

# Review of Board Casehandling Timeliness

## Report No. OIG-AMR-26-00-02

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Inspector General

National Labor Relations Board

Washington, DC 20570

March 31, 2000

I hereby submit a *Review of Board Casehandling Timeliness*, Report No. OIG-AMR-26-00-02. We reviewed only unfair labor practice cases appealed to the National Labor Relations Board for a decision. We did not review representation case appeals or other case-related matters processed by the Board. Our objectives were to review controls over case handling, the accuracy of the database system, and the timeliness of Board decisions.

Neither statutory nor regulatory standards exist for the time considered acceptable for an unfair labor practice case to be at the Board. An Agency policy and an unofficial standard that established time targets were used to monitor casehandling timeliness. An Agency policy to promote timeliness of case processing was not followed.

In 1991 the Board established unofficial time standards that set six months as the length of time a case should be at each of three decision stages and two years as the outside limit for a case to be at the Board. Over a ten-year period, some cases always exceeded these time standards. The Board mostly achieved a performance goal established for Fiscal Year (FY) 1999 to issue the oldest cases, with the intent that the unofficial and policy time standards would be achieved in future years.

Board Member turnover was the factor most often identified as having a significant impact on the timeliness of case processing. Staff reductions were also frequently cited as a reason for an increase in pending cases and the median days to process cases.

In FY 1999, the Board formed a Streamlining Partnership Committee to review the case processing system. The Committee issued a report with multiple recommendations in February 1999. The Board agreed with a majority of the recommendations, and had implemented a few.

Board Members varied from stating that the casehandling system is not the problem, to that the system needs to be totally revamped but no one is willing to abandon the current system. The Board Members all agreed that sufficient information was available to manage the caseload. Although no system is going to be perfect for all situations, we found this one provided adequate information and flexibility.

Multiple options for expediting a case are currently available to Board Members. These include establishing case priorities, scheduling Board meetings, redirecting staff assignments/duties, requesting that a case be reassigned to another Board Member, foregoing a dissenting or separate opinion, or limiting the length of decisions. The Board Members individually and as a group must assess each situation and determine what is necessary to ensure timely action on cases.

The Office of Executive Secretary maintained an electronic database of cases at the Board. The system generated reports used to manage cases and collected and compiled historical data for external reporting. We evaluated the adequacy of the system's management controls and accuracy of the data. We found that key elements in the database were accurate, with few exceptions. However, system edits were not in place to prevent the system's acceptance of illogical data.

Recommendations addressing these findings can be found on page 12 of this report.

An exit conference was held on February 22, 2000, with the Board Members, Executive Secretary, and Chief Counsel to the Chairman. The participants agreed that the statistical data in the report was accurate, but had significant objections that the data does not present a complete picture of the Board's performance over the past two years. The objections included, inter alia:

- As part of the Agency's Strategic Plan, the Board established a performance goal for FY 1999 to issue all cases (87) that would have been pending more than three years at the end of the fiscal year. These oldest cases often involved difficult and complex issues that prior Boards did not resolve. The Board anticipated that concentrating on the oldest cases at the expense of more recent cases would result in an increased median age of issued cases. The Board issued 74 of the 87 cases, with a resultant increase in the median age of issued cases from 239 to 387 days.
- The report only addressed unfair labor practice cases. Representation cases, that are a significant portion of the Board's workload and were addressed in the 1991 General Accounting Office audit report on casehandling, were not included in the scope. Representation cases were also the focus of a performance goal for FY 1999 to issue the oldest cases. In addition, Board Members have many other case-related and administrative duties and responsibilities that must be accomplished concurrently with issuing cases.

Board Members reaffirmed Agency policy standards of four, five, and four weeks respectively for the three stages of case processing, and an unofficial standard with a overall maximum of two years to issue a decision. As reflected in the current revision of the Strategic Plan, the Agency is concentrating on issuing all cases within maximum time goals and decreasing the emphasis on median times as a measurement.

This report was not intended to detract from the current Board's efforts to reduce the pending caseload, particularly the oldest cases. The Board's accomplishment in issuing the oldest cases is commendable, but does not negate the fact that many cases still exceed Agency policy and unofficial standards in every stage and overall. The Board will most likely continue to experience turnover and vacancies, and Board Members need to adjust how they handle cases in order to meet timeliness standards. The Board's accomplishments in FY 1999 support our finding that the casehandling process has the flexibility to allow different solutions to be applied to the specific circumstances of each case. Further, the difficulties encountered indicated a systemic solution can not be dictated by policy.

The Executive Secretary submitted written comments on the draft report. He agreed with all of our recommendations and we accepted his response. The Executive Secretary's comments are presented in their entirety as an appendix to this report.

Jane E. Altenhofen

Inspector General

## Background

The National Labor Relations Board (NLRB or Agency) administers the principal labor-relations law of the United States, the National Labor Relations Act of 1935 (Act), as amended. The Act is generally applied to all enterprises engaged in interstate commerce, including the United States Postal Service, but excluding other governmental entities as well as the railroads and the airline industries. The General Counsel is responsible for the issuance and prosecution of formal complaints in cases leading to Board decisions. The five-member Board primarily acts as a quasi-judicial body in deciding cases on formal records.

After an unfair labor practice (ULP) charge is filed, a case is opened and investigated by an agent in a Regional Office. If the investigation determines that a violation of the Act did not occur the case is dismissed by the Regional Director. If the case is deemed meritorious, the Regional Director issues a complaint. Throughout the life of a case the goal is to have the parties settle the case without a hearing. If the parties cannot reach agreement, the Regional Office prosecutes the case before an administrative law judge (ALJ) who issues a decision. Within 28 days, or longer if an extension is granted, parties may appeal ALJ decisions by filing an exception with the Board.

The Act provides for five three-member panels, with each Board Member acting as a head of one panel. Cases appealed to the Board are assigned to a panel by the Executive Secretary. Assignments are made roughly in the order in which cases are received but take into account efforts to even out workload assignments, whether the parties or the case have been subject to previous Board procedures, and staff development needs. Cases that present novel questions of law or issues on which the Board is divided are often referred to the full Board. Each Board Member has a professional staff to assist in processing cases. Board decisions may be appealed, other than by the General Counsel, to the U.S. Courts of Appeals and the Supreme Court.

The Executive Secretary is the chief administrative and judicial management officer of the Board. In addition to assigning cases to the Board for review, the Office of the Executive Secretary (OES) maintains control records on all cases before the Board and records all correspondence between parties to the case and the Board.

Over 30,000 ULP charges were filed with the Agency in Fiscal Year (FY) 1998 (the latest period available). Historically, only a very small percentage of the resulting cases required Board decisions. In FY 1998, the Board issued 426 decisions that primarily consisted of contested ALJ decisions (219), and motions for summary judgement (158).

## OBJECTIVES, SCOPE, AND METHODOLOGY

Our objectives were to review controls over case handling, the accuracy of the database system, and the timeliness of Board decisions. We followed up on Board actions taken in response to a General Accounting Office (GAO) report titled *National Labor Relations Board, Actions Needed to Improve Case-Processing Time at Headquarters* (GAO/HRD-91-29), issued in January 1991. We also assessed recent Board efforts to address timeliness of casehandling.

We reviewed applicable laws, regulations, and Agency policies and procedures. Guidance applicable to the timeliness of case processing was set forth in internal memorandum and the Guide for Staff Counsel of the NLRB (Staff Counsel Guide). We interviewed Board Members and Agency officials, primarily in OES and the Office of the Solicitor, to identify and gain an understanding of ULP casehandling.

This report addressed cases involving Board decisions of contested ALJ decisions that were primarily prepared by the Board Members' staff. Motions for summary judgement were usually processed by the Solicitor's Office and therefore not included. Representation cases, which comprise a significant portion of the Board's workload (263 cases issued in FY 1999), were not included in our analysis. Unless otherwise specified, references to cases in this report pertain only to contested ALJ decisions.

We reviewed the timeliness of cases at the Board after September 30, 1989, the date through which the GAO review covered all cases, through September 30, 1999. A sample of the OES information system was selected from ULP cases

that were decided by the Board in FY 1997 or FY 1998, or were pending as of May 31, 1998.

We evaluated the accuracy of key elements in the OES database using a combination of computer assisted auditing techniques (CAAT) and detailed testing. We used a statistically valid random sample to select cases for review and traced information to documentary evidence. Key elements consisted of date assigned to staff counsel, date of initial action, date draft decision circulated, and date of issuance. CAAT procedures were applied to provide information regarding the accuracy of the data and to identify potential internal control vulnerabilities.

We conducted this review between September 1998 and January 2000 at Board Headquarters. The review was performed in accordance with generally accepted Government auditing standards.

## **FINDINGS AND RECOMMENDATIONS**

### **TIMELINESS**

#### **Standards**

Neither statutory nor regulatory standards exist for the time considered acceptable for a case to be at the Board. An Agency policy and an unofficial standard that established time targets for cases were reportedly used to monitor casehandling timeliness but this did not prevent cases from becoming overdue. An Agency policy to promote timeliness of case processing was not followed.

Case processing at the Board is broken down into three stages described on pages 5 and 6 of this report. Time targets for each stage were established for normal and routine cases in Agency policy, an unofficial standard established maximum times for a case by stage and overall, and performance goals were adopted as follows.

- **Time Standards Policy** - The Staff Counsel Guide, revised in September 1994, identified three stages of case processing and set time targets for each stage. Generally, the time target for each stage of case processing was four weeks, although the Board agreed to increase the second stage to five weeks in April 1999. This was an increase from the prior targets that were, generally, three weeks at each stage. OES prepared reports to identify cases in stages I and II that exceed these time standards to monitor overdue cases.
- **Unofficial Time Standards** - The Board's response to the January 1991 GAO report set forth time standards for processing cases called the 6-6-6 System. This standard set the total length of time a case should be at each decision stage at six months and the outside limit for a case to be at the Board at two years. As described on pages 11 and 12 of this report, the 6-6-6 System was not fully implemented.
- **Performance Goals** - The Agency's Strategic Plan adopted in FY 1997 established multiple performance measures for cases. The goals were to issue all unfair labor practice cases pending at the Board for more than three years in FY 1999, cases pending more than 30 months in FY 2000, and cases pending more than 24 months in FY 2001 and thereafter.

The Agency adopted a policy to promote timeliness of case processing. OES Memorandum 76-1 (OES 76-1), issued January 13, 1976, was intended to expedite the issuance of cases that were awaiting a dissent or a separate opinion. The policy provides that when established timeframes are exceeded, the Board Member responsible for the delay is replaced in panel cases, or the case is issued without the dissent or separate opinion in full Board cases.

This policy was included in the Staff Counsel Guide, but was never fully implemented. The Report of the Streamlining Committee, issued in February 1999, recommended that the Board consider implementing OES 76-1 with respect to full Board cases.

Most Board Members stated this policy was flawed because it provides unlimited time to write a majority decision and have it approved, yet limited the time to issue dissenting or separate opinions.

## Performance

Over a ten-year period, some cases always exceeded the established time standards. The Board mostly achieved the performance goal for FY 1999 to issue the oldest cases, with the intent that the standards could be achieved in future years.

The graphs shown on the following pages illustrate pending cases at year-end stayed below 300 until FY 1997, and then increased over a two-year period to 473 pending cases as of September 30, 1999. Very few cases were pending over two years in the early 1990s, compared to 87 such cases as of September 30, 1999. In addition, the median number of days for case processing by the Board reached a 387-day median (median is the middle value, above and below which lie an equal number of values).

The graphs show a similar pattern by stage. On an annual basis, the Board occasionally came close to meeting the six-month maximum guideline (rather than the four-week standard), but generally 10 to 20 percent of the cases exceeded the time standards for stages II and III. The median days for stage I gradually increased over time, while stages II and III fluctuated in response to fewer decisions and/or older cases.

Cases Pending are contested ALJ decisions appealed to the Board for which a decision has not been issued.



Total Case Processing is from the time a case is first assigned until clearance of a Board decision.



**Stage I** is from the time a case is assigned or reassigned until the date on which the initial action is taken. An initial action is usually when Board Members' staff meet to discuss the case and cast tentative votes, referred to as a subpanel meeting. A written decision adopting the ALJ decision may be prepared in lieu of a subpanel.





**Stage II** is from the end of Stage I to circulation of the draft decision to Board Members for approval. A staff attorney is responsible for writing the draft decision that must be cleared by the supervisor, chief counsel, and the Board Member.



**Stage III** is from the end of Stage II to clearance of the Board's decision. Afterwards, a final copy reflecting agreed upon Board Member changes is prepared for processing and issuance.



During the period reviewed, fewer cases were appealed to the Board. The Board received more than 20 percent fewer cases in FYs 1998 and 1999 than in FY 1992, the peak year in our review, although the average size of the record transcripts in these cases increased by about 25 percent.



Thirty-three cases issued by the Board in FY 1999 were more than two years old by the middle of November 1997, when four of the five current Board Members began serving together. One of the Agency's FY 1999 performance goals under the Government Performance and Results Act was to issue all unfair labor practice cases pending at the Board for more than three years. The Executive Secretary said concentrating the Board's efforts on cases that have been at the Board longer than three years, at the expense of more recent cases, increased the median number of days to issue a case.

## **BOARD MEMBERS AND STAFF**



## Member Turnover

Board Member turnover was the factor most often identified as having a significant impact on the timeliness of case processing. Generally, case-processing time increased during periods when there were vacancies or several new Board Members were appointed, and decreased when the Board was stable, as illustrated in Exhibits 1 and 2.

The Board consists of five Members, appointed by the President, with the advice and consent of the Senate. Board Members serve staggered terms of five years each. Members appointed to fill vacancies are appointed only for the unexpired term of the Member whom he or she shall succeed. By design, one Board Member would be reappointed or replaced each year. This system was designed to provide continuity and stability to an entity that needs to work collegially to accomplish its mission.

Officials noted that the Board's casehandling process is better suited to stable membership, in which Board Members and staff know each other, their colleagues, the process, and colleagues' positions on the issues. Until the early 1980s, it was not uncommon for Board Members to serve more than one consecutive term. This type of tenure no longer exists, which can be seen in the swearing in of four new Board Members, one previously serving under a recess appointment, in November 1997.

New Board Members need time, estimated at six months to a year, to become familiar with the Board's decision-making process, develop a rapport with staff, gain enough experience to participate in the most difficult cases awaiting decision, and learn the details of the caseload they inherit. As a result of turnover, sometimes cases are returned to an earlier stage in the process.

Recess appointments affect timeliness because the appointments are made by the President when Congress is not in session and expire at the end of the next session, effectively limiting the appointment to less than two years at the most. During one period when the majority of Board Members were recess appointments, the Board did not decide precedent reversing cases as a matter of policy even though authorized to do so.

Vacancies reduce the number of Board Members able to handle cases and add to instability because new Board Members are appointed to complete a pre-established term, not a full five-year term. For example, a Board Member was sworn in on November 14, 1997, to complete the 5-year term ending December 16, 1999, serving only two years unless re-appointed.

The Board was relatively stable before 1980; Board Members commonly completed their terms and were reappointed several times. The early 1980s experienced a significant increase in vacancies and turnover in Board Members, followed by a relatively stable period during the late 1980s and early 1990s.

The middle to late 1990s was a period of high turnover, extended vacancies and multiple recess appointments. During FYs 1992, 1993, and 1997 no new Board Members were appointed. Three new Board Members were appointed in FY 1994. Four Board Members, three with no prior experience as Board Members, were appointed in November 1997. The Agency operated with three or fewer Board Members for close to nine months on two different occasions in the 1990s. Between February 28, 1997 and November 14, 1997, the Board operated with three members, two of whom were serving under recess appointments.

Vacancies sometimes present special problems. For two months (November 27, 1993, - January 23, 1994), the Board had only two members. This did not constitute a quorum, and no decisions could be issued. The Board also operated without a Chairman for three months (August 27 - December 4, 1998).

In November 1997, four new Board Members were sworn in, including one Board Member who had been serving under a recess appointment since January 1996. The Board was completed in December 1998, when the current Chairman was appointed; he had served previously as a Board Member multiple times and as Executive Secretary for 20 years. Except for a period of approximately three months, the Board has consisted of five Members since November 1997.

GAO recognized the impact that Board Member turnover and vacancies could have on timeliness, and suggested that

Congress amend the Act to provide for more continuity of Members. Provisions similar to those in some other agencies could allow Board Members whose terms are ending to either stay until a replacement has been confirmed, or continue for a limited period. Congress did not amend the Act and delays in the appointment process continue.

## **Staff Reductions**

Staff reductions were another reason cited for an increase in pending cases and the median days to process cases. Positions declined steadily from FY 1990 to FY 1997.

Board staff counsel are responsible for reviewing the case record, researching the law, representing Board Members at meetings, and drafting decisions. Staff reductions would affect timeliness if the decrease outpaced the decreased workload from fewer incoming cases.

Board staffs decreased in size from 121 full time equivalents (FTE) at the beginning of FY 1990 to 91 FTE in FY 1997. FTE remained at 91 FTE for both FYs 1998 and 1999. The FTE ceiling for FY 2000 is 104.5.

## **PARTNERSHIP COMMITTEE**

Early in FY 1999 the Board-side Streamlining Partnership Committee was formed to review the Board's case processing system and reach consensus on ways to change the system to issue cases more expeditiously. The committee included five representatives from the NLRB Professional Association, one supervisory attorney, one deputy chief counsel, and the Executive Secretary. The Committee met weekly over a three-month period and issued a report in February 1999.

On April 13, 1999, the Board met with the Committee to discuss the report, which contained 41 recommendations. The Board agreed with 33 recommendations and partially agreed with two recommendations. The Board disagreed with six recommendations, five of which involved standardized utilization of staff based on job title. The Board Members wanted to have the managerial flexibility to evaluate staff strengths and weaknesses in assigning duties and responsibilities. The Board has not implemented the majority of agreed upon recommendations.

The Committee report discussed possible changes throughout the Board's casehandling system. Recommendations were made to improve morale, experiment with alternative methods of assigning and managing cases, focus Board Member and staff efforts on the same cases, and empower employees with sufficient authority to reach consensus with other Board Members and their staffs.

Board Members varied from stating that the system is not the problem, to that the system needs to be totally revamped but no one is willing to abandon the current system. No system is going to be perfect for all situations. We found this one provides adequate information and flexibility. The Board Members all agreed that sufficient information was available to manage the caseload. The options available indicated that the system provided ample flexibility.

For example, three Committee recommendations that have been acted upon include the following.

- Once a case has gone to subpanel, priority should be given to the circulation of a draft within a realistic time target.
- Once a Board Member has approved a draft, priority should be given to getting the case out.
- If 45 days have elapsed without any action having been taken in Stage III, the Executive Secretary should schedule the case for a "45-day Agenda" meeting attended by Board Members, their chief counsels, and the originating counsel, supervisor, and deputy chief counsel.

Multiple other options are available. These include redirecting staff assignments/duties, requesting that a case be reassigned to another Board Member, foregoing a dissenting or separate opinion, or limiting the length of decisions. No one of these options is going to fit every situation. The Board Members individually and as a group must assess each situation and determine what is necessary to ensure timely action on cases.

## **DATABASE ACCURACY**

Key elements in the OES database were accurate, with few exceptions. The infrequent occurrence of illogical dates indicated a lack of internal control techniques, such as system edits.

Federal standards for internal control require accurate and timely recording of transactions and events. Key elements in the OES database were accurate, with few exceptions, based on detailed testing. From a universe of approximately 1,400 cases, we selected a statistically valid random sample of 78 items. We verified the four key dates for each case: assigned, initial action, circulated, and issued. We found ten errors in total. Each element had two or three errors, representing an acceptable error rate of 2.56 to 3.85 percent.

We also identified internal control weaknesses that allowed illogical dates to be entered into the database. Based on a universe of 5,150 cases at the Board between October 1, 1989 and May 31, 1998, we found the errors listed below.

- Three cases had a date issued before the date assigned.
- One case did not include the date the case was assigned.
- Eleven cases did not have a date of initial action.
- Seventeen cases had a date of initial action before the date the case was assigned.
- Thirty-one cases showed the date circulated before the date of initial action.
- One case contained invalid data in the date circulated field.
- Three cases showed the date the case issued before the date the case circulated.

The frequency of occurrence of these illogical dates does not indicate that the database was inaccurate, but identified a lack of internal control techniques, such as system edits, that should be addressed.

## **AUDIT REPORT FOLLOW-UP**

GAO report *National Labor Relations Board Action Needed to Improve Case Processing Time at Headquarters* (GAO/HRD-91-29) was issued in January 1991. The report contained two recommendations for corrective action. One, establish standards for the total length of time a case should be at the Board and a time for each decision stage, that when exceeded requires corrective action. Two, specify the corrective actions that Board Members and staff should take when those time targets are exceeded. Informal standards were adopted and corrective action specified, but the process was not fully implemented.

The Board letter responding to the GAO report established a 6-6-6 System. This standard set the total length of time a case should be at each decision stage at six months and the outside limit for a case to be at the Board at two years. When time standards are exceeded the procedure calls for directly involving all Board Members in matters that may be emerging as problem cases requiring special attention.

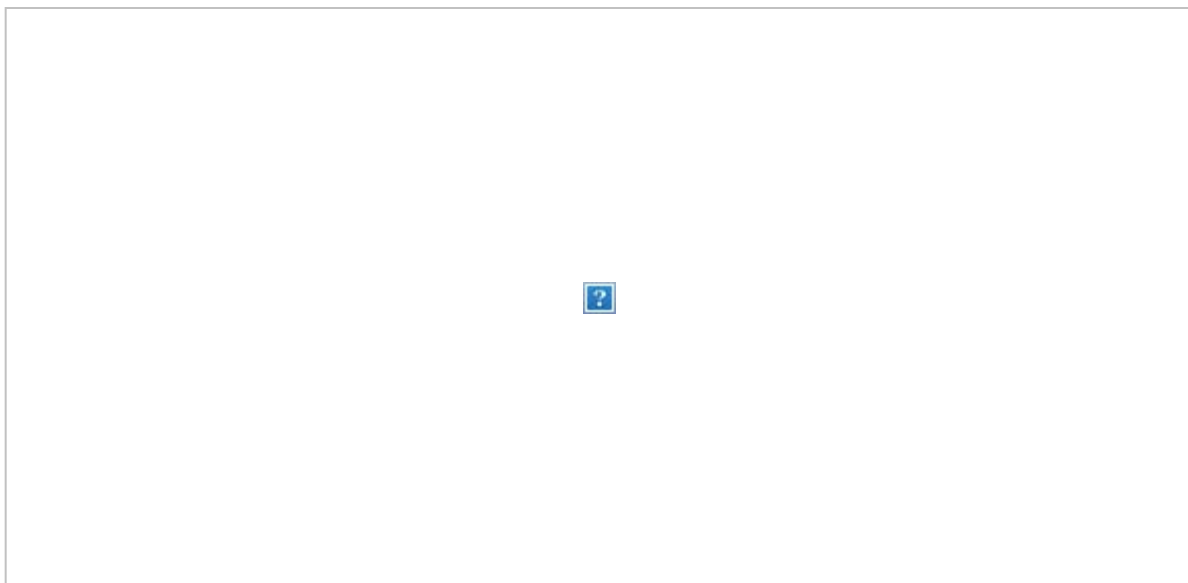
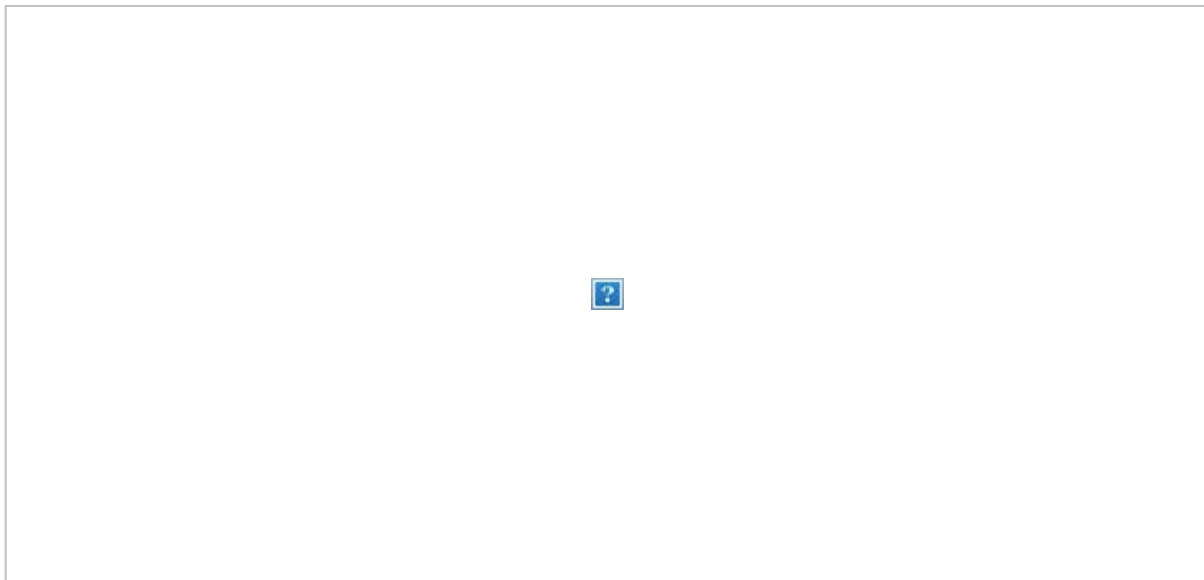
OES sporadically prepared a 6-6-6 Report to track cases, but did not refer all applicable cases to a full Board agenda. Some cases over two years old were referred to "Old Dog Agendas" where Board Members, Chief Counsels, and the Executive Secretary would discuss what was needed to issue these cases. OES last produced 6-6-6 Reports in February 1996, because the information was not used to establish case priorities. Also, much of the information on cases exceeding the time targets was available in other reports.

The effect of the 6-6-6 System on the timeliness of case processing by the Board is uncertain, but performance declined after the reports were no longer prepared.

## **RECOMMENDATIONS**

We recommend that the Executive Secretary:

1. Revise Board policy to include current time standards for case processing;
2. Cancel unused policies designed to promote timeliness, and implement recommendations made by the Committee; and
3. Develop appropriate edits for the electronic database.



## **APPENDIX**

United States Government  
National Labor Relations Board  
1099 14<sup>th</sup> Street NW  
Washington DC 20570  
March 28, 2000

TO: Jane E. Altenhofen

Inspector General

FROM: John J. Toner,  
Executive Secretary

SUBJECT: Draft Report "Review of Board Casehandling Timeliness"

This is in response to your Draft Report "Review of Board Casehandling Timeliness." The Board has no comments, and adopts the three recommendations which the Executive Secretary has been directed to implement as soon as practically possible.

J. J. T.

cc: The Board