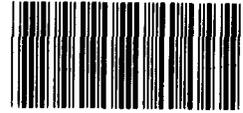


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Testimony



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Action Needed to Improve Case  
Processing Time at National  
Labor Relations Board Headquarters

Statement of  
Franklin Frazier, Director of  
Education and Employment Issues  
Human Resources Division

Before the  
Subcommittee on Employment and Housing  
Committee on Government Operations  
House of Representatives



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**SUMMARY OF TESTIMONY BY FRANKLIN FRAZIER**  
**ON ACTION NEEDED TO IMPROVE CASE PROCESSING TIME**  
**AT NATIONAL LABOR RELATIONS BOARD HEADQUARTERS**

The National Labor Relations Act of 1935, as amended, provides the basic framework governing labor-management relations in the private sector. The act created the National Labor Relations Board to administer and enforce the act. The Board decides two kinds of cases: (1) allegations of unfair labor practices by employers or unions (unfair labor practice cases) and (2) disagreements about elections to determine whether employees wish to be represented by a union (representation cases).

All cases originate in the Board's regional offices, and most cases are resolved there. If a party in the case contests the regional decision, the case comes to the five-member Board at headquarters for review and decision. Because of concern about the length of time the headquarters Board was taking to decide some cases, we were asked to examine the decisionmaking process. We focused primarily on decisionmaking in fiscal years 1984-89. Our objectives were to (1) assess how long the Board took to decide cases and whether delays were excessive; (2) identify factors that contributed to delays; and (3) identify administrative or legislative action that might be warranted.

**Increase in median case processing times after regional action.**

The median times for the five-member Board to decide cases during the 1984-89 period, after regional action was completed, were among the highest in Board history. Median times for unfair labor practice cases in these years were two to three times higher than during the 1970s. Medians for representation case were also higher than during the 1970s.

**Some cases were at headquarters over 2 years.** About 17 percent--over 800--of the cases appealed to the Board during the 6-year period took over 2 years to decide.

**Three factors primarily contributed to headquarters delays.**

First, the Board lacks standards and procedures to prevent excessive delays. Second, lack of timely decisions on lead cases have delayed related cases. Third, Board member turnover and vacancies also caused delays.

**Board corrective action needed.** We recommend that the Board establish standards for (1) the total length of time a case should be at the Board and (2) a time for each decision stage that, when exceeded, requires corrective action. We also recommend that it specify the actions to be taken when those standards are exceeded.

**Legislative options available.** Congress could amend the act to allow Board members whose terms are ending to either (1) remain until replacements are confirmed or (2) continue for a limited period while a replacement is being sought.

Mr. Chairman and Members of the Subcommittee:

I am pleased to be here today to discuss the length of time the five-member headquarters National Labor Relations Board (NLRB) takes to decide some cases appealed to it from the regions. As you requested, I will (1) describe how long the Board has taken to decide cases, particularly since 1984, and whether there were excessive delays; (2) discuss factors that contributed to such delays; and (3) suggest administrative or legislative action that might be warranted.

Cases generally reach the headquarters Board when parties contest decisions made by NLRB regional offices or administrative law judges (ALJs). Cases involve either (1) allegations of unfair labor practices by employers or unions (unfair labor practice cases) or (2) disagreements about elections to determine whether employees wish to be represented by a union (representation cases).

Our major points are the following:

- During fiscal years 1984-89, the five-member Board's annual median times to decide cases, after regional action was completed, were among the highest in Board history. Annual unfair labor practice case medians ranged from 273 to 395 days--from two to three times higher than during the 1970s. Representation case medians ranged from 190 to 256 days--also higher than medians during the 1970s.
- About 17 percent (820) of the cases appealed to the headquarters Board during the 6-year period took more than 2 years to decide.
- Factors contributing to the delays in deciding cases were (1) lack of standards and procedures to prevent excessive case delays; (2) lack of timely decisions on lead cases, which delay related cases; and (3) Board member turnover and vacancies.
- Although timeliness improved in 1989, we believe additional Board actions are needed to further improve case processing timeliness. Also, the Congress may wish to consider amending the National Labor Relations Act (NLRA) to provide for greater continuity of Board members.

Before discussing these points in detail, I would like to provide some background on our study and describe our methodology.

### **BACKGROUND**

The National Labor Relations Act of 1935, as amended, provides the basic framework governing labor-management relations in the private sector. The act created the NLRB to administer and enforce the act. Its two statutory missions are (1) to prevent and remedy unfair labor practices by employers or unions and (2) to conduct elections to determine whether employees wish to be

represented by a union. The agency's functions are divided between its General Counsel, which has responsibility for activities of the 34 regional offices, and a five-member Board. The President appoints Board members for 5-year terms with the consent of the Senate.

When a Board member's term ends, that position is vacant until a replacement has been nominated and confirmed. In contrast, some other federal agencies operate under laws that allow a member whose term is ending to either (1) remain for a fixed period of time or (2) continue until a replacement has been confirmed. Such agencies include the Equal Employment Opportunity Commission, the Federal Communications Commission, the Federal Trade Commission, the Interstate Commerce Commission, and the Securities and Exchange Commission.

All cases originate in the regions, and most cases are resolved there within 1 year or less. In fiscal year 1988, most unfair labor practice cases were resolved in the regions without formal litigation, and half of those were disposed of informally in 50 days or less. The median time to obtain a decision when unfair labor practice cases were litigated before an ALJ was about a year. Representation cases were generally resolved more quickly than unfair labor practice cases.

If the regional decision is contested, the case goes for review to the headquarters five-member Board, which affirms, modifies, or reverses the regional decision.<sup>1</sup> In 1989, fewer than 5 percent of all cases were decided at the headquarters Board; about 75 percent of these were unfair labor practice cases. The number of cases decided by the Board has declined steadily since 1980, roughly paralleling a decline in cases originating in the regions. In fiscal year 1989, 874 cases were assigned to Board members, compared with 1,875 in 1980.

Most cases are decided at the Board by three-member panels rather than the full five-member Board. After assignment to a Board member, cases proceed through three stages--analysis and research (Stage I), drafting (Stage II), and circulation (Stage III)--before the Board issues its decisions. The Board has established expected time targets for progress of cases through these stages and procedures for tracking case progress.

Board decisions on unfair labor practice cases, but generally not representation cases, can be appealed to circuit courts and may, in turn, be appealed to the Supreme Court. The number of cases appealed to the circuit courts in fiscal year 1989 was about 13 percent of all Board decisions issued in that year.

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<sup>1</sup>Two kinds of cases also come from the regions for Board review without first having regional hearings: Motions for Summary Judgment and Stipulations to the Board.

## SCOPE AND METHODOLOGY

In conducting our review, we concentrated on activities that take place at Board headquarters from the time the Executive Secretary assigns a case to a Board member to the time the Board issues its decision. However, for perspective, we also obtained selected information about NLRB regional activity, such as the number of cases that are resolved in the regions.

We collected information from the following sources:

- prior studies and published literature, including NLRB's annual appropriation justifications;
- current and former Board members and staff attorneys (using a combination of interviews and a questionnaire); and
- NLRB files, including computerized data from its management information system.

In describing delays, we focused on 1984-1989 because the Board said its computer data base was incomplete for earlier years. We included in our analyses only those cases that came to the headquarters Board after one of the parties appealed the decision of an NLRB regional office or administrative law judge (that is, we excluded summary judgments and stipulations to the Board).

To help identify factors contributing to delays, we analyzed (1) 20 cases selected judgmentally to illustrate delays in decisionmaking and (2) 90 cases randomly selected from those with the longest and the shortest processing times during the most recent complete fiscal year (1989).

## STUDY RESULTS

### Excessive Delays in Case Processing

In the 6-year period, 1984 through 1989, the headquarters Board decided about two-thirds of the 5,000 cases appealed to it within 1 year from the date the case was assigned to a Board member, but 10 percent of the cases took over 3 years to decide. A few cases took more than 7 years to decide.

We found 1984-89 headquarters case processing times to be excessive when compared with two criteria for excessive delays: (1) median processing times prior to 1984 and (2) a "more-than-2-years" timeframe that former Board Chairmen identified as an unreasonable length of time to decide any case.

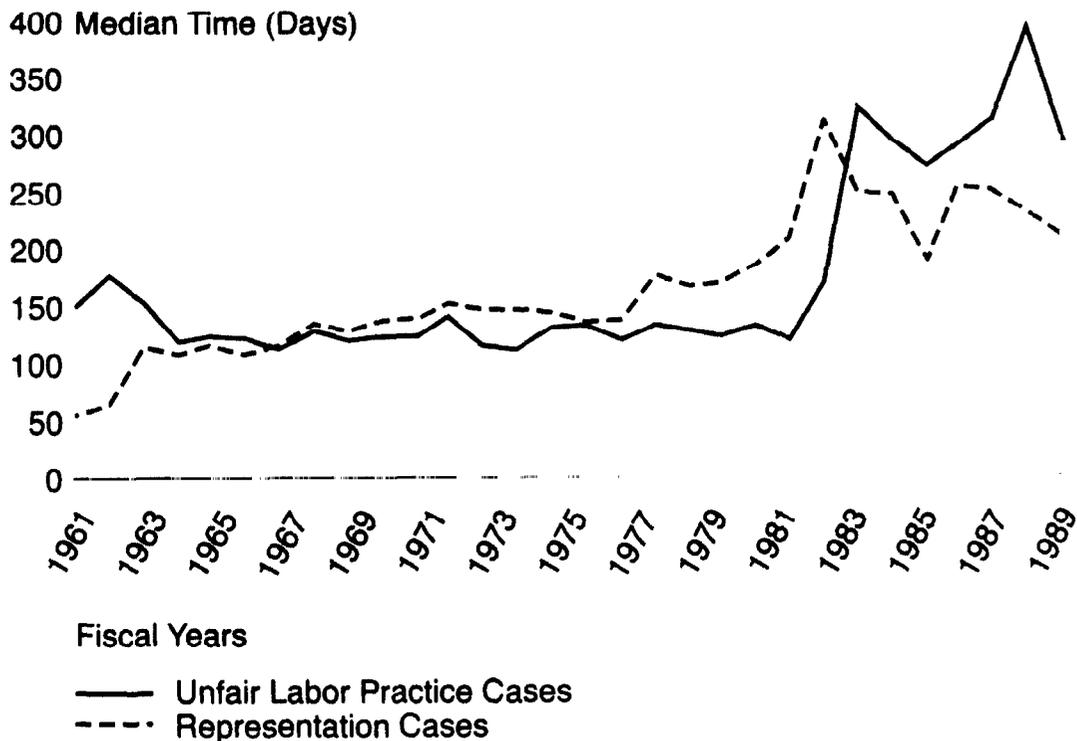
**Median case processing times have increased**

In 1984-89, the median times from the date regional action was completed to the date the Board decision was issued were among the highest in Board history, as shown in the first figure.<sup>2</sup> (By regional action we mean either an ALJ decision or a regional hearing.) The medians for unfair labor practice cases ranged from a low of 273 days to a high of 395 days--between two and three times higher than medians during the 1970s. Only one previous year had a median as high (324 days in 1983). For representation cases, the medians ranged from 190 to 256 days--also higher than medians during the 1970s.

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## GAO Median Time to Decide Contested Cases (1960-89)

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<sup>2</sup>This includes up to 60 days for parties to file documents regarding their appeal of the regional action. The Board does not publish historical data about median processing times from (1) the date all documents are received and the case is assigned to a Board member to (2) the date the decision is issued.

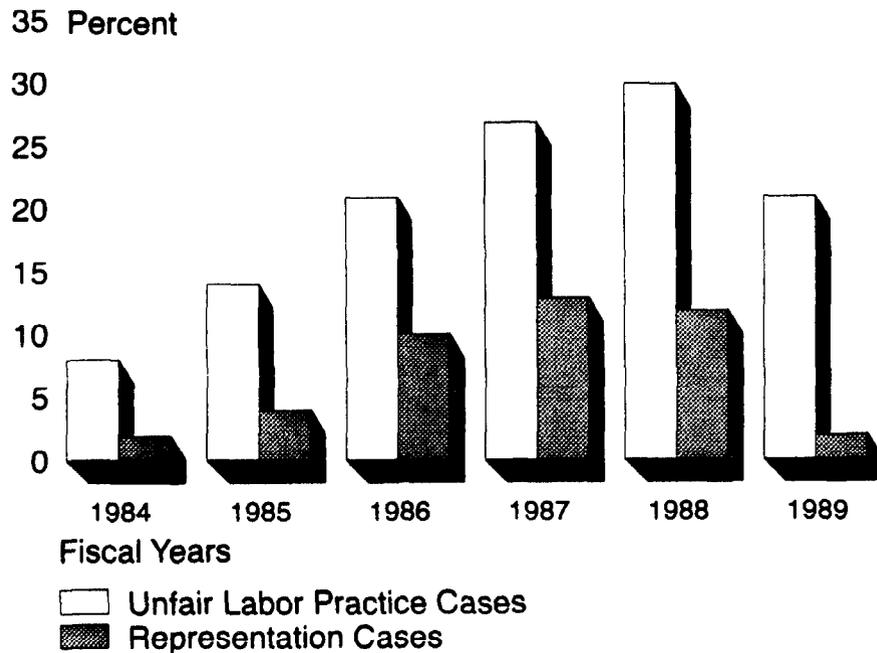
**Some cases took over  
2 years to decide**

According to the previous Board Chairmen we interviewed, all cases should be decided within 2 years. However, during the 1984-1989 period, the Board took more than 2 years to decide about 17 percent of its cases. Of its unfair labor practice cases, 752 (19 percent) took over 2 years to decide; of its representation cases, 71 (7 percent) took over 2 years. The percent of unfair labor practice cases taking longer than 2 years ranged from 8 percent in fiscal 1984 to 30 percent in fiscal 1988, as the figure below shows. Representation cases taking over 2 years ranged from 2 percent in fiscal year 1984 to 13 percent in fiscal year 1987.

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## GAO Percent of Contested Cases Taking Over Two Years to Decide (1984-89)

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**Timeliness improved in 1989  
but further improvement is needed**

The timeliness of Board decisionmaking improved in 1989. Both the median number of days to decide cases and the number of cases at the Board for over 2 years were lower in fiscal year 1989 than in 1988. In addition, the number of cases undecided at the end of 1989 (437) was lower than in any previous year of the decade. The Board Chairman attributed this improvement, at least in part, to actions taken at the Board to expedite certain kinds of cases and focus on deciding the oldest cases.

Nevertheless, in fiscal year 1989, the median time to decide unfair labor practice cases (300 days) was still substantially higher than at the start of the decade (133 days in 1980), and 21 percent of the unfair labor practice cases decided had been at headquarters over 2 years.

**Three Factors Primarily  
Contributed to Delays**

Our analysis of the Board's system for deciding cases identified three factors that, we believe, primarily explain why there have been decisionmaking delays.

**Lack of standards and procedures  
to prevent excessive delays**

The Board has no standard for (1) the total length of time it considers acceptable for a contested case to be at the Board or (2) the length of time a case can remain in each decision stage before corrective action is required. In the absence of such standards, its monitoring procedures do not require Board members or their staffs to focus proactively on cases most likely to show excessive delays unless corrective action is taken.

The Board does monitor the progress of cases through each stage, but it primarily uses as targets the estimated times in which cases are likely to move through each stage. For typical cases, the Board's time targets are 3 weeks in stage I, 3 weeks in stage II, and 2 weeks in stage III. In combination, these targets total about 2 months--a length of time with limited value in focusing attention on cases most in need of corrective action. In fact, in fiscal year 1989, about 90 percent of all cases were at the Board longer than 2 months before a decision was issued.

**Lack of timely decisions on "lead"  
cases delays related cases**

When several undecided cases deal with the same issue, the Board selects one case to serve as the principal or "lead" case and suspends further processing on all related cases until the lead case is decided. The lack of timely decisions on lead cases delays all related cases.

Our analysis of a random sample of 45 of the lengthiest cases decided during fiscal year 1989 disclosed that delays attributable to waiting for lead case decisions was a major factor in at least 13 (29 percent) of those cases. In contrast, none of the 45 shortest cases had been delayed for a lead case.

Our review of 20 other judgmentally-selected lengthy cases also determined that lead cases had caused delays in 13 of the 20 cases. Some cases were delayed more than once; four cases had been delayed three different times during their processing by different lead cases. Almost all of the lead cases that delayed these 13 cases either took more than 2 years to decide or had been pending for more than 2 years at the end of fiscal year 1989.

### **Board member turnover and vacancies**

Board member turnover and Board vacancies during the 1980-84 period contributed to a backlog of pending cases at the start of the 1984-89 period.<sup>3</sup> In addition, Board member turnover and vacancies during the 6-year period continued to affect case processing even after the backlog was no longer a problem and fewer new cases were coming to the Board.

Board member turnover during the 1980-84 period was the highest in agency history: the Board had as many new members (six) during that time as it had during the entire 1970-79 decade, and also more than during the 1960-69 decade. Five very experienced Board members--with over 60 years cumulative experience as members--were replaced during fiscal years 1980-83. One newly-appointed member served less than 17 months, another served less than 3 months. Turnover continued during the 1985-89 period when six new members replaced others who were appointed during the 1980-84 period.

Turnover contributes to delayed decisions in several ways. The Board must add departing members' undecided cases to remaining members' caseloads, and new members require time to hire senior staff and become familiar with the issues in cases they inherit. In addition, some cases get sent back to earlier decision stages because new Board members disagree with the previous decision.

During both 5-year periods (1980-84 and 1985-89), the Board had fewer than five members for a total of 3 out of 5 years. Likewise, each 5-year period had a total of 8 months in which two of the five positions were vacant. Vacancies increase the workload for other members and cause some cases--major cases the Board believes should have all five members voting--to be delayed.

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<sup>3</sup>Cases pending at fiscal year end increased from less than 500 in 1980 to over 1,300 in 1983 and 1984--almost three times as many as were pending 10 years earlier, in 1973.

## CONCLUSIONS

During the 1984-89 period, NLRB headquarters' median case processing times were among the highest in Board history, and the Board took more than 2 years to decide 17 percent (823 cases) of the cases appealed to it from the regions. Factors that contributed to delays included (1) lack of standards and procedures to prevent excessive delays, (2) lack of timely decisions on lead cases, and (3) Board member turnover and vacancies. Such factors indicate the need for a more proactive case management approach to systematically identify cases most in need of corrective action. Even though timeliness improved in 1989, reduced delays were probably due not only to specific actions of the Board, such as focusing on the oldest cases, but also to reduction in the number of cases coming to the Board. We believe additional Board actions are needed to further improve case processing timeliness and reduce inordinate delays in deciding cases at the five-member Board.

## RECOMMENDATIONS

We recommend that the Chairman of the National Labor Relations Board

- establish standards for (1) the total length of time a case should be at the Board and (2) a time for each decision stage that, when exceeded, requires corrective action and
- specify the corrective actions that should be taken when those standards are exceeded. Such action might include more extensive involvement of Board members during the first two decision stages or more frequent use of the existing policy option of issuing decisions without waiting for untimely written dissents during the final decision stage.

## LEGISLATIVE OPTION

To help reduce the problem of Board member turnover and vacancies, Congress may wish to provide for more continuity of members. Congress could amend the NLRA to include provisions similar to those applicable to other agencies, such as the Equal Employment Opportunity Commission, that would allow Board members whose terms are ending to either (1) stay at the Board until their replacement has been confirmed or (2) continue for a limited period while a replacement is being sought.

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Mr. Chairman, this concludes my statement. I will be glad to answer any questions you may have.