing practices with respect to the filing of amicus briefs and replies to oppositions to motions, and the settlement of cases through the Board's alternative dispute resolution program. This committee has also suggested modifications to the rule that requires a charging party to notify other parties of its decision to appeal the dismissal of an unfair labor practice charge.

Prior to the R-Case Procedures Rulemaking, the Board's most recent rulemaking was the Notice Posting Rulemaking, proposed on December 22, 2010, and made final on August 30, 2011. 76 Fed. Reg. 54006. The Board followed the procedures of the APA, including soliciting public comments, in promulgating this rule.

The most recent printed compilation of the Board's Rules and Regulations and Statements of Procedure dates from 2002, and we have attached as Exhibit 1 a table from that compilation that lists all of the amendments to the rules between 1959 and 2002. In addition, for your information, we have prepared and attached as Exhibit 2 a table that lists 11 amendments that were published in the Federal Register between 2002 and the present. A complete and current set of the Rules and Regulations and Statements of Procedure is available on the NLRB website at: <http://www.nlr.gov/publications/rules-regulations>.

R-Case Procedures Rulemaking

As you know, the public comment period for the R-Case Procedures Rulemaking closed on September 6, 2011. The NLRB staff involved in the preparation of the final rule work in several offices. On the Board side, there are staff from the offices of Board members, the Office of the Executive Secretary, the Solicitor, the Office of Representation Appeals, and the Office of the Chief Information Officer. From the General Counsel side, staff from the Special Litigation Branch of the Division of Enforcement Litigation and staff from several regional offices have assisted. These staff have been organizing, coding, reviewing, and analyzing the extensive public comments received as well as performing legal research on topics related to the rulemaking and preparing portions of a draft final rule to be presented to the Board members. Staff have not been transferred or reassigned to work on this project. They continue to carry out the duties they are assigned in their respective offices.

We are aware of no limitation, statutory or otherwise, on the allocation of staff by the Board or the Acting General Counsel to work on the R-Case Procedures Rulemaking. In unfair labor practice cases, of course, a strict division between the

office of the General Counsel and the Board is maintained, and staff who have been detailed from one office to the other cannot work on a case they handled during that detail when they return to their original office. Work on the R-Case Procedures Rulemaking does not implicate any conflict of interest concerns.

As is the case with any matter before it, the Board will seek to ensure that every Member will have adequate time to review a draft of the final rule and decide whether to approve it, propose modifications, or offer a dissent. Discussions between Board Members on how to complete the R-Case Procedures Rulemaking are ongoing and no specific timetable has been established at this time. The following is a timeline of past and anticipated actions on the rulemaking:

June 22, 2011 -- Publication of proposed rule.
July 18-19, 2011 -- Public meeting on proposed rule. 66 witnesses testified before the Board.
Aug. 22, 2011 -- Deadline for filing initial public comments.
Sept. 6, 2011 -- Deadline for filing reply comments.
Unknown -- Board vote on how to proceed on final rule.
Unknown -- Draft of final rule circulated to Board Members.
Unknown -- Publication of final rule in Federal Register.

In response to your request for information on the number of decisions issued by the Board, attached as Exhibit 3 is a chart showing a monthly breakdown of all decisions issued by the Board from October 2009 through October 2011. In addition, for your information we have attached as Exhibit 4 a chart showing the monthly breakdown of what are referred to as "contested decisions" for the same period.

Please do not hesitate to contact Jose Garza, Special Counsel for Congressional and Intergovernmental Affairs, at 202-273-0013, if you wish to discuss this matter further.¹

Sincerely,



William B. Cowen
Solicitor

cc: The Honorable George Miller, Ranking Member,
House Committee on Education and the Workforce

¹ Member Brian Hayes has indicated that he has not had sufficient time to review and consider this letter and he reserves the right to comment separately.