

## INTRODUCTION

### 1. Purpose

The purpose in compiling a list of all NLRB judges, past to present, is to prepare a record, for easy access, of those who have served as regular-staff judges for the National Labor Relations Board. As of August 2004, the first publication of this effort to provide an all-time list of such judges, 66 years have elapsed since the Board, effective August 1, 1938 (as described in a moment), decided to assign only regular-staff judges to preside at unfair labor practice (ULP) trials. That decision was an important turning point in Board policy, for previously the Board had relied to a substantial extent on per diem judges. (Thus, as we see shortly, testimony that Chief Judge Pratt gave before Congress discloses that in November 1937 Judge Pratt had 24 regular-staff judges and some 40 to 50 per diem judges.) With each passing year it becomes increasingly difficult to preserve the names of those who have served as regular-staff judges. Accordingly, this preservation effort is now made. In the process, it is historically relevant that we highlight some interesting aspects of the early years.

The Board created the Trial Examiners Division (now the Judges Division) in September 1935. See 1 *NLRB Annual Report* 14 (FY ending 6-30-1936), and J. A. Gross, *The Making of the National Labor Relations Board* 163 (1974). Originally the judges' title was "Trial Examiner." Effective August 19, 1972, the title for the judges was changed by U.S. Civil Service regulation to "Administrative Law Judge." See, for example, *Marland One-Way Clutch Co.*, 200 NLRB 316, 316 fn. 1 (1972). (Congress made the change statutory in 1978.) In this paper the time-honored title of "Judge," which is descriptive of the function, is used. Indeed, the Supreme Court has ruled that the role of the modern Federal administrative law judge is "functionally comparable" to that of a judge. *Butz v. Economou*, 438 U.S. 478, 513 (1978).

### 2. Sources

Several sources supply the background information for this paper. The Board's first few annual reports provide important information concerning the judges, and significant information appears in the three books (the second source) by Prof. James A. Gross covering the Board — *The Making of the*

*National Labor Relations Board* (1974) (*Making*), including, among others, pages 163-165, 239-240; *The Reshaping of the National Labor Relations Board* (1981) (*Reshaping*), at pages 175, 177, 183-186, 205-206, 242, 246, 337-338, among others; and *Broken Promise* (1995), at numerous pages. In *Broken Promise*, Prof. Gross has written a major work about the Board and the political climate during the years 1947 to 1994. [A brief pause here to highlight an interesting coincidence. On the second page of the “Acknowledgements” at the opening of *Making* appears the name of “Richard Miserendino” as one of the graduate students assisting in research for Prof. Gross. It so happens that Graduate Research Assistant Miserendino is now the Judge Richard Miserendino named on the List of Judges.]

A third source consists of the decisions of the Board as reported in the Board's bound volumes. This is the source that provides most of the basis for approximating dates when judges entered on duty with the Division (EOD dates). That is, by ascertaining from the decisions when each judge first began presiding at NLRB trials and hearings, his EOD date can then be approximated, or “deemed.” [There were no women judges in the early years.] The process of approximating, or “deeming,” is mentioned further in the next paragraph.

A fourth source (and most detailed in terms of names and dates) is a few remaining copies of rosters of the judges — the earliest is dated January 10, 1957, and bears the names of 45 judges with their Division EOD dates — plus a list of separations (LOS) covering those judges leaving (whether by resignation, transfer, or death) from July 1, 1949, through November 15, 1961. The lists of judges usually carry the Entry on Duty (EOD) date with the Judges Division. Although the rosters serve as a major basis for the names of the judges and their Division EOD dates, most of the EOD dates for the early years have to be approximated, or “deemed.” This approximation process is explained in more detail much later, in the Preface To The ABC List.

The fifth source of information consists of the transcripts of oral history interviews given by 12 judges (some retired at the time) during the research for the three books on the NLRB by Prof. Gross. Interviewing and taping the oral histories given in 1969-1970 interviews (of the 12 judges), for Cornell University, School of Industrial and Labor Relations, was Graduate Research Assistant Judith H. Byne — named by Prof. James A. Gross in the Acknowledgements section of the first of his three books on the Agency, *The Making of the National Labor Relations Board* (1974). The 1988 interviews (for the third book) were conducted by Barbara Stoye Mulhallen, as noted (with a different spelling of her name) in the Acknowledgements section of Prof. Gross' third book, *Broken Promise*, at page xv.

In addition to the judges so interviewed, several others, either currently with or retired from the Agency, gave their oral history interviews. One of

these persons was the Board's first Secretary, Benedict Wolf, who was interviewed on two dates during 1969: May 19 and December 29. Wolf indicates that one of his many duties included functioning as the Chief Trial Examiner. *Wolf* at 58, 60, 77.

The names of the judges so interviewed (not all 12 are cited in the paper) are as follows, with the interview dates (Judge Somers was interviewed twice) set forth after their names:

	<u>Name</u>	<u>Interview Date</u>	<u>Pages</u>	<u>Index Pages</u>
1.	George Bokat	3-17-1969	81	1
2.	George J. Bott	3-20-1969	72	1
3.	Fannie M. Boyls	3-20-1969	24	1
4.	Bernard Cushman	3-19-1969	45	1
5.	William Feldesman	7-28-1988	50	None
6.	A. Bruce Hunt	3-17-1969	31	1
7.	Will Maslow	3-20-1970	35	1
8.	George O. Pratt	3-18-1970	169	3
9.	A. Norman Somers	3-20-1969	56	2
	and	8-1-1988	23	None
10.	Owsley Vose	3-14-1969	55	1
11.	Melvin J. Welles	7-27-1988	72	None
12.	Ralph Winkler	8-4-1988	19	None

(The transcripts of the interviews with Judges Boyls, Feldesman, and Somers are “restricted” by the copyright holder: Kheel Center, Cornell University. To the extent these transcripts are cited in this paper, such limited citations or brief quotes are made under the “fair use” doctrine.)

Citations in this paper to these transcripts are given as, for example, *Pratt* at 12. Appreciation is expressed at this point for the courtesy and extensive helpfulness given by the Kheel Center, Cornell University (copyright owner of the tapes and transcripts), for providing copies, for this research paper, at a reasonable copying expense. Special thanks in all these regards belong to Research Archivist Dr. Patrizia Sione, Kheel Center for Labor-Management Documentation & Archives, Cornell University, for all her personal patience, helpfulness, and courtesy. Appreciation is also expressed to the Kheel Center in granting permission for a copy of Judge Pratt’s transcript to be donated to the NLRB’s Division of Judges.

While some of these interviews are of significance for this paper, the transcript of Chief Judge Pratt’s oral history interview is of singular historical

significance to the Division. First, as already noted, Judge Pratt was the first person to fill (in November 1937) the newly created Office of the Chief Trial Examiner (as the judges were called in those years). Second, while the interviews of some of the judges covered some of the weightier labor law issues of the day, Judge Pratt's interview, as we already have seen above, covers many of the routine problems facing the judges, such as, for example, rather frequent travel time away from home for extended periods.

A sixth source of information for such matters as appointments to the Division (an approximate EOD date), retirement dates, and dates of death, is the Agency's press releases (announcing appointments of newer judges and, frequently, retirements of older judges), bulletins (for such as death notices), and the Agency's internal newsletter, *All Aboard*, for its frequent coverage of all three events.

Finally, the memories of a few "old timers" (some still working, and some retired), supplemented by their research, have been very helpful.

Aside from various rosters (reconstructed and actual), the LOS, and the list of the Chief Judges, three main lists of judges are attached. The first list combines all judges, with their EOD dates, into one alphabetical (ABC) list. (References to a generic "List of Judges" generally contemplate the ABC list.) The second main list, the EOD list (the next to last list in this paper), names the judges under their office location in their sequence of EOD date. Effort has been made to list judges, who moved late in their careers and perhaps began working out of their homes, under the office with which they are most associated. The final list is the Unified EOD List (the EOD List with all offices merged into a master EOD list).

Respecting home offices, in his initial years with the Division, Judge Henry S. Sahn was one of the staff judges at the DC office. Later, he transferred to the San Francisco office. In the ABC and EOD lists, Judge Sahn is listed as part of the SF office. And Judge William Pannier, a SF judge who concluded his time at SF holding the position of Associate Chief Judge there, moved to Illinois and worked from his home there for the last 3 years or so before he retired. While in Illinois, Judge Pannier was attached to the DC office. For the ABC and EOD lists, Judge Pannier is shown as a judge with the SF office. Similarly, Judge Leonard Cohen, who began his career with the Division at the SF office, spent most of his Division years with the Atlanta office, and the latter office is shown for him in the ABC and EOD lists.

For the last many years, with the earliest available roster of judges being the one dated January 10, 1957, Judge William R. Ringer (who became the Chief Judge on 1-15-1947 per 72 NLRB at iii, fn. 4) was shown as the judge with the earliest EOD date, that being 10-1-1937. With the EOD List (the last list in this paper), we now have, as close as is reasonably possible, the names of

the regular staff judges who preceded him. As with nearly all the judges in those first few years, Judge Ringer began presiding (on May 24, 1937) on a per diem basis. He was converted to regular-staff, or Division Judge, on October 1 of that year.

### 3. Per diem System Initially Significant

As the decisions in the Board's first 10 or so bound volumes reflect, the names of a good many judges ("Trial Examiner" on those pages) appear as presiding at trials ("hearings") during 1936 and 1937, several months before the EOD date of Judge Ringer. There is a difference. As we learn from the Board's 3d Annual Report, for the fiscal year ending June 30, 1938, at 244:

Until recently the Board had made substantial use of the per diem trial examiner in addition to those on the regular staff. The per diem system was used for two basic reasons:

- (1) As a means of trying out applicants for positions, and
- (2) In order to carry the very heavy load of cases.

However, it was decided as of August 1, 1938, [that] the Board would no longer employ per diem trial examiners. From among those persons who had been per diem trial examiners a number of individuals were appointed to positions on its regular staff. Some few persons not applicants for regular positions are employed occasionally on a per diem basis when no regular examiners are available.

Chief Judge Pratt made the recommendation that the Board shift to all regular-staff judges because (1) using per diem judges was an administrative headache for various reasons, and (2) Judge Pratt felt that the per diem system resulted in less productivity, particularly as to writing the Intermediate Reports, than would a system of regular-staff judges. *Pratt* at 133-134. Similar to the situation of Judge Ringer, when future Chief Trial Examiner George Bokan first began presiding at hearings in October 1937 he, as virtually all the others at the time, worked at the per diem rate of \$25. See Prof. Gross, *Making*, at 164, at note 70, and 240-241; *Bokan* at 7 (although Judge Bokan does not specify the daily rate). In fact, Judge Pratt recounts, to the penny, that the salary portion of the per diem rate initially was only \$11.73, later increased to \$14.35, and the rest was for expenses, plus "**railroad fare from Washington to the point of hearing and return to Washington.**" (Emphasis added.) *Pratt* at 121, 122, 144.]

Observe from the lists below that, as shown on the Division's staff rosters, Judge Bokan's EOD date is February 1, 1938. This clearly is the date that he became one of the Division's regular-staff judges, and Judge Bokan himself confirms this in his March 1969 oral history interview. *Bokan* at 9.

Respecting the number of the Division's (regular-staff) judges, Prof. Gross reports, in *Making* at 239 footnote 29 (citing evidence presented at the Smith Committee hearings in 1939-1940), that the number increased from 11 on June 30, 1937 (close of the Board's second fiscal year) to 24 during the fiscal year ending June 30, 1938 (the fiscal year following the Supreme Court's April 1937 decision upholding the constitutionality of the Act). By about late 1939 to January 1940, Prof. Gross tells us, the Division's staff of judges had increased to 39. See *Reshaping* at 183-184 and 316 note 109 (again citing the Smith Committee Hearings). More information about the number of judges appears below in the part of this Introduction captioned as section "11. Staffing numbers."

By its policy change effective August 1, 1938, the Board perhaps anticipated the changes that Congress and President Franklin D. Roosevelt would institute in the very early 1940s. Thus, as an article at the Office of Personnel Management's website informs ([www.opm.gov](http://www.opm.gov); click on About the Agency; then, under Mission and History, click on Biography of An Ideal), at pages 5-6, on November 26, 1940, President Roosevelt signed the Ramspeck Act. And:

The Ramspeck Act paved the way for an unprecedented extension of the merit system. It also provided for extension of the Classification Act to the field service of the Government, and established efficiency-rating boards of review.

The Ramspeck Act authorized the President to include within the competitive service any offices or positions in the executive branch, with the exception of (1) those in the Tennessee Valley Authority and the Work Projects Administration, (2) Presidential appointees confirmed by the Senate, and (3) assistant U.S. district attorneys.

In effect, the act authorized the extension of the competitive service to more than 182,000 permanent positions—almost all the non-policy-determining positions in the executive civil service. It thus authorized the President to sweep away virtually all the exceptions which had accumulated since the passage of the Civil Service Act in 1883, and even permitted the extension of the merit system to unskilled laborers, who had been excepted by the Civil Service Act itself.

The Executive orders issued by President Roosevelt under the authority of the Ramspeck Act brought merit system jurisdiction to an all-time high, covering not only routine positions but also most high-level professional and administrative positions. By means of Executive Order 8743 of April 23, 1941, and other

orders, the President extended the competitive service to all previously excepted positions other than temporary positions, those excepted by the Civil Service Commission itself under Schedules A and B of the civil service rules, and those expressly excepted by the Ramspeck Act.

This interesting side note. In his March 1970 oral history interview, former Chief Judge George Pratt reports that in 1940 the judges, now secure in their positions, formed their Association of Trial Examiners and came to him seeking recognition and collective bargaining. After some discussions, they “arrived at some sort of an agreement,” but then “everybody went under Civil Service” and “that took care of the union.” *Pratt* at 144-146.

#### 4. The Chief Judges

##### *a. Introduction*

For its first 2 years of operation, the Board did not have a Chief Trial Examiner as a separate position filled by a person appointed to the office of Chief Judge. Instead, during those first 2 fiscal years (ending June 30, 1937), and for some 4 months into the third fiscal year (to November 1937), the Board's “Secretary” served as the Chief Trial Examiner. Most of this is described in the Board's first three annual reports. See 1<sup>st</sup> Annual Report at 15; 2d Annual Report at 8 fn. 10; and 3d Annual Report (for the fiscal year ending June 30, 1938) at 243. For further confirmation, see *Making* at 163 and footnote 65. For example, from 1 *NLRB AR* 15 (emphasis added):

The Trial Examiners Division, under the supervision of the secretary, as **acting Chief Trial Examiner**, holds hearings on behalf of the Board.

During those first 2 plus years, the Board's Secretary was Benedict Wolf. (“Executive Secretary” became the position title when the Secretary’s position was decentralized after a new Board Chairman — Harry A. Millis — was appointed on November 15, 1940, by President Roosevelt. See *Reshaping* at 226, 229; 6 *NLRB AR*, for the fiscal year ending June 30, 1941, at 7.) Whether Secretary Wolf was “acting” chief or full chief is immaterial here. A picture of Secretary Wolf appears in the Agency’s *The First Sixty Years* at 8 (1995) as follows:



Moreover, whether Wolf was filling an “office” of Chief Trial Examiner, as seems unlikely (for example, the page listing the Agency officials in the Board's first two annual reports lists Wolf as the “Secretary,” not “Secretary and Chief Trial Examiner”), or simply performing the function of chief trial examiner (the explanation that better fits the actual listings by the Board), is also immaterial here. For this paper, the relevant departure point begins in November 1937, some months after the Supreme Court declared the Act constitutional, the trial docket zoomed, the Board saw that it needed a full-time chief judge, and it therefore established that office as a position separate from that of the Secretary and made it a part of the Board's Executive Staff.

Under those circumstances, the Board issued its Press Release R-413 (*Press Release*), dated November 8, 1937, announcing the appointment of George O. Pratt as Chief Trial Examiner, with the first two paragraphs reading:

The National Labor Relations Board has announced the appointment of George O. Pratt as its Chief Trial Examiner. Since the creation of the Board Mr. Pratt has served as its Regional Director at Kansas City. He will assume his new duties at Washington on November 15. His successor as Regional Director at Kansas City has not as yet been appointed.

The office of Chief Trial Examiner has heretofore been held by Mr. Benedict Wolf in conjunction with Mr. Wolf's position as Secretary of the Board. Mr. Wolf recently resigned to practice law in New York City. His duties as Secretary will be assumed by Nathan Witt.

Accordingly, Judge Pratt's EOD date is here recognized as established (not “deemed”) to be November 15, 1937. Moreover, in the table of the chief judges set forth later below in subsection C, Secretary Wolf is not listed as a Chief Trial Examiner for the simple reason that the position did not exist as its own office, separate and independent of any other position, until after he departed the Agency. Even so, in the preamble to the list, Secretary Wolf's additional duty as Chief Judge (whether “acting” or otherwise) is recognized, as is his due.

Beginning with the 3d Annual Report (for the fiscal year ending June 30, 1938), the Chief Trial Examiner is listed by position and name (George O. Pratt in that 3d Annual Report), along with the Board members, Secretary Nathan Witt, and other top officials of the Agency. (Before its 15th Annual Report, for the fiscal year ending June 30, 1950, the Board only sporadically inserted footnotes to show the dates of appointments or departures of Agency officials.) And from the Board's 3d Annual Report (for the fiscal year ending June 30, 1938) at 243:

The Trial Examiners' Division, under the direct supervision of the Chief Trial Examiner, holds hearings on behalf of the Board. During a portion of the period covered by this report the Secretary of the Board also was the Chief Trial Examiner, but since the appointment of a Chief Trial Examiner these functions have been separated.

At page 242 of his second book, *Reshaping*, Prof. Gross states that Frank Bloom succeeded George Pratt as Chief Trial Examiner. That is confirmed by the listing of officials in the Board's 6<sup>th</sup> Annual Report, for the fiscal year ending June 30, 1941, that shows Judge Pratt as the Chief Trial Examiner, as compared with the 7<sup>th</sup> Annual Report, for the fiscal year ending June 30, 1942, that shows Judge Bloom to be the Chief Trial Examiner. However, we have a discrepancy between the Board's annual reports and the Board's bound volumes. In the Board's bound volumes for the relevant time frame (Volumes 41, 42, and 43), the page listing Agency officials shows George O. Pratt as the Chief Trial Examiner in Volume 41 (May 16–June 30, 1942), and also in Volume 42, the start of the new fiscal year (July 1–August 11, 1942). Then, in Volume 43 (August 12–September 15, 1942), Frank Bloom is listed as the “Acting Chief Trial Examiner.” These dates accord with Chief Judge Robert Giannasi's own analysis of the timeframes for service by the former Chiefs. Finally, Judge Giannasi's analysis is confirmed by Judge Pratt himself in his March 1970 oral history interview, for he reports there that it was in July 1942 (apparently late in the month) that he left the Agency. *Pratt* at 146, 155.

Judge Ringer succeeded Judge Bloom as Chief Trial Examiner, as noted above, in January 1947 (per Division files), in the fiscal year ending June 30, 1947. Judge Ringer served in that capacity until, as we learn from the Board's 26<sup>th</sup> Annual Report for the fiscal year ending June 30, 1961, he retired. (Chief Judge Giannasi's analysis of the records shows that Judge Ringer retired at the end of November 1961.) As is reflected by the Board's 26th Annual Report at iii fn. 1, for the fiscal year ending June 30, 1961, Judge Ringer was succeeded as Chief Trial Examiner by George Bokart on December 1, 1961. Judge Bokart served as Chief through June 1972, and that brings us past the early years and into the time of more recent records and memories. (Prof. Gross reports on

some of Judge Bokát's memories in a 1969 "oral history interview" with him. See Prof. Gross' 1974 *Making* at 240-241 and footnote 35.)

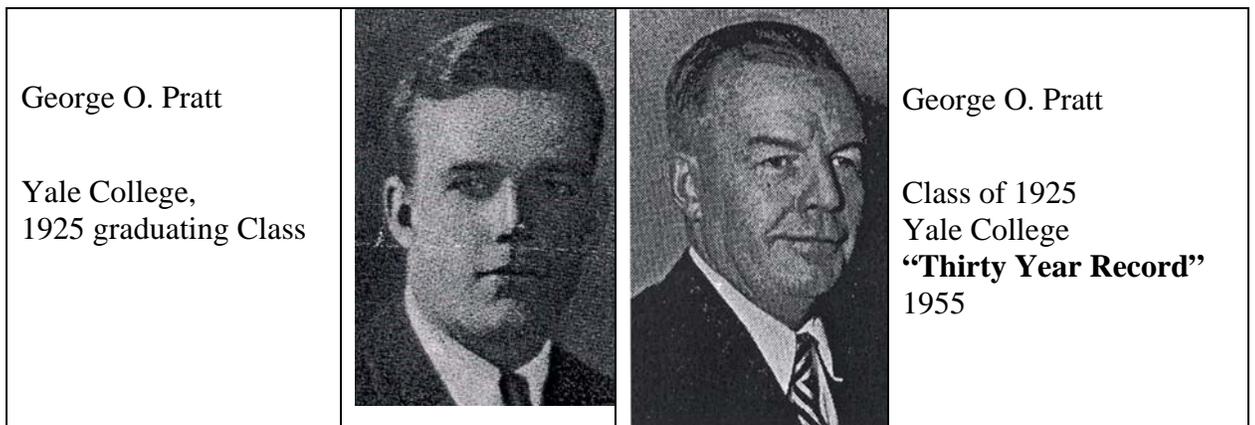
In a moment, all the chief judges are listed. The list essentially is that graciously prepared and submitted by Chief Judge Giannasi.

**b. Chief Judge George O. Pratt**

Because George O. Pratt was the first person appointed, in November 1937, to the newly created office of Chief Trial Examiner, this paper devotes some space to a brief summary of his rather short tenure with the Agency.

Born at Kansas City, Missouri on October 5, 1903 (*Press Release* R-413, Nov. 8, 1937), Pratt graduated from Yale College in 1925 (*Press Release*) and from Yale Law School in 1927. *Pratt* at 12. After some years of law practice in Kansas City, on October 2, 1934, Pratt was appointed as the Secretary of the Kansas City office of the "Old" National Labor Relations Board. Although Pratt refers to it as the "National Labor Board," *Pratt* at 43-46, the NLB was the predecessor organization abolished by the executive order that created, per joint Congressional Public Resolution Number 44, the "Old" or "First" National Labor Relations Board effective July 9, 1934. 1 *NLRB Annual Report* 6; *Making* at 72 and fn. 143; *The First Sixty Years, The Story of the National Labor Relations Board, 1935-1995* at 6-8 (ABA, 1995).

The following photo on the left is of George O. Pratt for his class picture for the 1925 graduating class of Yale College. (Yale Law School has a gap of about 20 years, including the 1920s, when no class pictures were made of the law students.) As of this picture (assuming that it was taken in late 1920 or early 1921), George Pratt would have been 21 years of age. The photo on the right is from "**The Thirty Year Record**," a 1955 publication by the Class of 1925, Yale College, with the assistance of the Class Officers Bureau, and edited by John Durant:



We have confirmation from Judge Pratt's 1970 oral history interview that he assumed the Chief Judge position in November 1937. *Pratt* at 117. He again confirms this during his Congressional testimony in 1940, by then Chief Trial Examiner Pratt, as quoted by Prof. Gross in *Reshaping* at 11 (emphasis added):

When I came to Washington, **in the middle of November 1937**, and assumed the position of Chief Trial Examiner, I had at that time ... 24 regular examiners and possibly 40 to 50 men on a per diem basis ... and my job was to supervise as best I could the activities of the regular and per diem examiners.

In his March 1969 oral history interview, Judge Bokart distinctly recalls that Judge Pratt arrived on November 15 to be the Chief Judge because that was Judge Bokart's birthday. *Bokart* at 1, 8.

As noted earlier, George Pratt was the original Regional Director for NLRB Region 17, Kansas City. 1 *NLRB Annual Report* at 17; *Press Release*. (And Prof. Gross reports that Pratt had been the Regional Director for Region 17 at Kansas City. See *Making* at 159 footnote 42.) In a moment we shall see how it came about that Regional Director Pratt presided as a trial examiner in several cases. As Prof. Gross puts it in describing a later event during Pratt's tenure as Chief Judge, Pratt was a person "that the Board had confidence in." *Reshaping* at 127.

An interesting side note. As an undergraduate majoring in Latin, Pratt wrote "quite a few" poems in Latin. *Pratt* at 12. Years later, when the House Special Committee to Investigate the NLRB (the Smith Committee; *Reshaping* at 106, 151) was doing its work, committee investigators hauled away all of Judge Pratt's files, including a personal file containing his Latin poetry. (See generally *Reshaping* 158-159.) Judge Pratt had been saving the poems to show to his grandchildren. *Pratt* at 146-147. When Edmund Toland, the Committee's General Counsel (*Reshaping* at 153), interrogated Judge Pratt during the hearings, he established through Judge Pratt that a document consisting of one of Judge Pratt's poems was not written in English. Toland offered the document on the basis that it was written in a "foreign language," had been found in the files of the Chief Trial Examiner, and that Judge Pratt admitted being the author. *Pratt* at 147-148. In its final report, and in an apparent reference to the Latin poetry, the Committee wrote that Judge Pratt had been maintaining "unauthorized materials on government property." *Pratt* at 148.

The first NLRB was left with no authority when the Supreme Court declared the National Industrial Recovery Act (NIRA) unconstitutional on May 27, 1935. 1 *NLRB AR* 6-7; *Pratt* 74. After the Wagner Act was enacted into law on July 5, 1935, Pratt and the other regional Secretaries of the "Old" NLRB

became the Regional Directors of the “New” NLRB. 1 *NLRB AR* at 16; *Making* at 159; *Pratt* at 78; *Press Release*. Thus, Pratt is shown in the Board's First Annual Report as the Regional Director for NLRB Region 17, Kansas City. 1 *NLRB AR* at 19.

In early November 1935, Regional Director Pratt issued his first complaint under the Act. Some 2 weeks later the local U.S. District Judge, Merrill E. [not “C”] Otis, issued what apparently was a temporary restraining order, and then later enjoined the NLRB and Regional Director Pratt from operating under the Act in the Western District of Missouri. *Stout (Majestic Flour Mills) v. Pratt*, 12 F.Supp. 864 (W.D. Mo. 12-21-1935). The injunction survived on appeal, although the constitutional issue was not reached. *Pratt v. Stout (Majestic Flour Mills)*, 85 F.2d 172 (8<sup>th</sup> Cir. 8-5-1936); 1 *NLRB AR* 47, 49-50, 57-58; 2 *NLRB AR* 31, 38-39. Thus, from about mid-November 1935 until the Supreme Court declared the Act constitutional on April 12, 1937, “nothing was done” at Region 17. *Pratt* 85-91; *Making* 208-210. This was the first injunction against the Board in what became an important legal battleground. 1 *NLRB AR* 46-50. [The timing suggested in Judge Pratt’s oral history interview is about a month earlier than that mentioned at 1 *NLRB AR* at 47 and in the reported decisions.]

While the question of the Act’s constitutionality worked its way to the Supreme Court, Regional Director Pratt was assigned to work in several capacities from Washington, D.C. to Honolulu. December 1935 saw him preside for the first time as a trial examiner, and thereafter he conducted elections, investigated charges, prosecuted unfair labor practice complaints, and served several other times as a trial examiner. The summer of 1937 was a busy one at Region 17, and he even acquired some help (previous to this, the staff consisted of Pratt and his secretary) in the person of a Regional Attorney, I. S. Dorfman. *Pratt* 93-109. That November 1937 Pratt received a call that led to his accepting, at the age of 34 (*Pratt* 143-145), the newly created position (as separate and independent of the Secretary’s office) of Chief Trial Examiner — an expensive proposition because, it appears, in those days the Government did not reimburse for moving expenses. *Pratt* 116-117; *Press Release No. R-413*.

Pratt served as the Chief Judge until he received another call, in July 1942, to help with the war effort. A week later he was transferred to work for the OSS — Office of Strategic Services. *Pratt* 146, 155. On leaving the OSS in late December 1945, Pratt did not resume his NLRB career. Pratt explains that he decided against returning to the Agency because he had been away for over 3 years, and because it appeared to him the legal environment for the Agency was moving toward conflict resolutions on the adversarial model rather than on the basis of investigation, conciliation, and encouragement of labor unions. *Pratt* at 156. Even in trials, the original concept, as Judge Pratt describes, was investigatory, and the trial examiner was free to speak to counsel

for either side, ex parte, to suggest that more facts be developed on this or that issue, and to bring in other witnesses if necessary. *Pratt* at 137-138, 140.

Instead of returning to the Board, Judge Pratt worked a few years with the Department of Interior, and in the early 1950s switched to a private engineering firm where he worked until semiretirement in about the late 1960s. In both positions, Pratt traveled extensively, including trips to many countries around the world. *Pratt* at 157-160. After a heart attack, apparently in the late 1960s, Pratt worked very little, his last stint for the engineering firm being in the spring of 1969, about a year before his oral history interview. *Pratt* 156-161.

But for Judge Pratt's oral history interview of March 1970, an impression could be left by the Board's Second Annual Report that Pratt had left Region 17 during the fiscal year ending June 30, 1937, for it tells us that the Regional Director for Region 17 was now Elwyn J. Eagan. 2 *NLRB AR* 11. Eagan was the Regional Attorney at Region 19, Seattle. 1 *NLRB AR* 19. Indeed, Eagan was the Board's trial attorney before Trial Examiner Pratt in Pratt's Honolulu case during the March-April 1937 trial there. *Pratt* 101-104. Apparently, when Pratt became the Chief Judge, and before the January 4, 1938 transmittal of the Board's Second Annual Report, it was decided that Eagan would succeed Pratt as the Regional Director at Kansas City. (Recall from the November 8, 1937 press release announcing Pratt's appointment to be Chief Trial Examiner, it is stated that no successor had as yet been appointed for the position of Regional Director of NLRB Region 17.) However, as we see for the following year, Eagan was promoted to be the Regional Director at Region 19, apparently never leaving Seattle. 3 *NLRB AR* 14. Assuming Regional Director Charles Hope of Seattle did not suffer an untimely passing, we reasonably can conclude that Eagan learned Regional Director Hope would be leaving the Regional Director's position in Seattle, that Eagan could be the Regional Director there rather than in Kansas City, and that Eagan decided to remain in Seattle.

These closing notes respecting Chief Judge Pratt. As of Judge Pratt's July 1942 departure from the Agency, the Smith Committee had not returned Judge Pratt's files to him. Thus, Judge Pratt was never able to show to his grandchildren the poems that he had composed in Latin so many years earlier. *Pratt* at 146. As his son, Sherwood Pratt of Brookline, Massachusetts, reports, Judge Pratt died in October 1979, and is buried in the family cemetery, Mosswood, at Salem, Connecticut.

### *c. List of the Chief Judges*

One or more of the Chief Judges either served, or may have served, in an acting capacity for a short time before the official term of their appointment began. The beginning month shown here is when they started even if that

includes any short time in an acting capacity. As discussed a few pages earlier, for the first 2 years and some 4 months of the Board's operation, the Board's first Secretary, Benedict Wolf, also performed the function of Chief Trial Examiner. Secretary Wolf is not included in the listing which follows because, as mentioned earlier, only those appointed to the separate office of the Chief Trial Examiner are listed here, with Judge George Pratt being the first so appointed. Judge Schneider is included because he was officially designated, in an acting capacity, to fill the established position on July 1, 1972. See 198 NLRB at iii, fn. 2.

Based on the foregoing, we see that the Agency has had 11 persons who have served, or still serve, as the Chief Judge (Chief Trial Examiner; Chief Administrative Law Judge), in the capacity of full (or Acting) appointment to the separate position of that office. Except for Chief Judge Pratt (who was the Regional Director of NLRB Region 17, Kansas City, at the time of his appointment, although he had served several times as a trial examiner), the other 10 of those 11 have been appointed from the ranks of the Board's trial judges.

	<u>Name</u>	<u>Term of Service</u>	<u>Note</u>
1.	George O. Pratt	11-15-1937 to 8/1942	
2.	Frank Bloom	8/1942 through 12/1946	
3.	William R. Ringer	1/1947 through 11/1961	
4.	George Bokat	12-1-1961 to 6-30-1972	
5.	Charles W. Schneider	7-1-1972 to 12-31-1972	Acting Chief
6.	Eugene E. Goslee	1/1973 through 10/1975	
7.	Thomas N. Kessel	11/1975 through 12/1979	
8.	Arthur Leff	1/1980 through 12/1980	
9.	Melvin J. Welles	1/1981 through 10/1993	
10.	David S. Davidson	11/1993 through 6/1996	
11.	Robert A. Giannasi	7/1996 to Present	

### 5. Officials and Other Early-Day Judges

In footnote 1 at page 22 of the Board's 1<sup>st</sup> Annual Report, for the fiscal year ending June 30, 1936, we are informed that, "In many cases the Board has designated one of its own members as trial examiner." An early example of that is reflected in the case (Case C-5) of *Clinton Cotton Mills*, 1 NLRB 97, 98 (1935), where it states that Board Member John M. Carmody was designated by the Board to be the trial examiner in the case. Indeed, for the first few months or so, the presiding "trial examiner" usually was someone other than a regular-staff judge. Perhaps symbolically, the Board itself sat as, in effect, the trial examiner in the first trial under the Act. See *Making* text at 171 and footnote 96, and *Pennsylvania Greyhound Lines*, 1 NLRB 1 (1935) (Case C-

1). Although the Board's decision does not state when the trial began, Prof. Gross reports, *Making* at 171, that the trial opened on October 22, 1935. Barely 6 weeks later, on December 7, 1935, the Board issued its decision in the case. In its First Annual Report, the Board reports that, for the fiscal year ending June 30, 1936, “the Board [itself] conducted 7 hearings in complaint cases.” 1 *NLRB AR* 38.

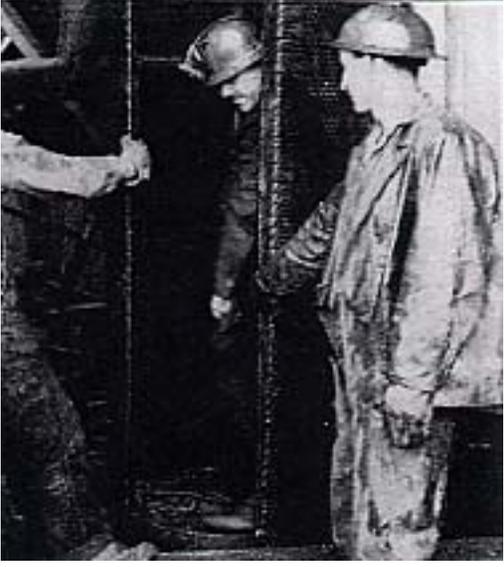
The range of “celebrity” judges extended from the Board itself, as at 1 *NLRB* 1, and at 1 *NLRB* 503 (*Jones & Laughlin Steel Corp.*), at least twice to each of the original members of the Board, to the Board's Secretary (Benedict Wolf, at four complaint cases and two representation cases), to several Regional Directors, and in a combined (not consolidated) trial of an “R” and a “C” case, to an academic, Charles E. Clark, dean of the Yale Law School, at 1 *NLRB* 686 and 1 *NLRB* 788.

A few names of early-day judges appear in *Making*, at pages 240-241 (Judge George Bokat) by Prof. Gross, and in his 1981 *Reshaping*. Named in the latter, at 174-175, 177, 184-186, 205, 242, are Chief Judge George Pratt and Judges Frank Bloom, Mapes Davidson, Tilford Dudley, Harlow Hurley, Martin Raphael, William R. Ringer, William Seagle, Charles Whittemore, and Charles Wood. (At p. 186(2) (second item) of *Reshaping*, see the 1938 photo of Judge Ringer emerging from a lead and zinc mine in Picher, Oklahoma following what may well be the first example in Board history of a **bench view** during a ULP trial.) For the reason expressed below, all these judges (except Harlow Hurley) are included in the ABC list that appears later. It seems that Prof. Gross names these judges, at least as to most of them, for the time period of late 1939 to early 1940. Harlow Hurley appears to have served on a per diem basis only. He is mentioned in *Reshaping* at 174-175 as a “green” trial examiner in December 1937, and he had no reported unfair labor practice trials after August 1938 (and only two representation hearings thereafter, in October 1938).

[This brief note in defense of the “green” per diem judges. Unlike future Chief Judges Ringer and Bokat, who came to the Board with substantial experience as trial lawyers, it is possible that Judge Hurley, and others like him in the 1930s, did not have such experience. In the 1940s and into the 1950s, a number of the Agency’s Trial Examiners were drawn from the old Review Section that was divided, after the Taft Hartley Act, into the legal staffs for the Board members. They, and those who transferred from the Agency’s appellate section, were very experienced with Board law. The Civil Service eligibility requirement of at least 7 years of litigation experience means that modern judges have come to the Division with a solid background of trial work. And for the last several years, as Chief Judge Giannasi advises, new judges arriving at the Division have come from other agencies, such as the Social Security Administration, where they already were administrative law judges. Some of these new judges had background experience with NLRB trials and hearings, or

other related labor law experience, and some have not. But all have had extensive litigation experience. Surely, therefore, there is no room for any of us modern day judges to feel any smugness that we were not “green” when we became judges with the Division. To make any comparison, we would have to ask what our situation would have been had we been lawyers in the 1930s — generally not a good time attempting to gain experience as a trial lawyer.]

As stated earlier in the Photo Credits, the photo of Judge Ringer emerging from his **bench view** of the lead and zinc mine is an NLRB photo that is reproduced in the commemorative publications on the NLRB at the 50-year mark (*NLRB, The First 50 Years, The Story of the National Labor Relations Board 1935-1985*), at page 23, and at page 13 of *The First Sixty Years, The Story of the National Labor Relations Board, 1935-1995* (ABA, 1995). The latter 60-page (an appropriate number) publication is reproduced on the Board's website, and the photo can be viewed there over the internet at [www.nlr.gov](http://www.nlr.gov). (At the website's homepage, on the menu on the left, under NLRB Documents, click Publications; the booklet is the second item; click on the PDF format (the HTML format, as note at its conclusion states, does not include graphics); under Chapter 2, click on pages 9 to 14; scroll to page 13 of booklet, or page 5 of PDF; photo is second of two on the page.) A copy of the photo also is reproduced here:

<p>Judge Ringer may have taken this <b>bench view</b> in the case of <i>Eagle-Picher Mining &amp; Smelting Co.</i>, 16 NLRB 727 (1939) (trial at Joplin, Missouri opened December 6, 1937 and closed April 29, 1938. Id. at 729).</p>		<p>This <b>bench view</b> by Judge Ringer may well be the first in Board history.</p>
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In *Reshaping* at 345, note 27, Prof. Gross names some additional judges as of March 1940. Because the time period is early 1940, it is clear that these individuals are regular-staff judges. (With one exception, Sidney Sugerman, this is confirmed by the fact that the Board's bound volumes reflect that the

judges should either have deemed EOD dates earlier than March 1940, or they are named on the January 1957 roster.) If the names of these judges so named by Prof. Gross were combined into a single list, the total number would be 22 (not counting Chief Judge Pratt). However, because the bound volumes reflect that judges Harlow Hurley (who, as noted earlier, appears to have been a per diem judge) and Charles Wood ceased presiding before 1940, and as Prof. Gross, in *Reshaping* at 184 (similar to 316, footnote 109) counts 39 regular-staff judges as of January 1940, it appears that as of early 1940 the 20 regular-staff judges (plus Chief Judge Pratt) named by Prof. Gross are:

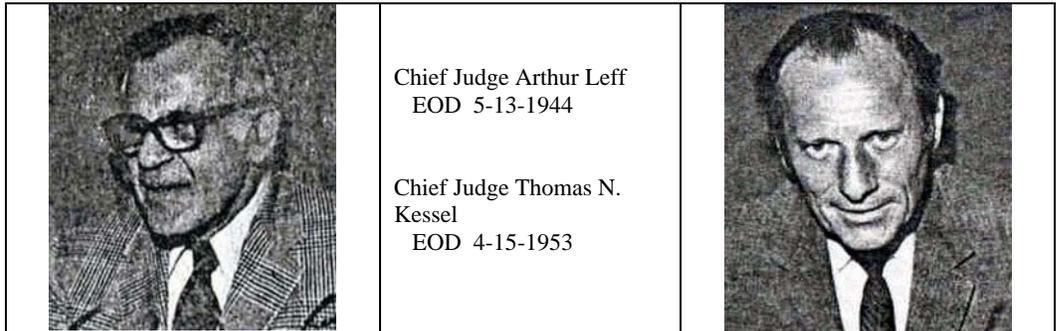
James Batten	Earl Bellman
Frank Bloom	George Bokat
Mapes Davidson	Tilford Dudley
A. Bruce Hunt	[Harlow Hurley gone]
Henry Kent	Charles Persons
Martin Raphael	M. Reimer
William R. Ringer	Henry Schmidt
William Seagle	Sidney Sugerman
Guy Van Schaick	W. P. Webb
Herbert Wenzel	Charles Whittemore
Thomas Wilson	[Charles Wood gone]

As noted in the preceding paragraph, the Board's bound decisions do not show a single reported case at which Judge Sugerman presided. In fact, during the timeframe of 1939 or well into 1940, Sidney Sugerman is listed on cases in the position of "Of counsel to the Board," meaning, of course, that he was serving in the old Review Section. See, for example, *New England Spun Silk Corp.*, 11 NLRB 852 (3-1-1939), and *Davidson Granite Co.*, 24 NLRB 370 (6-4-1940). This does not mean that he never became a regular-staff judge for the Division in that time period. Indeed, there have been one or two other instances in which a newly appointed judge either died shortly after reporting for duty (for example, C. Dale Stout in October 1979, as described later), or who left soon after their appointments. Thus, although Sidney Sugerman is acknowledged in this paper as having been appointed as a regular-staff judge, his tenure is deemed as having been very brief. He is assigned a deemed EOD date of March 1, 1940, per the reference, noted above, by Prof. Gross.

As already mentioned (and repeated in chapter 4, "Staffing numbers"), Prof. Gross is referenced for his report that as of early 1940 the Division had 39 regular-staff judges. *Reshaping* at 129 (with note 109 at 316) and 184. Unfortunately, as reported at 5 NLRB Annual Report 123, by the end of the fiscal year (June 30, 1940), 10 of the Division's then 35 judges were separated (a 28.6-percent layoff!) because of budgetary restraints. Thus, in the process of assigning deemed EOD dates, we have these numbers of 39 and 35 to check against. Only 6 of the above 20 are named on the January 10, 1957 roster. On that list Judge Ringer is shown with an early EOD date (10-1-1937), while

Judges Bellman and Bokart have EODs of 2-1-1938, and Judges Whittemore and Wilson EODs of 8-1-1938. For the others of the 22 named above (including Judge Wood but not Judge Hurley, who seems to have been only a per diem judge), EOD dates have to be deemed. The deeming process is explained in more detail later in chapter 6, Preface to the ABC List.

The following table shows scanned pictures of Judge Arthur Leff (EOD 5-13-1944) and Judge Thomas N. Kessel (EOD 4-15-1953). [As we saw just a few pages ago, both became Chief Judges. These pictures appear on their final photo-ID cards, and such photos of Judges Leff and Kessel capture their images when they were at the end of their careers and when each was the Chief Judge.] The pictures are late additions to the paper, and thanks for finding them (actually, their final photo-ID cards, from which scanned copies of the images were made) go to Chief Judge Giannasi, who, in these last few weeks before publication of the paper, has intensified his already generous time and efforts (including proofreading and finding old pictures) that he has devoted to this project. Although the quality of the scanned photos may fall a bit short of perfection, we can be very grateful that we have the images of these two great judges (on the left, Judge Leff; to the right, Judge Kessel) who once upon a time graced the NLRB trial bench.



## 6. LIFE Magazine, *Weirton Steel*, and Judge Edward Grandison Smith

Take a slight detour for a moment. For some 65 years, the 39,000-page trial transcript of *Weirton Steel Company*, 32 NLRB 1145 (1941) (see *Reshaping* at 17) has been one of the biggest NLRB unfair labor practice trial records. Very few cases have generated records as large or trials as lengthy. As then Chief Judge Melvin J. Welles recalls in his July 1988 oral history interview for Cornell University, the *Kohler Co.*, 128 NLRB 1062, unfair labor practice trial generated some 65,000 pages of transcript. Judge George A. Downing (EOD 9-16-1948) presided on various dates between February 1955 and February 1957. 128 NLRB at 1143; *Welles* at 29-30. And Judge Lowell M. Goerlich presided at a backpay trial that, as Judge Welles recalls (*Welles* at 58), generated some 70,000 “hearing pages” that settled just as he was about to issue his decision, after having worked on the decision for about 2 years. This

was the supplemental trial to, apparently, *Darlington Mfg. Co.*, 139 NLRB 241 and 165 NLRB 1074. In recent years, we have the 41,000 page record generated during 165 trial days (from July 1994 to July 1996 before Judge David L. Evans) in *Avondale I*, 329 NLRB 1064 (1999). See release R-2453 (May 8, 2002) at the Board's website under the tab for Press Releases. Notwithstanding these larger records, *Weirton's* 220 trial days (so indicated by the 220 volumes of testimony, as mentioned in *Reshaping* at 17), and 39,000 page transcript, still leaves it as one of the Board's longest trials and largest records.

The trial in *Weirton Steel* opened on August 16, 1937, in the Hancock County Courthouse at New Cumberland, West Virginia, and closed on January 30, 1939. *Weirton Steel* at 1148. Two trial examiners, in sequence, presided. Judge Edward Grandison Smith (named there, and in some other cases, as E. G. Smith, and as Edward G. Smith in other cases) opened the record and presided until, it appears, a recess that began following the events on July 11, 1938. Either at a resumption scheduled by the Board for August 24, 1938 (*Weirton Steel* at 1149), or some days later, the second trial examiner, Judge James C. Batten, began presiding until the close of the trial.

On July 11, 1938, Judge Smith excluded *Weirton's* lead attorney, Clyde A. Armstrong, from the balance of the trial for, in effect, contempt on July 7, 1938. After granting an appeal from this ruling, and after itself holding a July 20, 1938 hearing on the matter, at which Judge Smith and attorney Armstrong, and perhaps others testified, the Board affirmed Judge Smith's exclusion ruling. *Weirton Steel Company*, 8 NLRB 581 (July 25, 1938). When the case on the merits reached the Board, it reaffirmed its earlier affirmance of Judge Smith's ruling. *Weirton Steel Co.*, 32 NLRB at 1154 (1941). With one modification, the Third Circuit enforced the Board's order. *NLRB v. Weirton Steel Co.*, 135 F.2d 494 (3d Cir. 1943) (also approving, at 496-497, the Board's affirmance of its earlier decision sustaining Judge Smith's ruling excluding attorney Armstrong).

Among the eight attorneys listed in the reported decision, *Weirton Steel Co.*, 32 NLRB 1145 at 1147 (1941), one is David Rein. Of interest for the Judges Division is that Attorney Rein presumably is the same David Rein who later joined the Division (EOD 1-1-1946, deemed).

In its September 6, 1937 issue, **LIFE** magazine has an article that it indexes (at 17) as, "*The National Labor Relations Board tries Weirton Steel.*" The article (**LIFE**, hereinafter), with several photos, begins at page 19 with a photo of the county courthouse and the courtroom scene (the accompanying text states that the courtroom photo, and presumably all of them, was taken on August 20, or 4 days after the trial began), with Judge Smith on the bench. This is followed by a six-paragraph text with the heading, "The New Deal

Dispenses A New Brand Of Justice To Labor And Industry.” In its opening text, the article states, at 19:

What makes the hearing so important is that Weirton Steel is run by Ernest Tener Weir, who happens to be among the most ruggedly individualistic employers in the country.

The article continues by stating that Weir does not intend to let either the Government or unions tell him how to operate his business. With the Board, however, “tough Mr. Weir is up against a much tougher opponent than NRA’s old National Labor Board.” **LIFE** at 19.

The article contains photos of, in addition to Judge Smith, the lawyers (including Weirton Steel’s lead attorney, Clyde Armstrong), some witnesses, and a good many spectators. Toward the end of the article it also has photos of officials of the Agency. The article briefly summarizes the legal process of an unfair labor practice trial (for example, “no jury”), and reports (at p. 22) that the Board's success in the U.S. Circuit Courts, up to that point, was 16 wins and only 2 losses.

In the course of the Third Circuit’s enforcement opinion in *Weirton Steel*, the court states (internal footnote omitted), 135 F.2d at 496:

It is true that the hearings got off to a bad start under the administration of a trial examiner whom the Board subsequently withdrew from the case.

For its part, the Board states that Judge Smith “retired substantially before the close of the hearing.” 32 NLRB at 1155. If Judge Smith retired, his retirement was very brief, for the books show that he presided at Board trials and hearings during the balance of 1938, throughout 1939, and beyond the May 1942 Trial Examiners conference.

A sense of the atmosphere surrounding the *Weirton* trial is reflected in the July 25, 1938 decision of the Board sustaining Judge Smith’s ruling of exclusion. The Board there observes that in Steubenville, Ohio (a second location for the trial while Judge Smith was presiding) on July 13 (2 days after the ruling excluding Attorney Armstrong), a crowd gathered between the post office and the Fort Steuben Hotel. Those in the crowd were (8 NLRB 581 at 589-590, footnote omitted, emphasis added):

[C]arrying signs and placards which bore expressions outrageously slanderous of and derogatory to the Board, the Trial examiner, and the Board's attorney. [Lead attorney, apparently.] At about the same time, **an effigy of the Trial Examiner was hung from a window of the hotel.** At the request of members of the crowd, [attorney] Armstrong came

out of the hotel, was lifted to the shoulders of some men, and addressed the throng [saying that he was proud of them and of their support of him].

In his book covering, for the most part, much later events at Weirton Steel, Phillip Hartley Smith (a member of Weirton Steel's board of directors from 1983 to 1994), describes Attorney Armstrong as "a brutally effective labor lawyer and aggressive litigator." *Board Betrayal (The Weirton Steel Story)*, 73 (2003).

Lawyers and judges might debate evidentiary rulings that are made under the pressure of a big trial, but surely virtually all would agree that Judge Smith appears to have been a model judge in terms of patience and courtesy. For nearly a year Attorney Armstrong had tested that patience and courtesy. It is likely that very few modern judges would have demonstrated such courtly patience for anything beyond the first few episodes of unruly behavior by a lawyer at trial. Eventually, Judge Smith could stand no more, and he acted. And indeed, his ruling excluding Attorney Armstrong was approved by the Board and specifically affirmed by the Third Circuit.

Gracing the cover of **LIFE's** next issue, on September 13, 1937, is a photo of Ernest Tener Weir, the principal owner of Weirton Steel. The six-page "photographic essay" that begins at page 36 of the issue shows scenes of the steel mill, its workers, the company town, and life there. Although the text does not contain additional information about the NLRB trial, the opening text does mention the allegations of the NLRB case, and then states, at page 37: "Mr. Weir's blanket answer is that he does not propose to let any one tell him how to run the business he built from the ground up (**LIFE**, Sept. 6)."

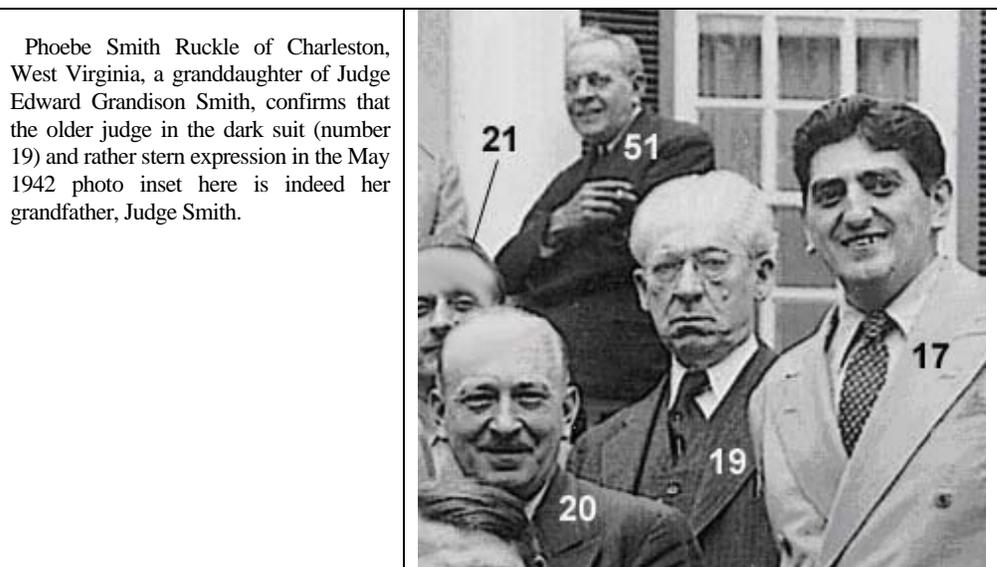
After the Third Circuit enforced the Board's order in *Weirton Steel*, the Agency found it necessary to institute contempt proceedings. Eventually, the Third Circuit issued its decree of contempt and ordered that Weirton Steel take the mandated action to purge itself of contempt. *NLRB v. Weirton Steel Co.*, 183 F.2d 584 (3d Cir. 1950).

Websites on the Internet discuss the history of Weirton Steel Company. According to a chronological list of events by Lois Alete Fundis, the reference librarian of the Mary H. Weir Public Library, Weirton, West Virginia, in April 1909 a predecessor company (with Ernest Tener Weir as president) bought land in the area and began operations. On August 1, 1918, Weir's 43rd birthday, the predecessor company changed its name to Weirton Steel Company. In November 1929, Weirton Steel merged with two other companies to form National Steel Corporation. Weirton Steel received 50 percent of the stock of National Steel, and Ernest T. Weir became the Chairman and Chief executive. Headquarters were set in Pittsburgh, Weir's hometown. On June 26, 1957, the same site reports, Ernest Tener Weir died at 81 years. In 1982 a plan evolved

to sell the Weirton Steel division of National Steel to the employees through an Employee Stock Ownership Plan (ESOP). Following a favorable vote in 1983, the “new” Weirton Steel Company (now employee owned) took over from National Steel on January 11, 1984. Most of Phillip Hartley Smith’s book, *Board Betrayal (The Weirton Steel Story)*, published in 2003 (and available through bookstores such as Barnes & Noble and Books-A-Million), treats events at Weirton Steel during the ESOP years.

These concluding notes. A few pages below, a photo of the 1942 Judges Conference, held in Annapolis, Maryland, is reproduced (followed by a copy of that picture with black key numbers marked on the images for the purpose of identification, to the extent possible at this late date).

In its September 1937 article, **LIFE** (at 22) records Judge Smith as being age 69. In 1942, at the Trial Examiners conference in Annapolis, Maryland, Judge Smith would have been almost 5 years older, or roughly age 74. The full May 1942 photo appears below in the section on “Staffing Numbers.” Look at the upper right section of the photo of the attendees at the May 1942 Trial Examiners conference, and especially at the copy with the black key numbers. In the upper right hand section of the picture (a copy of this inset is shown a few lines below), and just to the left of the young, dark-haired attendee in a light suit (key number 17), and slightly behind him to our left, is a white-haired judge (key number 19), balding at the front, wearing a dark suit. Although his look perhaps is sterner in 1942 than in 1937 (remember, August 20, 1937, was long before Judge Smith had reached the end of his patience with Attorney Armstrong), the white-haired man (key number 19) in the 1942 photo has been identified as Judge Edward Grandison Smith. The upper right section of the 1942 photo (with black key numbers) is reproduced here:



Ms. Ruckle also advises that Judge Smith, who was born April 8, 1868, died on February 17, 1944, at the age of 75. Judge Smith's passing was front page news for the February 18, 1944 issue of the *Clarksburg Exponent* which, with Judge Smith's photo prominent, printed a lengthy article that had to be continued on page two. Judge Smith is buried at West Milford, West Virginia, a few miles south of Clarksburg.

## 7. Presiding Over Both "C" and "R" Cases

As described in the Board's first few annual reports, judges ("trial examiners") not only presided over unfair labor practice trials ("C" cases), but also over representation hearings ("R" cases). See, for example, 2 NLRB Annual Report at 8; 3 NLRB Annual Report at 243; and 4 NLRB Annual Report at 149. See, also, *Making* at 165 and footnote 73. During the fiscal year ending June 30, 1940, budgetary constraints dictated a policy change. The change is described as follows in the Board's 5<sup>th</sup> Annual Report at 123, for the fiscal year ending June 30, 1940, that Board Chairman H. A. Millis transmitted to the President and to the Congress on February 26, 1941 (emphasis added):

Members of the Trial Examiners Division are assigned to preside over hearings on formal complaints, alleging the commission of unfair labor practices, and on petitions for certification of representatives. \* \* \* In cases involving certification of representatives they prepare memorandum reports for the Chief Trial Examiner. [Internal footnote omitted.]

Budget reductions occurring during the year made a reduction in personnel of the Trial Examiners Division necessary. Ten of the thirty-five trial examiners were separated from the Division. This reduction in personnel made it impossible for staff trial examiners to continue to hear all of the scheduled hearings in representation cases. It was, therefore, determined by the Board to use employees attached to the regional staffs as **trial examiners**, in those representation cases which, because of the issues involved, did not require the services of a staff trial examiner. Such designations of persons attached to the field staff, as trial examiners, have been made in a number of cases. The practice so inaugurated has been successful. **Employees attached to the field staffs of the various regional offices have heard approximately 90 percent of all of the representation cases since June 1, 1940.**

As the Board's bound volumes of decisions reflect, this new policy was begun with four hearings on Monday, May 27, 1940. Of these four, the first hearing was presided over by Garnet L. Patterson, as reported at 24 NLRB 606

(6-12-1940). The previous FY, ending 6-30-1939, Patterson is shown as the Regional Director at Chicago, IL — Region 13. 4 *NLRB AR* 15. For the fiscal year involved here, the one ending 6-30-1940, the Regional Attorney, Isaiah S. Dorfman, is also shown as the Acting Regional Director. 5 *NLRB AR* 10. At 31 NLRB (covering decisions issued April 16 to May 31, 1941), on page iii, the page listing Board officials, Garnet L. Patterson, for the first time, is shown as the “*Director of Field Division.*” Patterson apparently left Chicago, at some point, to join the General Counsel’s staff in Washington to become the Director of Field Operations. Judge George Bott, who also served a term as General Counsel and also as the Regional Director, at different times, of two Regional Offices (Kansas City and then Chicago) confirms as much. *Bott* at 26-28, 38. What is missing is the time sequence. Apparently, as of this hearing on May 27, 1940, Patterson either had already given notice of his departure, or had in fact departed Chicago for his new position, and then returned to preside at this first hearing under the new policy.

Two of the other three “trial examiners” on that May 27 were Regional Attorneys (Arthur R. Donovan at Indianapolis, Region 11; 24 NLRB 61; and Thomas R. [or “P”] Graham at Seattle, Region 19; 24 NLRB 967), and the third (24 NLRB 1077) would soon become the Regional Attorney at Cleveland, Region 8 — Max W. Johnstone. 7 *NLRB AR* 193 for FY ending 6-30-1942. This pattern, of mostly Regional Attorneys serving as the “trial examiners” for the first four “R” case hearings under the Board’s new policy, also was substantially the situation in the other cases heard during the first several weeks after the new policy was implemented. Eventually, most of the Regional Attorneys stepped back and other personnel at the Regions began presiding as “trial examiners” at these routine representation case hearings.

The following year the Board commented, respecting “R” cases, as follows in 6 NLRB Annual Reports (for the fiscal year ending June 30, 1941) at 9 (emphasis added):

In uncomplicated cases, for the purpose of expeditious handling, employees attached to Regional Offices are assigned as **trial examiners** to hear formal representation cases. The assignment is made by the Chief Trial Examiner, and Trial Examiners from Washington are sent into the field only in cases involving complex factual or legal problems.

And at 7 NLRB Annual Reports at 14:

While staff Trial Examiners are always assigned to hear complaint cases, they are assigned only on the more difficult and complex representation cases. In the routine representation case, the Chief Trial Examiner designates one of the regional staff to conduct the hearing.

Following the 1947 amendments to the Act, and apparently in light of Section 9(c)(1)(B) [“Such hearing may be conducted by an officer or employee of the regional office, ... .”], the Board wrote as follows at 13 NLRB Annual Report (for the fiscal year ending June 30, 1948) at 7:

The decision-making procedures in representation cases are somewhat different. Upon issuance of a notice of hearing by a regional director, the hearing is usually conducted by an officer attached to the regional office, rather than by a trial examiner.

In checking the names of judges in the Board's bound volumes, while weight is attached to the number of “R” cases heard by a judge, primary reliance is placed on the names of those judges presiding at trials in unfair labor practice cases in determining whether such judges should receive a “deemed” EOD date as a regular-staff judge of the Division. This is so because, as highlighted above, from May 27, 1940, through the balance of the Wagner Act years, regular-staff judges presided at only some of the “R” cases, with Regional Office personnel handling the bulk of them. Before that date, judges handled most of the representation cases, but not all of them, and before August 1, 1938, the judge presiding sometimes was one of the several per diem judges on call by the Division. Moreover, whether before or after May 27, 1940 (through the Wagner Act years), the person presiding at a representation case was declared to be the “trial examiner duly appointed by the Board” (and, later, duly appointed by the “Chief Trial Examiner,” and still later the appointment process is omitted in the published decisions and the person is simply named as the “trial examiner”).

Despite all this, the reported decisions reveal certain tell-tale signs. Thus, if a named trial examiner never heard more than a handful of reported cases (particularly if those were “R” cases), or heard only a few short cases (again, mostly “R” cases) sporadically over the course of perhaps a year or so, chances are strong that such person was either a per diem judge or, particularly in the early months, someone from any of a variety of positions inside, or outside, the Agency, and was not a regular-staff judge. By contrast, in the early years most of the regular-staff judges (those either with Division EOD dates or deemed EOD dates) are shown, in the reported cases, as having presided at a substantial number of cases, both “C” and “R.”

## **8. The Judges’ Decisions**

Respecting the judges’ written decisions (“Intermediate Reports,” then), in the early years they ordinarily were not attached to the Board's decisions. [Exceptions to this general rule can be found. See 20 NLRB 166, for example.] Indeed, until the Board changed its rules in September 1941, trial examiners submitted their Intermediate Report (IR) to the appropriate Regional Director

who served copies on the parties and the Board. See the Board's 7<sup>th</sup> Annual Report, for the fiscal year ending June 30, 1942, at 9; and F. Witney, *Wartime Experiences of the National Labor Relations Board* 237 footnote 9 (1949). For the preliminaries to that change, see *Reshaping* at 230-231. Before this 1941 change, after the Board received the record and the IR, it used the IR simply as an aid in making its own decision. *Wartime Experiences* at 237. Following the September 1941 rule change, the Board began using the IR as the foundation for its formal decision and order. *Wartime Experiences* at 237; *Reshaping* at 230-231. Thus, in the early years the Board, after reciting that the judge had filed an intermediate report, and that exceptions were filed to that report, then proceeded to write its findings of fact (obviously relying to some extent on the judge's intermediate report) and to state its conclusions and decision. By NLRB Volume 45 (part of 1942), we see the result of the September 1941 rule change, for the Board has begun (usually) attaching, to its (now shorter) decisions, the Intermediate Reports of the judges.

### 9. Judges Who Have Been Board Members or General Counsels\*

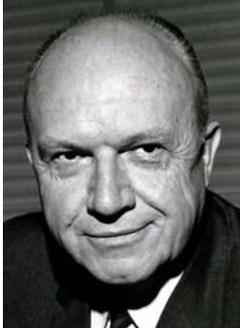
[\*Since the fall of 1961, at least for Agency titles, the Agency has used the Anglicized plural for counsel. See, for example, "Chief Counsels" at NLRB Vol. 133 at ii. Respecting such titles, that policy is applied in this paper.]

Over the years, there have been a few instances of movement to or from the positions of presidential appointment and the Division. At the Board level, the first occasion was President Eisenhower's November 1955 nomination of "little-known trial examiner Stephen Bean to the Farmer vacancy." See the third book by Prof. Gross on the Board, *Broken Promise*, at 129 (1995). As reflected at the Board's website, [www.nlr.gov](http://www.nlr.gov) (click on Organization), Member Bean's term ran from 12-1-1955 to 8-27-1960. As shown on the LOS, below, on the day (8-28-1960) after his term ended, he resumed his duties as Judge Bean.

As of the August 2004 publication of this paper, three other Board members (in addition to Member Bean) became judges after completing their terms on the Board. Ivar H. Peterson, President Truman's last appointment to the Board, was not reappointed when his term there ended August 27, 1956. *Broken Promise* at 100, 150; [www.nlr.gov/organization](http://www.nlr.gov/organization). (Judge Peterson's EOD date of 12-3-1962 therefore reflects a 6-year gap before he joined the Division.) A judge on the South Dakota Supreme Court when appointed April 4, 1955, to the Board by President Eisenhower, Member Boyd S. Leedom was designated in late 1955 to be Chairman. Leedom served in that capacity until replaced in 1961 by President Kennedy's choice for the position, Frank McCulloch. Leedom completed the remaining nearly 4 years of his second term as a member of the Board, with that term ending 12-16-1964. *Broken*

*Promise* at 124-125, 129, 147, 195; [www.nlr.gov](http://www.nlr.gov). Judge Leedom’s EOD date with the Division of January 5, 1965 reflects that he ascended the trial bench after a vacation over the Christmas holidays. Judge Mary M. Cracraft, EOD date of 1-22-1995, served as a member of the Board from 11-07-1986 to 8-27-1991. See the Board's website, [www.nlr.gov](http://www.nlr.gov) (click on the tab for About Us, then Structure, then Board), and *Broken Promise* at 386 footnote 176.

John C. Miller, who had served as Acting General Counsel from August 15, 1975, to November 30, 1975, before being appointed to the Division (EOD 7-3-1977), later served as Chief Counsel for Board Chairman John R. Van de Water from August 1982 to Chairman Van de Water’s departure in December 1982. About a week later, on December 23, 1982, Miller himself was appointed to the Board and 4 days later he was named the Chairman, a position he held until his recess appointment expired on March 7, 1983. Thus, five of our judges have served as Board Members, and two of those, Judges Boyd Leedom and John C. Miller, have served as Chairman. Here are the photos of those five, as the images appear in the Agency’s 1995 publication (reproduced on the Agency’s website; click on Publications), *The First Sixty Years*, at pages 50-53. (The symbol numbers set by Judge Bean’s EOD date, and the EOD dates of some other judges, are part of the deeming process that is explained later.)

JUDGES WHO HAVE SERVED AS BOARD MEMBERS		
Ivar H. Peterson EOD 12-3-1962  <i>The First Sixty Years</i>  Page 50		Board Member 3-21-1952 – 8-27-1956
Boyd S. Leedom EOD 1-5-1965  <i>The First Sixty Years</i>  Page 50		Board Member 4-4-1955 – 12-16-1964  Chairman 11-2-1955 – 3-6-1961

<p>Stephen S. Bean EOD 2-1-1950</p> <p><i>The First Sixty Years</i></p> <p>Page 50</p>		<p>Board Member 12-1-1955 – 8-27-1960</p>
<p>John C. Miller EOD 7-3-1977</p> <p><i>The First Sixty Years</i></p> <p>Page 52</p>		<p>Board Member 12-23-1982 – 3-7-1983</p> <p>Chairman 12-27-82– 3-7-83</p>
<p>Mary M. Cracraft EOD 1-22-1995</p> <p><i>The First Sixty Years</i></p> <p>Page 53</p>		<p>Board Member 11-7-1986 – 8-27-1991</p>

During the years of the Wagner Act, one of the General Counsels for the Board had been one of our judges — Alvin J. Rockwell. He served as General Counsel for a bit over 20 months, as shown on the Board's website: January 1, 1944, through September 16, 1945. Go to [www.nlr.gov](http://www.nlr.gov) and click on the tab “About Us.” Then under the topic for “Structure,” click on “General Counsel.” On that screen, click on the link to “GC and terms since 1935.”

Since the 1947 amendments to the Act made the General Counsel a presidential appointee, five of our judges have served (two of the five in a brief acting capacity) as the General Counsel — Robert N. Denham, from 8-1-1947 to 9-15-1950; George J. Bott, from 9-29-1950 to 12-20-1954; and Arnold Ordman, from 5-14-1963 to 6-25-1971. Eugene Goslee (EOD 11-28-1971) served as the Acting General Counsel for about 2 months from late June 1971 to late August 1971, as did John C Miller (EOD 7-3-1977), who served 8-15-1975 to 11-30-1975. [www.nlr.gov](http://www.nlr.gov). Thus, as Prof. Gross notes in *Broken Promise* at 381-382, fn. 64 (citing the Agency’s press release R-1679), John C. Miller holds the distinction as being the only NLRB judge who has served

(either in a regular or acting term), at separate times, as both a Board Member and as the General Counsel. As described in the Agency's December 27, 1982 press release (R-1679) announcing Miller's appointment as the Board's Chairman:

In the NLRB's 46-year history, Mr. Miller is the only individual to serve in both capacities as Chairman and Acting General Counsel, the latter position also a Presidential appointment post with authority and responsibility separate from the Board.

Although Judge Denham's name does not appear on any of the Division's available rosters, there is no question that he was a Trial Examiner during some of the early years. For example, see *Henry K. Phelps, Jr., Trustee in Bankruptcy of Atlas Pipeline Corp.*, 45 NLRB 1163, 1172 (1942), a case in which Judge Denham was the trial examiner. And see *Broken Promise* at 19 where Prof. Gross writes (footnote symbol omitted):

Truman, therefore, caused surprise, disappointment, anger, and much speculation when he nominated for general counsel a nationally unknown, sixty-two-year-old NLRB trial examiner, Robert Denham, considered within the agency controversial, an aggressive conservative, and a man of "enormous ego" who was definitely no diplomat.

In *Broken Promise* Prof. Gross devotes discussion, and notes, to Judge Denham's term as General Counsel, a term that ended prematurely under circumstances described by Prof. Gross at pages 62, 65-69, and 309-315. Prof. Gross reports, in *Broken Promise* at 20, that Denham became "a per diem trial examiner at the NLRB" in 1938, and that he served for 9 years as a trial examiner before beginning his service as the General Counsel. Of course, the "per diem" time frame reasonably would be interpreted as in the months leading up to the Board's decision, effective August 1 of that year, to assign only regular staff judges to preside at ULP trials. Moreover, the Board's bound volumes show that Judge Denham presided at ULP trials on both sides of August 1, 1938. As will be seen below, for this paper the deemed EOD date for Judge Denham is set as March 1, 1938, the month that he first began presiding.

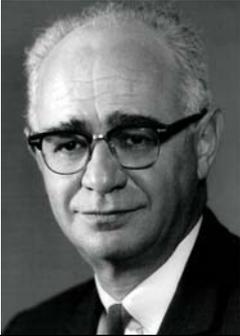
Judge Bott's EOD date of 2-1-1960 indicates a gap of over 5 years after his term as General Counsel ended in late December 1954 and before he joined the Division. Prof. Gross covers Judge Bott's term as General Counsel in *Broken Promise* at 72-73, 124, 126, 136-137. As Bott reports, he was in private practice during this 5-year gap. *Bott* at 67.

With an EOD date of April 20, 1959, Judge Ordman was with the Division before he left in June 1961 (see the LOS). As reflected by the page listing Agency officials in the Board's 25<sup>th</sup> Annual Report for the fiscal year

ending June 30, 1960, Judge Ordman left at his May 29, 1961 appointment to be Chief Counsel to the recently appointed Board Chairman Frank W. McCulloch. In May 1963 Ordman was appointed by President Kennedy to serve as General Counsel, leaving that position (after two terms) in June 1971. *Broken Promise* at 194-195, 221; [www.nlr.gov](http://www.nlr.gov) (then click on the tab for About Us;” under the topic for the NLRB’s structure, click on “General Counsel”, and finally “GC and terms since 1935). As the Board’s bound volumes of decisions reflect, Judge Ordman returned to the Division following his service as the General Counsel. His first case back appears to have been *Ring Metals Co.*, 198 NLRB 1020 (1972) (trial in 9/1971; TXD issued 10-29-1971), with his last reported case apparently being *McClure Associates*, 223 NLRB 580 (1976) (trial in 8/1975; JD issued 11-7-1975). Thus, Judge Ordman apparently retired in November 1975.

JUDGES WHO HAVE SERVED AS THE GENERAL COUNSEL		
Alvin J. Rockwell EOD 9-1-1937●  <i>The First Sixty Years</i>  Page 54		General Counsel 1-1-1944 – 9-16-1945
Robert N. Denham EOD 3-1-1938●  <i>The First Sixty Years</i>  Page 54		General Counsel 8-1-1947 – 9-15-1950
George J. Bott EOD 2-1-1960  <i>The First Sixty Years</i>  Page 54		General Counsel 9-29-1950 – 12-20-1954

INTRODUCTION

<p>Arnold Ordman EOD 4-20-1959❷</p> <p><i>The First Sixty Years</i></p> <p>Page 54</p>		<p>General Counsel 5-14-1963 – 6-25-1971</p>
<p>Eugene G. Goslee EOD 11-28-1971</p> <p><i>The First Sixty Years</i></p> <p>Page 55</p>		<p>Acting General Counsel 6-26-1971 – 8-23-1971</p>
<p>John C. Miller EOD 7-3-1977</p> <p><i>The First Sixty Years</i></p> <p>Page 55</p>		<p>Acting General Counsel 8-15-1975 – 11-30-1975</p>

As an interesting bit of coincidence, appearing on the list of Agency officials, following the title page for the Board's 28<sup>th</sup> Annual Report for the fiscal year ending June 30, 1963, are six persons who either had been, would be, or would be again, judges in the Division: Board Member Boyd Leedom (EOD date of 1-5-1965); Arthur Leff (Chief Counsel to Chairman McCulloch), with an EOD date of 5-13-1944 and Chief Judge during 1980; Harry H. Kuskin (Chief Counsel to Member Leedom), with an EOD of 4-15-1965; Ralph Winkler (Chief Counsel to Member Brown), with an EOD of 4-3-1950; Chief Trial Examiner George Bokar (EOD of 2-1-1938), and Arnold Ordman, General Counsel (EOD 4-20-1959).

Similarly, at 122 NLRB (covering decisions issued November 1, 1958, through February 28, 1959), at page iii (the page listing Agency officials), there are 17 officials named. Of the 18, seven either had been, would be, or would be again, Division Judges: Chairman Boyd Leedom (EOD 1-5-1965), Member Stephen S. Bean (EOD 2-1-1950❸), Chief Counsel (Leedom) Harry H. Kuskin

(EOD 4-15-1965); Chief Counsel (Rodgers) Thomas F. Maher (EOD 5-11-1959); Chief Counsel (Joseph Jenkins) John F. Funke (EOD 4-16-1959), Solicitor James V. Constantine (EOD 10-2-1961); and Chief Trial Examiner William R. Ringer (EOD 10-1-1937).