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NLRB

THE WHITE HOUSE

WASHINGTON

May 18, 1983

MEMORANDUM FOR FRED F. FIELDING

FROM: JOHN G. ROBERTS

SUBJECT: Action by NLRB to Restrict Authority  
of NLRB General Counsel

Sherrie Cooksey has conveyed your request that I examine the legal authority for the NLRB's recent decision to transfer enforcement and appellate authority from the General Counsel to the Solicitor. The report of that action is attached at Tab A, with press stories at Tab B. Briefly, the NLRB required all pleadings and briefs in proceedings involving enforcement, review, Supreme Court, contempt, and miscellaneous litigation to be reviewed and approved by the Solicitor. Hitherto such pleadings and briefs had been the sole responsibility of the General Counsel appointed by the President with the advice and consent of the Senate. The NLRB also indicated that it "retains for itself the authority to transfer, promote, discipline, discharge, and take any other necessary and appropriate personnel action" with regard to the attorneys performing the above-mentioned functions. The press reports portrayed the move as one to restrict the authority of the incumbent Democratic General Counsel William Lubbers and elevate the Republican Solicitor Hugh Reilly. Lubbers is the darling of organized labor; Reilly hails from the Right to Work Legal Defense Fund.

The pertinent provision of the statute states that "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under section 160 of this title, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law." The office of General Counsel was added by the Taft-Hartly Act of 1947 to separate the investigatory and prosecutorial functions of the NLRB from the adjudicative functions. As the Conference Report on the Act noted, "The General Counsel . . . is to have the final authority to act in the name of, but independently of any

direction, control, or review by, the Board in respect of the investigation of charges and the issuance of complaints of unfair labor practices . . ." H. Rep. No. 510, 80th Cong., 1st Sess. (1947). The actions of the General Counsel in issuing complaints are not reviewable by the Board, see Vaca v. Sipes, 386 U.S. 171, 182 (1967).

The Board has apparently drawn a distinction between legal action with respect to its orders -- primarily enforcement actions or defenses in the Courts of Appeals -- and the investigation and filing of an unfair labor practice complaint leading up to a Board order. The statute by its terms reserves only the latter category of actions to the General Counsel, and the concern to separate investigatory and prosecutorial functions from adjudicatory functions only applies to the latter category. Once the Board issues an order, it is not in a conflict position with respect to enforcing it.

The real difficulty with the Board position is with the statutory provision granting the General Counsel "general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members)." The Board's order essentially transfers supervision of the appellate and enforcement attorneys to the Solicitor, and specifically retains for the Board itself "the authority to transfer, promote, discipline, discharge, and take any other necessary and appropriate personnel action" with respect to those attorneys. This seems flatly inconsistent with the statutory grant of general supervision over all attorneys to the General Counsel. The exception in the statute for "legal assistants to Board members" would not seem pertinent, since the role of those assistants has been generally understood to be limited to assisting Board members in drafting Board opinions. The Board styled its action as a revocation of a 1955 "delegation" memorandum, but it is not clear that the 1955 memorandum actually delegated the authority in question as opposed to simply describing the authority conferred on the General Counsel by law.

I discussed the issues with John Irving, who is convinced that the Board lacks the authority to do what it did. He fears a request from the General Counsel for an Attorney General opinion (which he is confident will be against the Board), personnel action by the affected attorneys, and Congressional hearings. Organized labor strongly supports Lubbers and detests Reilly, so it is unlikely that this affair will quietly go away. I am not wholly convinced that the Board is acting illegally, since the General Counsel

still has independent authority with respect to investigations and filing complaints -- the basis for the creation of his office. The conflict with the statute on the supervision point is rather stark, however, and at least at this stage looks like a loser for the Board. The Board would have to argue that the words "general supervision" in the statute should be given only a very loose interpretation. The NLRB is an independent agency, but I recommend you call Dotson to express your doubts and make sure he has a solid legal base for his actions.

cc: Sherrie M. Cooksey

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## NLRB MOVES TO CLIP WINGS OF GENERAL COUNSEL, CONSOLIDATES ENFORCEMENT POWER UNDER SOLICITOR

Trimming the powers of NLRB's general counsel, Chairman Donald Dotson moves to consolidate authority for the Board's enforcement litigation under his newly appointed Solicitor — Hugh Reilly. Under a new procedure approved by a May 4 vote of the Board's Republican majority, all appeals court briefs and pleadings must be reviewed by the solicitor's office one week before they are to be filed in court.

Reilly, a former attorney for the National Right to Work Legal Defense Foundation, will be assisted in this task by Eugene Slade, who is currently an attorney on NLRB Member Robert Hunter's staff. Slade will have the title of Deputy Solicitor.

Of concern to attorneys in the appellate branch of the General Counsel's office is Chairman Dotson's assertion of the power to hire and fire them. They fear that such power will result in an "ideological litmus test" for employees that will result in a purge of those who disagree. One attorney, who asked not to be identified, remarked that there will now be two layers of internal review for briefs — "one for law and style, and one for orthodoxy."

The Board action also strips the General Counsel's name from the briefs and pleadings and instead requires that the names of the Board's Solicitor and assistants be listed. The current General Counsel — William A. Lubbers — is a Democrat appointed to the post in December 1979 by President Carter. He began his career in 1950 as an organizer in the state of Michigan for the American Federation of State, County and Municipal Employees. Lubbers came to the Board in 1952 as a staff counsel for Member Abe Murdock. He joined the staff of Member John H. Fanning in 1957, where he served until July 1977, when he was appointed to the Solicitor's post. He then served for a brief period as the agency's executive secretary.

NLRB officials declined to comment on the scope of the changes other than to explain that the five-member Board will exercise more control over the positions taken on its behalf in court. Some suggest that cases pending in the appeals courts will be pulled back for further study by the agency.

### Vote of Three to One on May 4

The change in procedure was approved by a May 4 vote of Dotson and fellow Republican members — Howard Jenkins and Robert Hunter. Member Don A. Zimmerman, an independent appointed by President Carter, cast a negative vote. The Board's newest member — Patricia Diaz Dennis — did not participate in the vote. Dennis, a Democrat, took the oath of office on May 5.

The cutback of the powers of the General Counsel alters an arrangement that dates back at least to 1955. An April 1, 1955, memorandum, titled "Delegation of Powers to General Counsel" described the authority and assigned responsibilities of that office. The memo authorized the General Counsel to "seek and effect compliance with the Board's orders . . ." and said that the General Counsel "is authorized and has responsibility, on behalf of the Board, to select, appoint, retain, transfer, promote, demote, discipline, discharge and take any other necessary and appropriate personnel action with regard to" personnel of the field offices and in the Washington office other than the administrative law judges, the legal assistants of the five Board members, the Solicitor, the Executive Secretary, and the information office.

Board sources explain that a three-member committee will be appointed to hammer out the details of the reorganization. But the minutes of the Board's May 4 meeting provide that all

briefs and pleadings shall be submitted to the Solicitor, and that "effective immediately" the Board, through Dotson, shall exercise its power to "transfer, promote, discipline, discharge, and take any other necessary and appropriate personnel action" affecting employees of the Appellate Court Branch, Division of Enforcement.

#### Supreme Court Docket Also Affected

The shift in control to Chairman Dotson and Solicitor Reilly covers not only the branch that handles the filing of briefs with the various circuit courts, but also the branches that handle Supreme Court litigation, contempt litigation, as well as miscellaneous, special litigation.

The minutes add, however, that the General Counsel will continue to exercise "general supervisory responsibility" over employees of these branches. Unaffected by the reorganization is the General Counsel's authority with respect to the issuance of unfair labor practice complaints — a power codified in Section 3(d) of the National Labor Relations Act — and his control of the field offices.

General Counsel Lubbers declined to comment, but others questioned the legality of the maneuvers. They point out that Section 3(d) of the Act provides that the "General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members). . . ." The legal question, which may ultimately be resolved by a court, is whether the phrase "general supervision over all attorneys" was intended by Congress to include the power to hire, promote, discharge and discipline.

The legal posture is further confused by Section 4 of the Act which provides in part that:

"The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors and such other employees as it may from time to time find necessary for the proper performance of its duties."

Meanwhile, the union representing the agency's professional staff claims that the Board must bargain with it before implementing any such reorganization. It intends to file a request that the Board bargain about the implementation and effects of the changes.

#### Language of May 4 Minutes

The minutes of the Board's action, signed by its Executive Secretary John Truesdale, follows: (TEXT)

The Board has considered how best to carry out its statutory powers to petition courts for enforcement of its orders; resist petitions for review; support its legal positions before the United States Supreme Court; seek compliance with its orders and, where necessary, institute contempt proceedings; and participate in miscellaneous court litigation. In this connection, the Board has reviewed the General Counsel's delegated assignments with respect to these statutory powers as such assignments are set forth in the Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board effective April 4, 1955.

In order to exercise its statutory powers more responsibly and effectively, the Board has decided the following:

1. Effective immediately, all pleadings and briefs in proceedings involving enforcement, review, Supreme Court litigation, contempt and miscellaneous litigation shall be submitted to the Board's Solicitor for his review at least one week before they are due to be filed.

2. The aforementioned pleadings and briefs shall thereafter be filed by the General Counsel on the Board's behalf only after the Solicitor's express approval, and as approved by him. This authority may be delegated by the Board to Deputy, Associate, and Assistant Solicitors.



3. Briefs and pleadings filed by the General Counsel on the Board's behalf shall list as counsel only:

(a) the Board's Solicitor or Deputy Solicitor, Associate Solicitor, or Assistant Solicitor if delegated as provided in paragraph 2;

(b) the attorney immediately responsible for supervising the drafting of the pleading or brief; and

(c) the attorney or attorneys who actually drafted the pleadings or brief, or who will argue the case.

4. Effective immediately, the Board will exercise its statutory authority, set forth in Section 4(a) of the Act, to appoint all attorneys and related employees needed to carry out the functions set forth in the preamble of this minute and in paragraph 1. The Board retains for itself the authority to transfer, promote, discipline, discharge, and take any other necessary and appropriate personnel action with regard to all employees referred to herein. The Board, in turn, delegates this authority to the Chairman, subject to redelegation by him.

5. The Board desires that the General Counsel exercise general supervisory responsibility over the attorneys and related employees performing the functions listed in the preamble and in paragraph 1. Evaluations and other personnel recommendations shall emanate from the immediate supervisors of the personnel involved, but shall be subject to final approval of the Solicitor and the Board.

6. The Board directs that the Solicitor's office and staff relocate to the area where the attorneys involved in enforcement litigation are located.

The Executive Secretary is directed to communicate the Board's instructions to the General Counsel forthwith. [End of Text]

-- End of Section AA --

In awarding liquidated damages, the court rejects an argument by the company that such an award is discretionary in cases of willful violation of ADEA. "To allow a good faith defense even after a jury has determined that a violation was willful would produce unintended and anomalous results," the court concludes, ordering the \$98,000 jury award to be doubled.

The court also finds the attorneys are entitled to \$100,664 in fees and \$11,901 in costs, but rejects a request for additional fees based on the risk involved in the litigation. While the plaintiffs had argued that the riskiness of the litigation was high due to the subtle nature of the discrimination, the potential inadmissibility of key evidence, and the vast resources of the company, Sun responded that the risk was low since the case did not involve novel issues of law and because "large corporate defendants tend not to evoke the sympathies of jurors."

"Since the court is awarding fees for virtually all of the hours spent in trial preparation, increasing that already substantial award to compensate for risk would result in overcompensation of the plaintiffs' attorneys," the court finds. Although the plaintiffs' attorneys "were exceptionally well-prepared at trial, this high caliber of representation is expected of attorneys with the experience and reputation of plaintiffs' counsel," the court adds. "Since the quality of counsel's work is already reflected in their hourly rates [\$125 for a senior attorney and \$80 for an associate], an increase for quality is unwarranted."

(*Babb v. Sun Company, Inc.*; USDC Minn, No. 4-81-87, May 5, 1983.)

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#### DOTSON MOVES TO ALLAY CONCERNS OF STAFFERS; DETAILS OF REORGANIZATION ARE UNDER REVIEW

NLRB Chairman Donald Dotson attempts to puncture fears of staff attorneys that the Board's vote to bring the agency's enforcement branch under the direct control of the Board's Solicitor is a prelude to a purge. In a May 10 memorandum to the staff attorneys' union, Dotson declares that political considerations played no part in the reorganization. He also reassures the union that it will be notified of the proposed changes when the details of its implementation have been resolved.

"Please be assured," the Dotson memo says, "that no reorganization that affects employees in any NLRB bargaining unit will be implemented except in conformity with legal and contractual requirements. Please be assured further that the Board does not intend that its 4 May decision will result in any substantial adverse impact on bargaining unit employees nor major changes in the substance of the work. Despite the clamor of the popular press, partisan political motives do not form the basis for the decision and will not be pursued through personnel administration practices."

The memo came in response to a request by the NLRB Professional Association that the Board bargain with the union concerning its May 4 vote that all pleadings and briefs must be submitted to the Office of the Solicitor seven days in advance of filing dates. The Board's May 4 vote also delegated to Chairman Dotson the authority to hire, fire, discipline, transfer or promote employees of the appellate court branch of the General Counsel's office (1983 DLR 89: AA-1).

Dotson adds that the changes are designed to improve communications between the Board and the enforcement litigation unit. The memo compares the relationship to that of a client and a lawyer:

"[T]he Board's decision of 4 May clearly reflects a change of policy that was arrived at neither precipitously nor casually. Rather, it reflects the Board's careful consideration of how the Board may best carry out the authority vested in it by the [National Labor Relations Act] to petition courts for enforcement of its orders, etc. The change in policy enunciated in the 4 May decision is that the Board shall, through its Solicitor or other offices which may be established, rather than through its 1955 delegation to its General Counsel, exer-



CURRENT DEVELOPMENTS

cise final decision authority over positions taken on its behalf in the courts. It is the Board's conviction that this change will serve the Agency well in carrying out the provisions of the NLRA by opening more regular and meaningful communications between the Board — as a client — and the enforcement litigation units — as the Board's legal representative on such matters. Such improved communications will enhance both the effectiveness of the Board's enforcement litigation efforts and the clarity and enforceability of the Board's decisions. The mutual benefits thus derived will substantially benefit our efforts to administer the NLRA effectively and efficiently."

Meanwhile, more than one week after the Board's vote, none of the changes envisioned by the May 4 minutes have been implemented — including the symbolically significant action of striking the General Counsel's name from NLRB briefs. "The decision in principle has been made, but the implementation and the details all remain to be worked out," according to the Board's executive secretary, John Truesdale.

The delay in implementation may brighten the chances for a peaceful accommodation between Chairman Dotson and General Counsel William A. Lubbers. The Board's action has sent agency historians scurrying to unearth the origins of the Solicitor's post and its relation to the General Counsel. One potentially significant artifact is an August 1947 document outlining the status of the agency's Solicitor as subordinate to, and under the general supervision of, the General Counsel. The minutes, signed by then-NLRB Chairman Paul Herzog and the other Board members, provide that the position of the newly appointed Solicitor "will pursuant to Section 3(d) of the National Labor Relations Act, as amended, become subject to the general supervision of the General Counsel. The General Counsel hereby details him to the exclusive service of the Board. It is understood that he shall not perform any investigative or prosecuting functions, nor exercise any authority within the area of operations which is under the supervision and direction of the General Counsel, whether by virtue of the statutory provisions or the delegation of authority to the General Counsel promulgated by the Board."

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#### PRODUCTIVITY INCENTIVE BILL TIES WAGES TO COMPANY PROFITS

A bill aimed at giving workers an incentive to be more cost and productivity conscious by tying their pay to the earnings of the company or increases in its productivity, by providing special tax treatment to certain employee bonuses, is introduced by Rep. John Seiberling (D-Ohio).

Under the prevailing wage system in this country, employees "often feel that they have little stake in the company's performance," Seiberling said, and, as a result, often perceive their pay increases as being independent of the company's profitability. Such a wage system emphasizes the divergence between employers and employees and "contributes greatly to the deep antagonism that is characteristic of labor-management relations in the United States," he said.

To remedy some of the problem, Seiberling this week introduced H.R. 3014 to encourage employers to adopt a base wage and bonus system tied to company profits or cost savings. Under the new wage system, the bonus could comprise up to a third of the employee's annual compensation. To offset any additional costs associated with establishing and running the system, employers would receive a tax credit equal to 10 percent of the bonus in the first year of operation, 5 percent in the second year, and 3 percent in the third.

The bill would give workers an incentive to be more productive, the congressman said, since their pay would depend on company earnings and productivity, and, to the extent that profit sharing is adopted, the system would give companies a means of adjusting labor costs to meet adverse changes in the business cycle without cutting the workers' weekly pay or resorting to layoffs.

The legislation has been referred to the Ways and Means Committee.

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## NLRB Weakens Top Official in Litigation Unit

By Pete Earley  
Washington Post Staff Writer

The Republican-dominated National Labor Relations Board has significantly weakened power of the agency's general counsel by requiring that he submit all legal briefs to board attorneys.

The action will place higher responsibility on the NLRB staff attorney, solicitor Hugh L. Reilly, who formerly worked as an attorney for the National Right-to-Work Committee. The switch was viewed by some as an attempt to give the NLRB a more conservative cast.

At a meeting last Wednesday, the board voted 4 to 1 to weaken the control of general counsel William A. Lubbers, a Carter administration appointee, over the litigation unit, which handles all appeals of NLRB decisions and enforces board decisions in the courts if necessary. The decision was conveyed to agency employees Thursday, but not given to the public until Friday.

Don A. Zimmerman, a political independent appointed by President Carter, was the only member to vote against the change. President Reagan's three appointees and Howard Jenkins Jr., a Republican reappointed by Carter, supported it.

Lubbers, whose four-year statutory term expires next April, declined comment.

Reilly served as executive assistant to new board chairman Donald L. Dotson, when Dotson was assistant secretary of labor for labor-management relations. Dotson brought Reilly with him when he became board chairman this year.

The AFL-CIO initially opposed Dotson's nomination because of his hiring of Reilly, but backed off by the time the nomination came before the Senate.

Last night Dotson denied an earlier report that Lubbers had been stripped of his authority, saying the unit will remain under Lubbers but all actions must be reviewed and approved by Reilly.

Agency sources said the board took the action, in part, because it was afraid the litigation staff might not accurately reflect its views before the federal courts. While the NLRB makes decisions in labor disputes and organizing battles, it must rely on the federal courts to enforce the decisions. Past board members, under both Republican and Democratic administrations, have sometimes complained that the agency's litigation staff substituted its legal determinations for the board's when presenting cases in court.

Reilly referred all questions to Iliff McMahan, an agency spokesman, who minimized the concerns of some members of the litigation staff. He said the change was made simply to improve coordination between the board and the legal staff.

A spokesman for Rep. William L. Clay (D-Mo.), chairman of the House subcommittee on labor-management relations, said Clay was "quite concerned" about the action because it raises a "number of legal and political questions" and "it looks like a blatant political move."

The general counsel is required to undergo Senate confirmation, while the board's solicitor is not.

# Labor Board votes to undercut power of general counsel

By David L. Perlman

The Republican majority on the National Labor Relations Board has voted to downgrade the responsibilities of the agency's independent general counsel and shift major enforcement powers to its new solicitor, an alumnus of the anti-union Right to Work Legal Defense Foundation.

The new policy, adopted by the NLRB at the urging of its chairman, Donald Dotson, substantially lessens the role of NLRB General Counsel William A. Lubbers, who is in the final year of his statutory four-year term. The general counsel is the only NLRB official other than the five board members who is appointed by the President and subject to confirmation by the Senate.

Under the new policy, the general counsel's long-established authority over enforcement litigation and over the staff of the enforcement division's appellate court branch is transferred to the solicitor.

## Anti-labor background

Hugh Reilly, the recently appointed NLRB solicitor, came to the Reagan Administration from the staff of the right to work foundation, which specializes in harassment suits against unions and uses virulent anti-labor propaganda in its fund-raising. (See editorial, Page 15.)

Reilly went from the National Right to Work Legal Defense Foundation to the Labor Dept. when the Reagan administration took office. He served as executive assistant to Dotson, who was assistant secretary of labor for labor-management relations before being named NLRB chairman.

Dotson's own background has been as a management lawyer and, when he was appointed to head the NLRB, AFL-CIO President Lane Kirkland expressed "grave reservations" about the choice of a management partisan to protect workers' rights.

In a letter to Senate Labor Committee Chairman Orrin G. Hatch (R-Utah), Kirkland warned earlier this year that the Administration's policy of packing the NLRB on ideological lines raises doubts as to the labor board's concern for protecting the rights of workers under the National La-

Another Reagan appointee to the NLRB, Robert Hunter, as a Senate staffer had been a strategist for the filibuster that blocked labor law reform, Kirkland noted. He described Reagan's choices for the NLRB as "rewards by the Administration to the reactionary businessmen and to the far right wing that the Administration delights to serve."

## Split vote

The NLRB vote to shift authority from the general counsel to the solicitor was reported as 3-1.

Voting with Dotson were Hunter and Howard Jenkins, a holdover Republican who is the senior member of the board. Voting against the move was Don A. Zimmerman, an independent appointed by President Carter after having served as counsel to Republican members of the Senate Labor Committee. The newest board member, Patricia Diaz Dennis, was not sworn in until the day after the vote.

The general counsel has statutory authority over issuance of unfair labor practice complaints and over NLRB field offices.

# Infighting Breaks Out at NLRB Over Move To Let New Chairman Supervise Lawyers

By LEONARD M. APCAR

Staff Reporter of THE WALL STREET JOURNAL

WASHINGTON—The National Labor Relations Board, the nation's referee in labor-management disputes, is caught up in a messy internal argument of its own. And its dispute may have to be untangled finally by Congress or the courts.

Early this month, the five-member board voted to strip its general counsel of his long-standing powers to supervise the work of board lawyers who go to court seeking enforcement of its contested decisions. Those enforcement lawyers, mostly young and aggressive, were managed by William Lubbers, a veteran NLRB staffer who was promoted to the general counsel post by former President Carter. Until the board's decision, all legal briefs and papers prepared by the enforcement lawyers were under Mr. Lubbers's direction.

But now the board wants that procedure to stop. Donald L. Dotson, the recently installed Republican board chairman, pushed through a motion giving him the power to supervise the 79 lawyers affected by the change. Under the new rules, the staff of Hugh L. Reilly, a conservative labor lawyer Mr. Dotson brought to the board and promoted for the job of board attorney, will check all the legal documents the lawyers write. And Mr. Dotson will decide which of the lawyers should be promoted, disciplined or sacked.

The action has turned the NLRB, a usually quiet agency a block from the White House, into a cauldron of rumors. Turf fights have become common. Board decisions have slowed, for debatable reasons. And a war of memos is being waged between Mr. Dotson, Mr. Lubbers and the lawyers' own union. Meanwhile, a House Labor subcommittee is watching the agency closely, and some lawyers outside the agency are considering legal action to block the board's move.

## Liberal Critics Concerned

The dimensions of the squabble go far beyond the board's walls. At the least, board experts say, the in-fighting is a time-consuming diversion when the board's docket is the biggest it has been in years. Union lawyers and other liberal critics worry that the move signals a shift to a more conservative board—all but one of the members are Republicans—whose decisions will make it more difficult for unions to organize, bargain and aid grieving workers.

For now, the focus of the controversy is Mr. Dotson, a 44-year-old no-nonsense Pittsburgh labor lawyer who served as chief labor counsel for Wheeling-Pittsburgh Steel Corp. His former boss, Joseph Scalise, a vice president, praises Mr. Dotson's skills as a bargainer and a lawyer with "respect for the law, whether he agrees with it or not." In 1981, President Reagan named him to an assistant secretary job at the Labor Department. Last March he became NLRB chairman.

Mr. Scalise and other admirers say Mr. Dotson is a "bright," "serious" and "reflective" man who may be well-suited to the judicial-like tone of the labor board. "He

couldn't care less about the power games" and he isn't a sycophant, says a supporter on Capitol Hill. But critics say he also is rigid in his ways. They question the breadth of his legal background and worry that he harbors "anti-union leanings." Also, says a co-worker, his personality "has a brittle appearance that makes it difficult for him to communicate and administer effectively."

For his part, Mr. Dotson says, "I'm like everybody else; I try to live by the Boy Scout law." And he adds, "I try to make decisions on sound, effective touchstone principles. I let the chips fall where they may."

So far, those chips have scattered on a nervous group of board staffers. Even before Mr. Dotson arrived, staff members sent people to the Labor Department to find out something about the new chairman. They



Donald L. Dotson

found that he had an unending run-in with the department's chief lawyer over the management of lawyers assigned to him. They also found that he likes to ride up front with the driver in a government car and that he occasionally enjoys riding to work on his Triumph motorcycle. Mr. Dotson says that he used to race dirt bikes, likes to hunt and used to compete in rifle and pistol shooting.

"He seems like a nice enough guy," says an NLRB enforcement attorney. But his style has provoked widespread fear in the agency. He has talked to very few of the staff lawyers, and rumors are flying. "It seems he has complete contempt for board attorneys," says one.

After he arrived, lights in the hallway outside board members' offices were dimmed, dark paint was applied and dark carpeting put down, some locks were changed, a few office safes were installed and staffers quipped that "dark days are ahead." (Mr. Dotson's own office is frequently dark because he prefers to work with a minimum of light.)

In an interview, Mr. Dotson says that his mission at the board is to restore a sense of professionalism and fairness to board deliberations that he believes it has frittered

away. "I want the board to be an effective and respected agency," he says firmly. He wants board lawyers to be better prepared in court, their arguments more forcefully made, and he wants to win more cases when the NLRB goes to court to get its decisions enforced.

"I see a lot of evidence that the quality of work has fallen off," he declares.

## Working in Jeans

As an example, he cites a case decided a few years ago by the U.S. Court of Appeals in Philadelphia. The judge, in his written opinion, bluntly criticized NLRB lawyers for making courtroom arguments that the court already had rejected in a prior case, twisting a quote from another case to buttress a point and suggesting to the court that previous decisions were wrongly decided without introducing new evidence. These are "tactics that aren't quite unethical," says Mr. Dotson.

He also is bothered by attitudes that he believes have crept into the board's corps of enforcement lawyers. The lawyers come to work in jeans and casual clothes unless they're headed for court. They also largely set their own hours because many need to work nights and weekends, often on quick notice, to prepare a case. Beyond appearances, though, Mr. Dotson believes that there is a little too much swagger in the lawyers' esprit as the young hot-shots of the NLRB. "There's an attitude on some part of the people in enforcement that there's no accountability to the board," he says.

Worse, in his view, is that some of the arguments the lawyers press in court don't fully reflect the board's views. "Representations were made to the courts that were contrary to what the board had said" in a decision, he says. And he believes that if the board is going to be the client of these lawyers, the board has a right to know how its views will be presented before the lawyer gets to court.

Peter Nash, a former NLRB general counsel, says the idea "has some surface appeal," but he adds that "I don't see a compelling need to make that change." He and others note that the enforcement lawyers have good batting averages in court and have been praised openly by some federal judges recently.

## Some See Power Grab

For that reason, Washington labor specialists are looking to political motives to explain what some consider to be a power grab. Mr. Lubbers is a Democrat, who has lost power to Mr. Dotson and Mr. Reilly, both Republicans. What also raises labor's ire is that Mr. Reilly once was a lawyer for the National Right to Work Committee. Mr. Dotson denies any political railroad job. In fact, says John Penello, a former NLRB member, the idea of realigning management of the lawyers has been debated inside the agency for years by others.

Still, several labor law experts question whether the board's action is legal. John S. Irving Jr., a former NLRB general counsel, contends that the law requires that all board

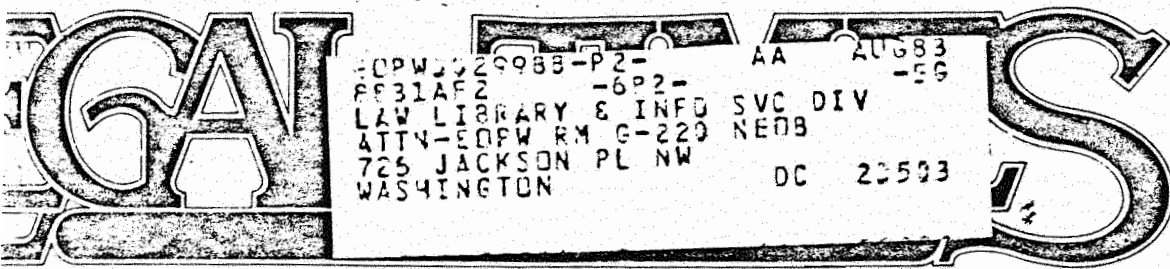
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lawyers, except administrative law judges and those assigned to board members, be supervised by the general counsel. Other labor experts say that the law gives the board the power to decide whether to go to court and who should represent it, but that the general counsel supervises the case work. Previously the board gave the general counsel the power to decide whether to advance a case to the court and which lawyers to hire. Mr. Lubbers, the general counsel, and his office declined to be interviewed. However, Mr. Lubbers is trying to accommodate the board move.

Mr. Dotson insists that the law is on his side, and several lawyers outside the agency agree. "They haven't taken away any statutory authority from the general counsel," says a former lawyer for a board member, whose curiosity prompted a search into the legal history of the law.

Whatever the outcome, the controversy at the labor board is certain to simmer for awhile. Mr. Dotson's initial response is to criticize the press accounts of the change and blast the "elite group" of Washington labor lawyers and union leaders who want to see him fail. "I don't lose any sleep over it," he says. "But it does cause a lot of time to be wasted and a lot of misunderstanding."



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## NLRB Cuts Into Power Of Its General Counsel

By Kim Masters  
Legal Times Staff

*Lubbers: Traditional power  
taken over by NLRB*

The National Labor Relations Board created controversy and confusion last week by transferring authority over enforcement of the board's decisions from the independent general counsel's office, which has supervised enforcement since 1955, to the board itself.

Sources said last week that the board voted 3-1 (with Member Don A. Zimmerman dissenting) to transfer enforcement power—including the authority to hire, fire, and evaluate enforcement attorneys—without any

consultation with general counsel William A. Lubbers. All the board members refused comment on the change; Lubbers also declined to comment.

The change greatly expands the power of the board's solicitor, who will assume the general counsel's responsibility for reviewing briefs filed in courts of appeals to enforce the board's decisions. Many observers expected political fallout from the change because the board's new solicitor, Hugh Reilly, was formerly a staff attorney with the National Right to Work Committee. Reilly most recently served as assistant to current board chairman Donald L. Dotson when Dotson was the Labor Department's assistant secretary for labor-management relations.

Several former board members said they approved the change because it gives the board closer control over briefs that are filed to enforce the board's decisions, but a number of attorneys criticized the switch and questioned how it would benefit the board. "The action that the board has taken is unworkable and I think it is unlawful," said Carl L. Taylor of the D.C. office of Chicago's Kirkland & Ellis. Taylor, who served as associate general counsel for enforcement litigation when his current partner, John S. Irving Jr., was NLRB general counsel, said he based his comments on his beliefs about the board as an institution, aside from political considerations.

NLRB attorneys reportedly are concerned that the change could be a prelude to political purges because the

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# NLRB Takes New Role in Enforcing Decisions

*Continued from page 1*

board has assumed authority to hire, fire, promote, and evaluate lawyers who previously had been under the general counsel's supervision. "It's had a tremendously negative morale impact," one insider said. Some speculated that the change could be a prelude to bringing responsibility for drafting briefs within individual board members' offices. They say the board also may want to transfer to the regions authority for certain court litigation currently in the general counsel's office.

Former board members said they approved the change because it removes an apparent conflict that occurs when the general counsel unsuccessfully argues a position before the board, but then must support the opposite position on the board's behalf before courts of appeals. Betty Southard Murphy, a former board member now with the D.C. office of Cleveland's Baker & Hostetler, emphasized that she admires Lubbers' performance as general counsel, but she said she believed the change would "enhance the board's position before the courts."

Peter D. Walther another former member now with Philadelphia's Drinker Biddle & Reath, said he supports the transfer. "It has always seemed strange to me that the enforcement would be with the general counsel," he said.

But attorneys like Taylor and former general counsel Peter G. Nash, now with the D.C. office of Greenville, S.C.'s Ogletree, Deakins, Nash, Smoak and Stewart, said the move appeared to involve several liabilities and no assets. Rather than enhancing the board's position before courts of appeals, both agreed that the effect would be harmful.

"In any board, at any time, because of the nature of the board, there are vigorous disagreements among board members. . . . The closer the board is to the day-to-day supervision of brief writing, the more those disagreements are likely to make the task of enforcement of the board's orders impossible," Taylor said.

Nash said he thought close consultation with the board members would make it more difficult to draft the briefs. "If the five members want to confer and agree on what goes into every appeals court brief, the board will run a substantial risk of losing more cases," he said. Taylor and Nash dis-

puted any idea that the move would prevent the general counsel from putting his own slant on cases argued before the appeals courts. "I've never seen a general counsel put a gloss on a brief in any way other than to the support the decision of his client, which is the board," Nash said.

Nash said he did not anticipate that any benefit would result from the change. He and Taylor agreed that the National Labor Relations Act entrusts authority for supervising the board's attorneys to the general counsel, and specifically forbids the board to employ attorneys other than those on the members' staffs. Nash said the board's action could result in considerable confusion over who is in charge of the attorneys.

Questions about the legality of the transfer could lead to litigation, he said, since parties before appeals courts could argue that the board's attorneys were not appearing properly before the court.

Further, Nash said, the move has an appearance of being politically motivated, since Lubbers is a Democrat and the board is now dominated by members appointed by the current administration. That could lead to congressional hearings and undesirable strife within the board, he said.

"It seems to me kind of like a silly public fight within the agency, and don't understand why . . . unless the Republicans want to show they have some control over the general counsel who's a Democrat. So what? Next time the Democrats will be in control of the board and there will be a Republican general counsel," Nash said.

Several attorneys said they believed that the change would have little substantive impact. Arthur F. Rosenfeld of the U.S. Chamber of Commerce said he did not think the change was politically motivated, and he thought its effect would be "very minimal" since the general counsel's office already has been charged with supporting the board's views.

But union attorney Elliott Bredhoff of D.C.'s Bredhoff & Kaiser said he was not inclined to believe that the move was free of political motivation although he could not perceive what payoff it would have. "It really is hard to give a rational procedural reason as to why they might be trying to do this but there is a great fear that there are hidden motives, which can only mean diminished and less effective agency," he said. "It is a hair-raising kind of development, and you can only ascribe some sense to it if you attribute some hidden motive."

MEMORANDUM

THE WHITE HOUSE  
WASHINGTON

May 17, 1983

FOR: FRED F. FIELDING

FROM: SHERRIE M. COOKSEY *SMC*

SUBJECT: Potential Controversy  
Relating to the NLRB

The members of the NLRB recently voted to restrict the powers of the Board's General Counsel (a statutory position) to initiate investigations and file complaints. The current General Counsel, William Lubbers, was appointed to his four-year term by President Carter on April 24, 1980 and is perceived by many individuals in the business community to be biased, in his enforcement of the labor laws, against management.

John Irving, NLRB General Counsel from 1975-1979, called Jonathan Rose last Friday to alert Rose to Irving's opinion that the NLRB has gone beyond its legal authority in its restrictions on the General Counsel's authority. Irving also reported that the General Counsel recently presented his arguments in writing to the Board against this restriction of his authority but that it is likely that the Board will reject those arguments; following that, Lubbers probably will seek an opinion from the Attorney General as to the legality of the Board's actions in restricting his authority. Irving also advised that Congressional hearings on this matter have been planned.

Rose wanted you to know all of this because he believes Irving's concerns regarding the legality of the Board's actions should be taken seriously. Rose and Irving are hopeful that you can review this matter and devise a way for the Board to back down (if as Irving believes they have gone beyond the scope of their authority) before the Justice Department is placed in the middle of this situation.

MEMORANDUM

THE WHITE HOUSE

WASHINGTON

July 18, 1983

FOR: FRED F. FIELDING

FROM: JOHN G. ROBERTS *JGR*

SUBJECT: NLRB Dispute

On July 14, Donald Dotson sent Mr. Hauser a note advising that Dotson and NLRB member Robert Hunter wanted to meet with him to "discuss alternatives" in connection with the dispute at NLRB concerning the respective powers of the Solicitor and the General Counsel. Dotson enclosed a legal analysis of the dispute and noted that it was urgent that the matter be resolved. Hauser asked that I review the question and determine (1) whether the Board had the authority to act as it did in transferring authority from the General Counsel to the Solicitor, (2) whether the General Counsel may be removed by the President, (3) if the General Counsel's defiance of the Board directive constitutes "cause" for removal of the General Counsel, and (4) how Mr. Meese's office is involved in the dispute.

I first reported on this dispute in a memorandum of May 18, 1983 (attached). You will recall that on May 4, 1983, the Board required the General Counsel to submit "all pleadings and briefs in proceedings involving enforcement, review, Supreme Court litigation, contempt, and miscellaneous litigation" to the Solicitor for his review, and directed that such pleadings and briefs may be filed only after approval of the Solicitor, acting for the Board. The Board also assumed authority to "transfer, promote, discipline, discharge" and take other appropriate personnel action with respect to NLRB attorneys engaged in the activities to be reviewed by the Solicitor. The General Counsel, however, was directed to exercise "general supervisory responsibility" over those attorneys.

The legal memorandum submitted by Dotson defends the Board's action by noting the statutory authority of the Board to "appoint... attorneys... necessary for the proper performance of its duties... Attorneys appointed under this section may, at the discretion of the Board, appear for and represent the Board in any case in court." 29 U.S.C. § 154(a). The Board recognizes that the General Counsel, under 29 U.S.C. § 153(d), has independent authority to investigate charges and issue unfair labor practice complaints. The Board's action does not affect attorneys employed in these areas. The Board maintained, however, that the General Counsel's

authority to represent the Board in court is based not on any similar statutory grant of authority but rather on a revocable delegation of authority from the Board. The Board's legal memorandum notes that a similar dispute between the Board and its General Counsel arose in 1950, and was resolved when the President requested and obtained the General Counsel's resignation.

We have not been provided with a copy of the General Counsel's legal analysis, but I understand that it focuses on the language of 29 U.S.C. § 153(d): "The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board..." This clear statutory language, according to the General Counsel, flatly prohibits any effort by the Board to place control over enforcement and appellate attorneys in the hands of the Solicitor. Simply stating, as the Board did, that the General Counsel will continue to exercise "general supervisory responsibility" over such attorneys is a meaningless assertion in the face of the Board's requirement that the Solicitor review and approve briefs and pleadings and the Board's assertion of authority over attorney promotions, disciplining, transfers, and terminations.

As I pointed out in my earlier memorandum, the Board's position is not illogical, nor does it contravene the intent of the Taft-Hartley Act, which established the office of NLRB General Counsel. It was the purpose of that Act to insulate the General Counsel from the Board with respect to the presentation of complaints before the Board. Such insulation with respect to enforcement of orders issued by the Board was not necessary (no problem of commingling adjudicative and prosecutive roles being present once the Board had issued an order), and accordingly this question was not specifically addressed by the Taft-Hartley amendments. In addition, there is a great deal of common sense appeal to the proposition that the Board should be able to control the legal arguments presented on its behalf before the courts.

On the other hand, the plain language of 29 U.S.C. § 153(d) presents a major hurdle to the Board's legal analysis. Even if the intent of Congress was only to insulate NLRB attorneys from the Board with respect to the filing of complaints, the language chosen -- giving the General Counsel "general supervision over all attorneys employed by the Board" (emphasis supplied) -- is not so limited. In sum, it is not apparent which side in this dispute would prevail if the matter were put to the proof, which in this case would presumably entail an Attorney General opinion rather than a court test.

There is a clear answer to the second query posed by Mr. Hauser. In an opinion dated March 11, 1959, Malcolm Wilkey, then Assistant Attorney General for the Office of Legal Counsel, concluded that "the General Counsel of the Board is a purely Executive Officer and that the President has inherent constitutional power to remove him from office at pleasure under the rule of Myers v. United States, 272 U.S. 52." We were advised in April of this year that the Department of Justice still adhered to the Wilkey opinion. Since the General Counsel serves at the pleasure of the President, it is unnecessary to consider Mr. Hauser's third question, viz., whether the General Counsel's conduct constitutes "cause" justifying Presidential dismissal for cause.

With respect to the fourth question, Ken Cribb advised me on July 15 that it was his understanding that Craig Fuller would be meeting with Dotson to discuss the matter, at Mr. Meese's direction. Hauser called Fuller, who seemed unaware of any such arrangement. In any event, Hauser advised Fuller that our office was looking into the matter and should be kept apprised of any developments.

In light of the NLRB's status as an independent agency, we should keep some distance from the legal dispute. Dotson may want a meeting to discuss firing the General Counsel, the step taken over thirty years ago when the NLRB was similarly deadlocked. Since such a move can only come from the President, we are inevitably involved if Dotson seeks that solution. I would, however, recommend against taking sides in the legal dispute. Dotson took this action without consulting us or, more appropriately, the Justice Department, and we should not be anxious to sleep in a bed not of our own making.



# WHITE HOUSE CORRESPONDENCE TRACKING WORKSHEET

☐ O - OUTGOING☐ H - INTERNAL☐ I - INCOMINGDate Correspondence  
Received (YY/MM/DD) \_\_\_\_\_

Name of Correspondent: \_\_\_\_\_

☐ MI Mail Report

User Codes: (A) \_\_\_\_\_ (B) \_\_\_\_\_ (C) \_\_\_\_\_

Subject: \_\_\_\_\_

## ROUTE TO:

## ACTION

## DISPOSITION

Office/Agency	(Staff Name)	Action Code	Tracking Date YY/MM/DD	Type of Response	Code	Completion Date YY/MM/DD
W Holland		ORIGINATOR	83.07.14			1 1
WAT18		Referral Note:	D 83.07.14			1 1
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## ACTION CODES:

A - Appropriate Action  
 C - Comment/Recommendation  
 D - Draft Response  
 F - Furnish Fact Sheet  
 to be used as Enclosure

I - Info Copy Only/No Action Necessary  
 R - Direct Reply w/Copy  
 S - For Signature  
 X - Interim Reply

## DISPOSITION CODES:

A - Answered  
 B - Non-Special Referral  
 C - Completed  
 S - Suspended

## FOR OUTGOING CORRESPONDENCE:

Type of Response = Initials of Signer  
 Code = "A"  
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Comments: \_\_\_\_\_

Keep this worksheet attached to the original incoming letter.  
 Send all routing updates to Central Reference (Room 75, OEOb).  
 Always return completed correspondence record to Central Files.  
 Refer questions about the correspondence tracking system to Central Reference, ext. 2590.



John

1. <sup>Brd's</sup> Authority to revoke  
delegation to GC on  
enforcement matters.

2. Can GC be removed  
at will by TT?

3. Does departure of Brd  
directive by GC constitute  
"cause" for removal?

4. Meek's gr was provided  
a copy of this memo  
about 2 wks ago. ∴ check  
w/ Crist or Uhlman.

5. This should be given  
most attention.

NATIONAL LABOR RELATIONS BOARD  
WASHINGTON, D.C. 20570

OFFICE OF  
THE CHAIRMAN

14 July 83

Mr. Hauser,

As soon as you have reviewed this, Member Hunter and I would like to meet with you to discuss alternatives. It is urgent that this be brought to a resolution.

Also enclosed two recent press articles.

DL Dotson

254-9258

## I. INTRODUCTION

There presently is a dispute at the National Labor Relations Board between the five Member Board and the General Counsel with regard to the authority of the Board<sup>1/</sup> to review and direct the work of attorneys who appear on behalf of the Board in various cases in court. Most of this court work involves actions filed on the Board's behalf to enforce decisions and orders rendered by the Board.<sup>2/</sup> The dispute arises out of the differing views of the Board and General Counsel as to their respective statutory authority as set forth in Section 4(a) and Section 3(d) of the Act.<sup>3/</sup>

As set forth more fully, infra., Sections 4(a) and 3(d) were part of the Taft-Hartley amendments that were enacted into law in 1947. In those amendments, Congress created an independent General Counsel, whose primary responsibility, as defined in Section 3(d) of the Act is to investigate charges, issue complaints, and prosecute these complaints before the Board. Section 3(d) further provides that the General Counsel "shall have such other duties as the Board may prescribe...." Pursuant to its Section 3(d) authority to delegate additional duties to the General Counsel and concurrent with the passage of the Taft-Hartley amendments, the Board on 21 August 1947, specifically delegated to the General Counsel substantial additional powers, with the provision that "such delegated powers may be revoked by the Board at any time."<sup>4/</sup> Among these delegated powers was the authority to appoint and

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<sup>1/</sup> The "Board" will hereafter refer to the limited functions of the five Member Board, and "Agency" will hereafter refer to the combined functions of the General Counsel and the Board. See Attachment I for a description of the duties and responsibilities of the Board and General Counsel and Attachment II for an organizational outline of the Agency.

<sup>2/</sup> Board orders are not self-enforcing, and Section 10(e) and 10(f) authorize the Board to file petitions in the federal courts to enforce its orders.

<sup>3/</sup> Sections 4(a) and 3(d) are set forth in full in Attachment III.

<sup>4/</sup> The delegation contained the additional self-evident observation that "Such powers as are vested in the General Counsel by statute, rather than delegated by the Board, are not the subject of revocation." The Board's delegation appears at 13 F.R. 1654 and was revised in respects not here relevant at 15 F.R. 1088 (1950), 15 F.R. 6927 (1950), and 20 F.R. 2175 (1955).

direct attorneys who appear in court on behalf of the Board, pursuant to Section 10(e), to petition for enforcement of Board orders.<sup>5/</sup>

In the Board's view, the language of Section 4(a) permits it to modify its prior delegation to the General Counsel to appoint and to effectively direct and review the work of the attorneys who appear in court on the Board's behalf. Thus, Section 4(a) states in pertinent part:

The Board shall appoint an executive secretary and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties... . Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court.

The General Counsel concedes that the Board has the statutory authority to appoint such attorneys. However, the General Counsel further asserts that these attorneys are subject to his general supervision, as Section 3(d) states that: "The General Counsel shall exercise general supervision over all attorneys employed by the Board (other than trial examiners<sup>6/</sup> and legal assistants to Board members...." Thus, the General Counsel contends that he derives the authority to supervise from the Statute and not from a Board delegation. Therefore, the General Counsel asserts that the Board lacks the statutory authority to direct or control the attorneys appearing in court on its behalf because such an assertion of control would interfere with the General Counsel's asserted statutory duty to exercise general supervision over these attorneys.

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<sup>5/</sup> In addition, the Board delegated to the General Counsel the authority to appoint and direct the attorneys who appear on the Board's behalf in review cases pursuant to Section 10(f) of the Act, the Supreme Court, contempt cases, and miscellaneous litigation.

<sup>6/</sup> Trial Examiners are now known as Administrative Law Judges.

The present dispute arose on 4 May 1983<sup>7/</sup> when the Board notified the General Counsel that it was modifying the Board's previous and almost carte blanche delegation to the General Counsel of the Board's statutory authority to appoint and direct the attorneys who appear on the Board's behalf in various courts.<sup>8/</sup> The General Counsel responded on 13 May 1983 and, as indicated above, he disputed the Board's authority to take such action, claiming that the Board's action effectively disabled him from exercising his statutory authority to assert general supervision over these attorneys and over the content of the briefs and pleadings that these attorneys file on the Board's behalf in various courts. The General Counsel claims support for his position in the longevity of the pre-4 May 1983 division of responsibility between himself and the Board, as established by the Board's 1947 delegation of authority, and in the General Counsel's asserted belief that the failure of Congress to alter the Board's administrative delegation since 1947 means that it has become part of the statute, and therefore the Board lacks the power to alter its own administrative delegation.

<sup>7/</sup> The Board's 4 May 1983 Minute, as amended, appears in full as Attachment IV.

<sup>8/</sup> See fn. 4, supra.

II. PRIOR RESOLUTION OF DISPUTE BETWEEN  
THE BOARD AND THE GENERAL COUNSEL

This is not the first time that a General Counsel has taken such a position. In 1950 the then General Counsel, Robert Denham, disputed the Board's authority to appoint and supervise an attorney, the Board's Solicitor, to represent the Board in a case pending enforcement in the Court of Appeals for the Sixth Circuit.<sup>9/</sup> The Board had directed its Solicitor to appear on the Board's behalf in a case pending enforcement in the Sixth Circuit because the General Counsel had refused the Board's explicit direction to make certain arguments before the court. The General Counsel instead attempted to terminate the Board's Solicitor. Whereupon, the Board then declared the General Counsel's action to be "without authority and of no effect."

In his brief to the Sixth Circuit, the General Counsel asserted that in view of the General Counsel's Section 3(d) authority to "exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members)," the Board could not be represented in court by attorneys on its own staff and that the representation of the Board in court must be by attorneys on the General Counsel's staff. The General Counsel pointed out to the court, however, that the controversy before the court "turning as it does upon statutory provisions relating exclusively to the division of administrative functions within the agency, is not appropriate for decision by the judiciary, but can properly be resolved only by the executive or legislative branches of the government."<sup>10/</sup>

The Board agreed with the General Counsel that the courts were not an appropriate forum to resolve the dispute over the authority to direct and exercise control over attorneys appearing on the Board's behalf in court and that the

<sup>9/</sup> N.L.R.B. v. Vulcan Forging Company, 188 F.2d 927 (6th Cir. 1951).

<sup>10/</sup> General Counsel's Motion in response to the Board in N.L.R.B. v. Vulcan Forging Company, supra.



Executive Branch should resolve the conflict. Accordingly, the Board requested the President to direct the General Counsel to follow the Board's directions regarding the attorneys who appear in court on the Board's behalf. The Board pointed out that in refusing to follow the Board's directions, the General Counsel had acted in an ultra vires fashion, contrary to the specific language of the statute which states that the General Counsel "shall have such other duties as the Board may prescribe...." The General Counsel also had disputed the Board's attempt to clarify its control over the court attorneys wherein the Board had modified the 1947 delegation of duties to the General Counsel by stating that henceforth petitions for enforcement of Board orders "will" be made "in full accordance with the directions of the Board"<sup>11/</sup>. The General Counsel, contrary to the Board, had argued that his right to represent the Board in court stemmed from the statute and that the Board did not have the authority to restrict or "direct" his representation of the Board in court. The President was apparently in agreement with the Board's interpretation of the division of statutory authority in the statute, because on 18 September 1950, General Counsel Denham resigned at the request of the President.<sup>12/</sup> Thereafter, the Solicitor proceeded at the Board's direction, to represent the Board in the case pending before the Sixth Circuit.

<sup>11/</sup> 15 F.R. 1088 (1950) amending 13 F.R. 1654 (1947).

<sup>12/</sup> As set forth in Section 3(a) of the Act: "Any member of the Board may be removed by the President, upon notice and hearing, for neglect of duty or malfeasance in office, but for no other cause." There is no such qualifying language in Section 3(d) regarding the removal of the General Counsel. Section 3(d) merely states that: "There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years." In the absence of such limiting language, the President requested the resignation of General Counsel Denham.

III. THE BOARD IS ACTING PURSUANT TO  
THE CLEAR LANGUAGE OF THE ACT

At the outset, before reviewing the Statute in detail, it is important to recognize that the dispute between the Board and the General Counsel concerns only attorneys whom the Board has the clear statutory authority to appoint and whom act only on behalf of the Board, not the General Counsel. The Board is not seeking to assert any authority over attorneys employed by the Agency who act on behalf of the General Counsel in accordance with the General Counsel's Section 3(d) responsibility to investigate, issue, and prosecute complaints before the Board.<sup>13/</sup> Accordingly, the General Counsel's assertion that he, as a third party, has the statutory authority to interfere with the Board's direction and effective control of the Board's attorneys and the contents of the briefs that are prepared on behalf of the Board is not only illogical but is also inconsistent with prevailing concepts of attorney-client relationships.<sup>14/</sup>

<sup>13/</sup> The General Counsel's Section 3(d) authority to initiate the prosecution of a complaint before the Board relegates very broad authority to that Office. Thus, the Board can only consider unfair labor practice cases, if the General Counsel in his discretion issues a complaint. In the absence of a complaint, there is no way for the Board to make an unfair labor practice finding. Similarly, in representation cases, although the Board issues certifications, there can be no testing or enforcement of that certification unless the General Counsel issues an unfair labor practice complaint alleging a refusal to bargain. See for example, Matter of Times Square Stores Corporation, 79 NLRB 361 (1948).

<sup>14/</sup> In general, the client, not the attorney defines the attorney-client relationship. This is true in private sector relationships. It is equally so where, as here, the relationship is of government attorney to government client. United States v. Beebe, 180 U.S. 343, 351 (1901).

In addition, an examination of the Statute further reveals that the General Counsel's assertion is contrary to the clear language of the Act and Congressional intent. Section 4(a) specifically provides that the Board shall not only "appoint" but that the Board shall also control the "direction" of its attorneys who "appear for and represent the Board in any case in court."<sup>15/</sup> In using such language, Congress was well aware that "direction" is commonly understood to mean: "guidance or supervision of action, conduct or operation..."<sup>16/</sup> Congress' intent that the Board, and not the General Counsel, retain the right to appoint and effectively direct attorneys is further explained by Congress' decision to borrow verbatim from the preceding Wagner Act, the present language of Section 4(a) of the Act. Under the Wagner Act, all of the Agency's employees were appointed and supervised by the Board, and specifically, the attorneys who appeared in court on behalf of the Board reported to the Board and were supervised and controlled by the Board.<sup>17/</sup>

<sup>15/</sup> Obviously, in order for the Board to carry out its statutory mandate to formulate and apply a uniform national labor policy, it must be able to control the positions argued to the courts on its behalf. For the Board knows best what it has decided, and to allow arguments to the Court which it views as inconsistent with its decisions will create confusion in the judicial and public understanding of the national labor policy. Moreover, as set forth in more detail, *infra*, the General Counsel's assertion that he has the right to control the content and presentation of briefs filed on the Board's behalf, impermissibly permits the General Counsel, whose function as a prosecutor by that time has ended, to intrude upon the Board's responsibility to render and enforce its decisions and orders.

<sup>16/</sup> Webster's Third New International Dictionary (1966).

<sup>17/</sup> See fn. 32, *infra*, for a fuller discussion of the import of Congress' decision to carry over intact the language of Section 4(a) from the Wagner Act.

#### IV. THE ACT AND ITS LEGISLATIVE HISTORY

Although the language of Section 4(a) and a logical reading of the Statute establishes that Congress intended that the Board retain the right to exercise effective control over the attorneys who appear in court on its behalf, the question of Congressional intent becomes even clearer when the apparent conflict between Section 4(a) and Section 3(d) is examined within the context of the legislative history of the Taft-Hartley Act.<sup>18/</sup> The Taft-Hartley Act of 1947 amended the Wagner Act and made substantial substantive changes not only in the law,<sup>19/</sup> but also in the organization of the Agency. In examining the Legislative History of the Taft-Hartley amendments, it is important to remember that the debate surrounding the enactment of those amendments was one of the most highly publicized and contested of the post-war years, and the final legislation that became the law was enacted over a Presidential veto, and was of necessity, comprised of a series of compromises derived from numerous proposals and bills.

<sup>18/</sup> Where, as here, the Statute is arguably ambiguous, resort to the Legislative History is entirely appropriate. See National Woodwork Manufacturers Association et. al. v. N.L.R.B., 386 U.S. 612, 619-621 (1967), where the Supreme Court stated:

That principle has particular application in the construction of labor legislation which is "to a marked degree, the result of conflict and compromise between strong contending forces and deeply held views on the role of organized labor in the free economic life of the Nation and the appropriate balance to be struck between the uncontrolled power of management and labor to further their respective interests."

\* \* \* \*

"Before the true meaning of the statute can be determined consideration must be given to the problem in society to which the legislature addressed itself, prior legislative consideration of the problem, the legislative history of the statute under litigation, and to the operation and administration of the statute prior to litigation." (Citations omitted).

<sup>19/</sup> Some of the more important changes are as follows:

Section 7 was amended to give employees the right to "refrain" from engaging in activities protected in the original Section 7. The "closed shop" was outlawed, but a "union shop" was allowed in those states where it was lawful under state law. See Section 8(a)(3) and Section 14(b). A new Section 8(b) was added to prohibit certain union unfair labor practices, including coercive conduct on the part of unions and various secondary boycotts. Section 8(c) was added to guarantee "free speech" to both unions and employers.

Under the Wagner Act, a General Counsel was appointed by the Board and reported to the Board. That arrangement engendered criticism because it allowed the Board to act as a prosecutor, judge and jury.<sup>20/</sup> In response to such criticism, the 1947 amendments changed the basic organization of the Agency and created an independent General Counsel, appointed by the President with the advice and consent of the Senate for a term of 4 years. The primary responsibility of the new General Counsel, as set out in Section 3(d), is to investigate charges, issue complaints, and prosecute such complaints before the Board. To perform this function, Congress specifically authorizes the General Counsel to "exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices."<sup>21/</sup> In addition to its exclusive control of regional attorneys involved in prosecuting violations of the Act, the General Counsel also exercises supervisory authority over attorneys in Washington who render advice to the regions regarding the issuance of complaints<sup>22/</sup> and over other attorneys in Washington who administratively consider appeals from a Regional Director's

<sup>20/</sup> 93 Cong. Rec. 7001 (statement of Senator Taft) (1947), reprinted in 2 NLRB, Legislative History of the Labor Management Relations Act, 1947, at 1623 (1948) [hereinafter cited as Leg. Hist., 1947].

<sup>21/</sup> Because representational matters for which the Board is responsible are of necessity performed by regional personnel who are the same people that carry out the General Counsel's prosecutorial responsibilities, the Board has delegated to the General Counsel its supervisory responsibility over employees handling representational matters. However, the Board's regional guidelines make it clear that, insofar as possible, the same individuals should not handle related unfair labor practice and representational matters.

<sup>22/</sup> These attorneys are assigned to the Division of Advice. See the Organizational Outline in Attachment II.

refusal to issue an unfair labor practice complaint on behalf of the General Counsel.<sup>23/</sup>

In addition to the criticism that prosecutorial and adjudicative functions were improperly intermingled, the Wagner Board's adjudicative process itself was criticized as being contrary to the Administrative Procedure Act and being contrary to fair judicial procedures.<sup>24/</sup> In particular, Congress was very critical of the Wagner Board's treatment of trial examiner's decisions. Thus, a trial examiner's decision was often heavily influenced by the trial examiner's superiors, and trial examiners often held secret meetings with the Board in an attempt to persuade the Board that the trial examiner's decision had been correctly decided. Further, Congress was concerned that the Board members were not being presented with the full record, since under the Wagner Board all appeals to the Board were initially screened by attorneys in the Board's Review Section, and Congress was concerned that the Board only

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<sup>23/</sup> These attorneys are in the Office of Appeals. Interestingly, the General Counsel has administratively made the Office of Appeals part of its Division of Enforcement Litigation, and in so doing, has improperly intermingled its prosecuting attorneys with the Board's enforcement attorneys. Thus, the Associate General Counsel of Enforcement Litigation has the primary responsibility for supervising the preparation of briefs on behalf of the Board, and is the General Counsel's principal deputy responsible for reviewing appeals to a refusal to issue an unfair labor practice complaint. In modifying its delegation to the General Counsel of its court work, the Board has specifically declined to become involved in the work of the attorneys in the Office of Appeals, as that work is clearly part of the General Counsel's statutory responsibility. See the Organizational Outline in Attachment II.

<sup>24/</sup> 93 Cong. Rec. 3953 (statement of Senator Taft) (1947), reprinted in 2 Leg. Hist., 1947, at 1011.



considered the issues that were presented by anonymous individuals. In response to such criticism, Section 4(a) prohibited a trial examiner's superiors from influencing a trial examiner's decision, and trial examiners were prohibited from advising or consulting with the Board regarding exceptions to their findings, rulings, or recommendations; and in place of the anonymity of the Review Section, a staff of legal assistants was provided to each Board member to review transcripts and prepare decisions on behalf of the individual Board members. <sup>25/</sup>

The foregoing explains why trial examiners and legal assistants, who are part of the Board's adjudicative process, were specifically excluded from the General Counsel's general supervisory authority over its prosecuting attorneys. Since the attorneys who represent the Board in court perform neither prosecutory nor adjudicative roles, the two functions that Congress was determined to recognize and reform, it is easy to understand, in retrospect, why Congress in its various debates did not focus a great deal of attention on the role of the Board's court attorneys. However, the issue was raised on a number of occasions by opponents to the new law <sup>26/</sup> and specifically by President Truman in his veto message to Congress. Among the numerous listed reasons for vetoing the legislation, the President stated, with particular reference to the enforcement of Board orders, that the Board's effectiveness would be hampered by permitting the General Counsel to determine "whether orders of the Board were to be referred to the court for enforcement." <sup>27/</sup>

<sup>25/</sup> See S. Rep. No. 105, 80th Cong., 1st Sess. 8-9 (1947), reprinted in 1 Leg. Hist., 1947, at 414-415; 93 Cong. Rec. 4267 (1947), reprinted in 2 Leg. Hist., 1947, at 1078.

<sup>26/</sup> See for example, 93 Cong. Rec. 6655 (statement of Senator Murray) (1947) reprinted in 2 Leg. Hist., 1947, at 1567; and 93 Cong. Rec. 7678 (statement of Senator O'Mahoney) (1947), reprinted in 2 Leg. Hist., 1947, at 1630-31.

<sup>27/</sup> President's veto message, 93 Cong. Rec. 7500, 7502 (1947), reprinted in 1 Leg. Hist., 1947 at 915, 918.

In reply to the President's veto message, Senator Taft pointed out that the President's analysis was wrong<sup>28/</sup> and wholly ignored the detailed presentation of the bill's provisions that had been provided on the Senate floor.<sup>29/</sup> In that presentation, Senator Taft stated that the amendments recognize "the principle of separating judicial and prosecuting functions without going to the extent of establishing a completely independent agency."<sup>30/</sup> Similarly, speaking on the floor of the Senate immediately before the vote to override the President's veto, Senator Taft referred to the General Counsel as a "prosecutor" who "will not have any extraordinary powers--nothing like the power of the Attorney General of the United States...."<sup>31/</sup> The Attorney General, of course, directs and controls the government's appellate court work. In stating that the

<sup>28/</sup> Indeed, the legislation on its face provides that the Board, not the General Counsel, would petition the courts of appeals for enforcement of Board orders. See Section 10(e). Furthermore, as Senator Taft pointed out, the President's message essentially mirrored the criticisms leveled against the legislation by Congressional opponents. "In their zeal to defeat a bill, they understandably tend to overstate its reach. It is the sponsor that we look to when the meaning of the statutory words is in doubt." National Woodwork, 386 U.S. at 639-640 (citations omitted). Accordingly, no weight can properly be attached to the President's remarks or to the remarks of various legislative opponents seeking to defeat the enactment of the amendments. (See fn. 26, supra.)

<sup>29/</sup> 93 Cong. Rec. A3232 (1947), reprinted in 2 Leg. Hist., 1947 at 1626. According to Gerald Reilly, who served as special counsel to the Senate Labor Committee and assisted in the drafting of the bill, President Truman, in his veto message was ill served in his reliance on a partisan memorandum attacking the legislation. Reilly, The Legislative History of the Taft-Hartley Act, 29 Geo. Wash. L. Rev. 285, 288 (1966).

<sup>30/</sup> 93 Cong. Rec. 6599 (1947), reprinted in 2. Leg. Hist., 1947, at 1538.

<sup>31/</sup> 93 Cong. Rec. 7691 (1947), reprinted in 2 Leg. Hist., 1947, at 1655-1656. Similarly, Congressman Hartley, in answering the questions of his colleagues regarding the independent authority of the General Counsel, pointed out that the General Counsel would have the responsibility of investigating charges and prosecuting complaints and that the General Counsel would have complete power over the attorneys prosecuting those complaints. In addition, although Hartley also indicated that the scope of the Board's judicial review had been expanded, he made no mention of the General Counsel's supervisory authority over the Board's enforcement attorneys. 93 Cong. Rec. 6540 (1947), reprinted in 1 Leg. Hist., 1947 at 883.

General Counsel would not have the power of the Attorney General, Senator Taft was making the point that the General Counsel would not have the statutory authority to direct or control the Board's court work. In addition, since the third stage of a Board proceeding, the enforcement of a Board order in court, is not a prosecutorial function, Senator Taft was also indicating that there was no intent to separate that function from the Board or to treat it differently from how it had been treated under the Wagner Act, where, as pointed out previously, the Board exercised total control over the attorneys who sought court enforcement of the Board's decisions and orders. <sup>32/</sup>

In making these statements, Senator Taft was pointing out that the Board was not merely a court. Instead, the Board was quasi-judicial, an administrative agency. <sup>33/</sup> Although the Board no longer exercised control over the prosecutorial functions of the Agency and the Board's adjudicatory process had been reformed, the responsibility of enforcing Board orders remained unchanged from the Wagner Act and belonged

<sup>32/</sup> Section 4(a) of the Wagner Act had been carefully considered before enactment as it permitted the Board to enforce its orders in the courts through its own attorneys and not be dependent on Justice Department attorneys, a procedure which had caused delays in enforcing the orders of the pre-Wagner Act Board established under Public Resolution 44. Most other agencies are still required to rely on Justice Department attorneys to represent them in court. Hearings on S. 1958 before the Committee on Education and Labor, United States Senate, 74th Cong., 1st Sess. 93-95, 97 (1935) (statement of Francis Biddle), reprinted in 1 NLRB, Legislative History of the National Labor Relations Act, 1935, at 1469-1471, 1473 (1949) [hereinafter cited as Leg. Hist., 1935]; S. Rep. No. 573, 74th Cong., 1st Sess. 5 (1935), reprinted in 2 Leg. Hist., 1935, at 2304-2305; Hearings on H.R. 6288 before the Committee on Labor, House of Representatives, 74th Cong., 1st Sess. 18-19 (1935) (statement of Robert F. Wagner), reprinted in 2 Leg. Hist., 1935, at 2492-2493; H.R. Rep. No. 1147, 74th Cong., 1st Sess. 3-4, 6 (1935), reprinted in 1 Leg. Hist., 1935, at 3049, 3052.

<sup>33/</sup> Thus, aside from the General Counsel's prosecutorial functions "...the statute left the Board all other functions of administration and enforcement of the law." Klaus, The Taft-Hartley Experiment in Separation of NLRB Functions, 11 Ind. and Labor Rel. Rev., 371, 378 (1958). For example, shortly after the Taft-Hartley amendments became effective, the courts disagreed with the General Counsel's interpretation of his statutory authority and found that the Board, not the General Counsel, had the discretionary authority to seek injunctions (Evans v. International Typographical Union, 76 F. Supp 881 (D.C. Ind. 1948)), to enforce subpoenas (NLRB v. International Typographical Union, 76 F. Supp 896 (D.C. N.Y.)), and determine the Agency's jurisdiction (Halston Drug Stores, Inc. v. NLRB, 187 F.2d 418 (9th Cir. 1951), cert denied 342 U.S. 815 (1952)). Accordingly, it is clear that the General Counsel's statutory exercise of general supervisory authority is limited to his role as a prosecutor, and the General Counsel's exercise of supervisory authority elsewhere is derived from authority delegated by the Board.

to the Board and not to the Agency's prosecutor, the General Counsel. Moreover, if the General Counsel were to have statutory, non-revokable supervisory authority over the court enforcement of Board orders, such authority could be used improperly to permit the General Counsel to intrude upon the Board's decision-making process and undercut the Board's ultimate responsibility to administer a national labor policy. As indicated above, in separating the prosecutorial and adjudicatory functions of the Agency, Congress clearly did not intend to permit the General Counsel, during the enforcement stage of a Board proceeding, to circumvent the Board's responsibility to interpret the National Labor Relations Act and prevent statutorily defined unfair labor practices.<sup>34/</sup>

Similarly enlightening as to Congress' intent in the Taft-Hartley amendments regarding the Board's authority to direct its enforcement attorneys is the rejection of H.R. 3020 insofar as that bill proposed substantial changes and modifications in Section 4(a) of the Wagner Act. H.R. 3020 would have created two agencies, the Labor-Management Relations Board and the Administrator of the National Labor Relations Act.<sup>35/</sup> In short, the Board would have been limited entirely to a judicial function and could not have appointed any attorneys other than legal assistants, trial examiners, and digesters. The Administrator would have performed all of the prosecutorial functions presently assigned to the General Counsel. In addition, H.R. 3020 specifically entrusted to the Administrator the responsibility of seeking the

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<sup>34/</sup> Section 201 of the National Labor Relations Board Organization and Functions, referred to supra. in Attachment I, and published at 47 F.R. 20888, states one of the two primary functions of the Board is: "The prevention of statutorily defined unfair labor practices...." Since Board orders are not self-enforcing, the "prevention" of unfair labor practices by necessity, encompasses control over the enforcement process.

<sup>35/</sup> H.R. 3020, 80th Cong., 1st Sess. Sections 3, 4 (1947), reprinted in 1 Leg. Hist., 1947, at 44-48.

enforcement in court of Board orders and the Administrator was specifically given the statutory authority to appoint and supervise the attorneys necessary <sup>36/</sup> for the performance of this duty.

In Conference, the House approach in this regard was not followed, and the Wagner Act provisions dealing with the Board's power to petition for enforcement of its orders [Section 10(e)] and to direct the attorneys representing it in court [Section 4(a)] survived intact. <sup>37/</sup> In rejecting the contrary provisions of H.R. 3020 and instead incorporating the relevant language of Sections 4(a) and 10(e) of the Wagner Act, it is clear that Congress intended that the Board retain the right to supervise, as well as to appoint and direct, the attorneys who appear in court on its behalf. Although there have been various subsequent Congressional attempts to redefine the Board's authority to appoint, direct, and supervise the attorneys who appear in court on the Board's behalf, none of those attempts has been successful. <sup>38/</sup>

<sup>36/</sup> Indeed, the House Report contained comments critical of the Board's staff and went on to state, "It is to be hoped that the Administrator will not employ such people." H.R. Rep. No. 245, 80th Cong., 1st Sess. 26 (1947), reprinted in 1 Leg. Hist., 1947, at 317. Such expressions of distrust of the Wagner Board, may in part, explain why the Board delegated so much of its statutory authority to the General Counsel in 1947. Thus, one commentator has pointed out that the majority of the first Taft-Hartley Board was comprised of holdovers from the Wagner Board. Those Board members, in an attempt to establish their objectivity and to deflect congressional criticism and continuing congressional scrutiny may have felt that it was necessary to delegate substantial Board authority to the newly appointed Republican General Counsel. Such a "political decision", of course, has no bearing on the Board's statutory authority to modify its delegation of duties to the General Counsel. See Klaus, supra., at 11 Ind. and Lab. Rel. Rev. 371, 389 (1958). Thus, contrary to the General Counsel's assertions, the Board's subsequent modifications to its delegation of duties to the General Counsel and the Board's reaction to former General Counsel Denham's insubordination establishes that the Board has always interpreted the General Counsel's supervisory authority over the Board's court attorneys as delegated, not statutory authority. See discussion, supra, at fn. 11.

<sup>37/</sup> H. Cong. Rep. No. 510, 80th Cong., 1st Sess. 5, 13-14 (1947), reprinted in 1 Leg. Hist., 1947, at 509, 517-518.

<sup>38/</sup> S. 249, 81st Cong., 1st Sess. (1949); Reorg. Plan No. 12 of 1950; and H.R. 8342, 86th Cong., 1st Sess. Section 701 (d) (1959), reprinted in 1 NLRB, Legislative History of the Labor-Management Reporting and Disclosure Act of 1959, at 748-749 (1959). H.R. 8342 was a particularly drastic piece of legislation which would have stripped the Board entirely of its enforcement authority under Sections 4(a) and 10(e) and delegated this function to the General Counsel. However, as stated above, this bill was not enacted. Thus, it is clear that Congress intended to preserve the Board's existing enforcement powers.



In addition, in his analysis, the General Counsel relies heavily on statements made after the enactment of the Taft-Hartley Amendments, including a 1948 Joint Congressional Committee Report. These comments are of little, if any, significance, for the Supreme Court has remarked that "post-passage remarks of legislators, however, explicit, cannot serve to change the legislative intent of Congress expressed before the Act's passage. Such statements represent only the personal views of these legislators, since the statements were made after passage of the Act."<sup>39/</sup> Moreover, many of the statements relied on by the General Counsel are not even statements of legislators. Furthermore, it is highly illogical for the General Counsel to argue as he does that the failure of attempts to abolish the office of General Counsel, or reduce its prosecutorial powers, somehow demonstrates that the General Counsel possesses the statutory authority to supervise the Board's enforcement attorneys. The fact remains, as this memorandum demonstrates, that the General Counsel has never had such statutory authority.

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<sup>39/</sup> Regional Rail Reorganization Act Cases, 419 U.S. 102, 132 (1974) (citations omitted).

V. THE SOLICITOR'S OFFICE

As set forth at p. 6 of his Analysis, the General Counsel contends that the manner in which the Solicitor's Office was created supports his contention that the General Counsel exercises general supervisory authority over the attorneys appointed by the Board to appear on its behalf in court. In fact, the manner in which the Solicitor's Office was created leads to the opposite conclusion--that the Board, not the General Counsel retains the statutory authority to direct these attorneys. Thus, General Counsel Denham's resignation at the request of the President, in addition to resolving the dispute over the Board's authority to direct and effectively control the attorneys who appear in court on its behalf, also resolved a secondary dispute that had arisen between the Board and the General Counsel over the control of the Solicitor's Office. As set forth previously, when the Board directed its Solicitor to file a brief in the Vulcan Forging case in opposition to the General Counsel's position, the General Counsel attempted to terminate the Solicitor, asserting that the Solicitor's action was without force and effect because the Solicitor was "subject to the general supervision of the General Counsel" as set forth in Section 3(d) of the Act.

The Board disagreed, claiming that under Section 4(a) it had the authority to appoint "such attorneys...as it may from time to time find necessary for the proper performance of its duties" and to direct those attorneys to "appear for and represent the Board in any case in court." In fact, subsequent to the enactment of the Taft-Hartley amendments but prior to the date that those amendments became effective, the Board had met informally with the Joint Committee of Congress, as provided for in Public Law 101, Title IV to discuss the Board's authority to appoint a Solicitor to advise the Board on broad

policy matters. It was the consensus of the Board and the representatives of the Joint Committee that, pursuant to Section 4(a) of the Act, the Board could designate a Solicitor to serve as a legal advisor to the Board as a whole and that the Solicitor would not be subject to the supervision of the General Counsel. <sup>40/</sup> Accordingly, with the informal approval of Congress, the Board created the position of Solicitor.

From the very first days of its establishment, it is clear that the Solicitor's Office has always been considered responsible to the Board and not to the General Counsel. Thus, when the Board delegated various duties to the General Counsel concurrent with the enactment of the Taft-Hartley amendments, the Board specifically excluded the Solicitor's Office from its broad delegation to the General Counsel of personnel responsibilities over various Board employees. In subsequent modifications and amendments to the initial delegation, the Board has always specifically excluded the Solicitor's Office from the General Counsel's delegated supervisory authority. Further, Section 201 of the National Labor Relations Board Organization and Functions specifically states that "the Board exercises full and final authority over...the Office of the Solicitor," and Section 202 states that the Solicitor's Office is specifically excluded from the exercise of the General Counsel's supervisory

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<sup>40/</sup> In a letter from the Comptroller General to the Chairman of the Board, dated 19 August 1947, unofficially reported at 20 LRRM 34, the Comptroller General found that the Board had the authority to appoint a Solicitor. The Comptroller also suggested that the question of the supervision of the Solicitor was a matter that was more properly resolved by the Attorney General. If it becomes necessary, the Board will request the Attorney General to render such an opinion. Finally, the Comptroller construed the term "legal assistant" narrowly. If necessary, the Board will seek a new Opinion from the present Comptroller on that matter; however, it is not contemplated that the Board's enforcement attorneys be designated "legal assistants."

authority.<sup>41/</sup> Section 202 further points out that the General Counsel's exercise of general supervisory authority is derived from the provisions of Section 3(d) and the various delegations of authority from the Board.

Obviously, if the General Counsel's exercise of general supervisory authority was derived entirely from the Statute, the Board's administrative division of responsibilities could not exclude the Solicitor's Office from the General Counsel's supervision. Unlike Section 3(d) which permits the Board to delegate duties to the General Counsel, there is no similar provision permitting the General Counsel to delegate duties to the Board.

Futhermore, the exercise of general supervisory authority over the Solicitor, the Board's legal counsel, by the General Counsel would be contrary to Congress' intent to separate the General Counsel's prosecutorial functions from the Board. Finally, if there were ever any doubt as to the General Counsel's assertion of supervisory authority over the Solicitor, General Counsel Denham's resignation at the request of the President is clear evidence that the issues of authority over the Solicitor's Office and the Agency's enforcement functions have been resolved by the Executive Branch in favor of the Board.<sup>42/</sup>

<sup>41/</sup> As set forth in fns. 1 and 4, all of the various delegations and the National Labor Relations Board Organization and Functions have been duly published in the Federal Register without any challenge from the General Counsel or any other party.

<sup>42/</sup> The General Counsel's assertion at page 8 of his Analysis that an informal unpublished agreement between the General Counsel and the Board on 22 August 1947 establishes the General Counsel's supervisory control over the Solicitor is without merit. The meaning of that agreement is susceptible to a number of interpretations, and is without effect in the face of official public documents published in the Federal Register. Further, the present General Counsel's reliance on former General Counsel Denham's subsequent 1953 testimony is of little value in interpreting Sections 4(a) and 3(d) as Denham's resignation, at the request of the President, was based in part on his attempt to carry out those views. See also fn. 39, supra.

VI. THE BOARD'S MINUTE DOES NOT INTERFERE WITH  
THE GENERAL COUNSEL'S GENERAL SUPERVISORY AUTHORITY

Finally, even if it is determined, contrary to the position asserted herein, that the General Counsel has the statutory authority under Section 3(d) to "exercise general supervision" over the attorneys appearing in court on the Board's behalf, the Board's 4 May 1983 Minute, as amended, does not interfere with such authority. Thus, as fully set forth in the Board's Minute, the General Counsel still has the authority to exercise many indicia of general supervisory authority. Therefore, if Section 3(d) is interpreted to give the General Counsel supervisory authority, not only over attorneys within his prosecutorial province, as illogical as that may seem, but also over the attorneys who enforce the Board's orders, such general supervisory authority has not been disturbed by the terms of the Board's 4 May 1983 Minute, as amended.<sup>43/</sup>

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<sup>43/</sup> Such general supervisory authority includes, for example, the authority to direct these attorneys in their work on a day-to-day basis and the authority to make effective recommendations regarding various personnel functions, such as promotions, transfers, and evaluations. The fact that the ultimate authority to hire, fire, pass on various personnel functions, and to direct the work of these attorneys is retained by the Board is not inconsistent with the possession of other statutory indicia of supervisory authority by the General Counsel. See, for example, Section 2(11) of the National Labor Relations Act, where the supervisory indicia in the Statute is interpreted in the disjunctive. Ohio Power Company v. N.L.R.B., 176 F.2d 385 (6th Cir. 1949), cert denied 338 U.S. 899.



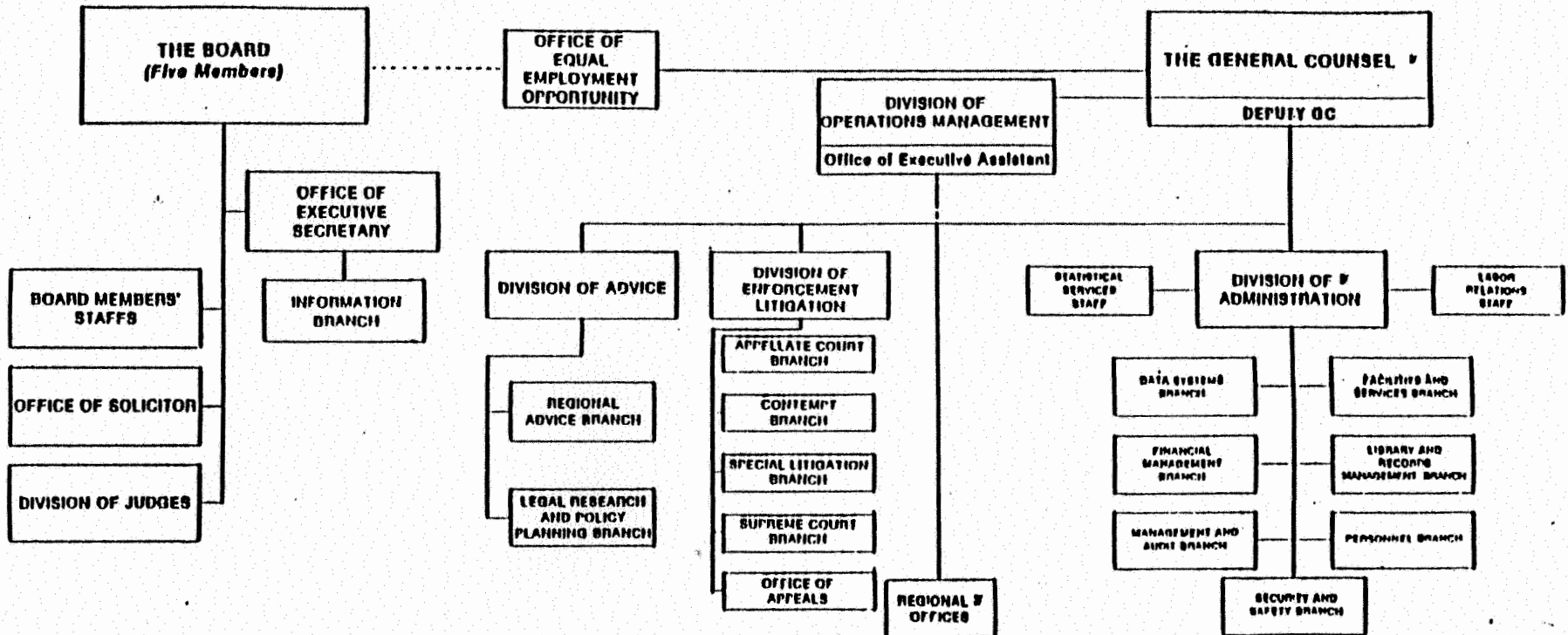
## ATTACHMENT I

The five Board Members are each appointed by the President, with the approval of the Senate, for a term of 5 years. One Member is designated by the President to serve as the Chairman of the Board. The Board has two principal functions under the National Labor Relations Act, as amended:

(1) the prevention of statutorily defined unfair labor practices on the part of employers and labor organizations, and (2) the conduct of secret-ballot elections among employees in appropriate collective-bargaining units to determine whether or not they desire to be represented by a labor organization.

The General Counsel is appointed by the President, with the approval of the Senate, for a term of 4 years. The General Counsel derives specific authority for some functions of the office from the provisions of Section 3(d) of the Act which provides that the General Counsel shall investigate, issue, and prosecute unfair labor practice complaints before the Board. In addition, as set out in Section 3(d), the General Counsel derives certain other authority by delegation from the Board. The organization of the Agency and the responsibilities of the Board and the General Counsel is set forth more fully in the National Labor Relations Board Organization and Functions which is published at 32 F.R. 9588 as amended by 37 F.R. 15956, as amended by 44 F.R. 34215, as further amended by 47 F.R. 20888.

# NATIONAL LABOR RELATIONS BOARD



1. The authority and responsibility of the General Counsel in certain administrative matters is derived by delegation from the Board.
2. Division of Administration is also responsible to the Board for administrative support services required in the performance of Board functions.
3. Includes exercise by Regional Director of Board authority under Section 9 of the Act, in representation cases, by delegation from the Board.

APPROVED:

*William A. Lubbers* *John C. Miller*  
 WILLIAM A. LUBBERS JOHN C. MILLER  
 General Counsel Chairman

JAN 25 1983

Date

ATTACHMENT II

### ATTACHMENT III

Section 3(d) provides:

"There shall be a General Counsel of the Board who shall be appointed by the President, by and with the advice and consent of the Senate, for a term of four years. The General Counsel of the Board shall exercise general supervision over all attorneys employed by the Board (other than trial examiners and legal assistants to Board members) and over the officers and employees in the regional offices. He shall have final authority, on behalf of the Board, in respect of the investigation of charges and issuance of complaints under Section 10, and in respect of the prosecution of such complaints before the Board, and shall have such other duties as the Board may prescribe or as may be provided by law. In case of a vacancy in the office of the General Counsel the President is authorized to designate the officer or employee who shall act as General Counsel during such vacancy, but no person or persons so designated shall so act (1) for more than forty days when the Congress is in session unless a nomination to fill such vacancy shall have been submitted to the Senate, or (2) after the adjournment sine die of the session of the Senate in which such nomination was submitted."

Section 4(a) provides:

"Each member of the Board and the General Counsel of the Board shall receive a salary of \$12,000 a year, shall be eligible for reappointment, and shall not engage in any other business, vocation, or employment. The Board shall appoint an executive secretary, and such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties. The Board may not employ any attorneys for the purpose of reviewing transcripts of hearings or preparing drafts of opinions except that any attorney employed for assignment as a legal assistant to any Board member may for such Board member review such transcripts and prepare such drafts. No trial examiner's report shall be reviewed, either before or after its publication, by any person other than a member of the Board or his legal assistant, and no trial examiner shall advise or consult with the Board with respect to exceptions taken to his findings, rulings, or recommendations. The Board may establish or utilize such regional, local or other agencies, and utilize such voluntary and uncompensated services, as may from time to time be needed. Attorneys appointed under this section may, at the direction of the Board, appear for and represent the Board in any case in court. Nothing in this Act shall be construed to authorize the Board to appoint individuals for the purpose of conciliation or mediation, or for economic analysis."

MINUTES OF BOARD ACTION

May 27, 1983

The Board has considered how best to carry out its statutory powers to petition courts for enforcement of its orders; resist petitions for review; support its legal positions before the United States Supreme Court; seek compliance with its orders and, where necessary, institute contempt proceedings; and participate in miscellaneous court litigation. In this connection, the Board has reviewed the General Counsel's delegated assignments with respect to these statutory powers as such assignments are set forth in the Board Memorandum Describing the Authority and Assigned Responsibilities of the General Counsel of the National Labor Relations Board effective April 1, 1955.

In order to exercise its statutory powers more responsibly and effectively, the Board (Member Zimmerman abstaining, Member Dennis not present) today has decided to amend the Minutes of May 4, 1983, to read as follows:

1. Effective immediately, all pleadings and briefs in proceedings involving enforcement, review, Supreme Court litigation, contempt, and miscellaneous litigation shall be submitted to the Board's Solicitor at least one week before they are due to be filed.
2. The aforementioned pleadings and briefs shall thereafter be filed by the General Counsel on the Board's behalf only after the Board's approval. This authority may be delegated by the Board to the Solicitor, Deputy, Associate, and Assistant Solicitors.
3. Briefs and pleadings filed by the General Counsel on the Board's behalf shall list as counsel only:
  - (a) the Board's Solicitor or Deputy Solicitor, Associate Solicitor, or Assistant Solicitor if delegated as provided in paragraph 2;
  - (b) the attorney immediately responsible for supervising the drafting of the pleading or brief; and
  - (c) the attorney or attorneys who actually drafted the pleadings or brief, or who will argue the case.
4. Effective immediately, the Board will exercise its statutory authority, set forth in Section 4(a) of the Act, to appoint all attorneys and related employees needed to carry out the functions set forth in the preamble of this minute and in paragraph 1. The Board retains for itself the authority to transfer, promote, discipline, discharge, and take any other necessary and appropriate personnel action with regard to all employees referred to herein. The Board, in turn, delegates this authority to the Chairman, subject to redelegation by him.

5. The Board desires that the General Counsel exercise general supervisory responsibility over the attorneys and related employees performing the functions listed in the preamble and in paragraph 1. Evaluations and other personnel recommendations shall emanate from the immediate supervisors of the personnel involved and the General Counsel but shall be subject to final approval of the Board.

6. The Board directs that the Solicitor's office and staff relocate to the area where the attorneys involved in enforcement litigation are located.

The Executive Secretary is directed to communicate the Board's instructions to the General Counsel forthwith.

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John C. Truesdale  
Executive Secretary

APPROVED:

Donald L. Dotson  
Chairman

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Howard Jenkins, Jr.  
Member

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Don A. Zimmerman  
Member

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Robert P. Hunter  
Member

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Patricia Diaz Dennis  
Member

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## STEVE ANTOSH

# Another union 'hot air' campaign

**T**he hot air mass that settled on Capitol Hill the other day was displaced by a wave of refreshingly cool air flowing in from the National Labor Relations Board. The result will be fairer weather for the nation's workers.

At the apparent behest of the AFL-CIO, the House-Labor Management Relations Subcommittee last Wednesday grilled NLRB Chairman Donald Dotson on the motives behind a series of recent board decisions. Dotson's cool responses frustrated congressmen who were attempting to use the hearings to spark a hot scandal.

Union chiefs have been up in arms because Dotson and the rest of the five-member board recently moved to rein in the monarchic powers of the board's general counsel. In the past, union officials had counted on the general counsel as a powerful and reliable ally.

The board decided that as their official attorney, the general counsel ought to at least check in with the board occasionally on policy being represented in court. This is especially appropriate, given the fact the general counsel has lost more than one-third of all board court cases.

AFL-CIO leaders met his action with piercing cries of "union-busting" and "stacking the deck." The union verbiage was reminiscent of the first attack on Dotson,

when he was nominated last winter to serve as NLRB chairman.

AFL-CIO brass immediately labeled him "anti-worker." And since Dotson had previously served as legal counsel for several industrial firms, the AFL-CIO higher-ups decried him as "pro-management." (Somehow the laborites never accused him of being "pro-union," even though Dotson had at one time served as a local union president.)

The AFL-CIO later withdrew its opposition, admitting their loud protest was "not sufficiently documented." Dotson was subsequently confirmed by the Senate.

When the smoke cleared from the recent hearings, it was evident the unions had simply choreographed another "hot air" campaign, with no evidence to back up their heated accusations. If anything, the hearing served to highlight Donald Dotson's superb credentials and performance as chairman of the National Labor Relations Board.

A clear pattern has evolved in all this, and a lesson should be learned for the future. Whenever union officials lack evidence, they throw out emotional buzz words like "anti-worker" or "union busting" to cloud the issue.

Dotson's previous experience in the labor relations field has gone a long way toward removing the "ivory tower" stigma long ascribed to the board. His commitment to individual rights promises to restore what has become the lost party in labor relations — the worker himself.

The reform under way at the NLRB is eminently sensible, especially given the bias of the current general counsel, a former union organizer. The board now should seek other ways to corral the domain of this "labor czar."

Unlike other board members, Dotson may not be offered a union job upon retirement. But then again, that's a small price to pay to restore the interests of the U.S. worker to its rightful place in American labor policy.

*Steve Antosh is executive director of the Center on National Labor Policy, a public interest legal foundation concerned with workers' rights.*

# Restoring Balance To the Labor Board

Reagan's appointees have reduced the NLRB's pro-union tilt, but not as much as expected—so far.

**T**WO THIRDS of the workers voted against union representation. But the National Labor Relations Board held that the employer had used unacceptable means to discourage a pro-union vote and must therefore negotiate with the rejected labor organization.

In another case, the board upheld a call for a boycott of all tenants in a shopping mall by a union engaged in a dispute with a contractor building one store in the mall. In still other cases, the NLRB has opened major loopholes in laws designed to limit union jurisdiction over employees who have access to employers' confidential information.

Those are some of the NLRB decisions that caused the National Labor Relations Act Task Force of the U.S. Chamber of Commerce to conclude in a recent report: "Over the past few years, the National Labor Relations Board has repeatedly taken positions that support the institutional interests of organized labor."

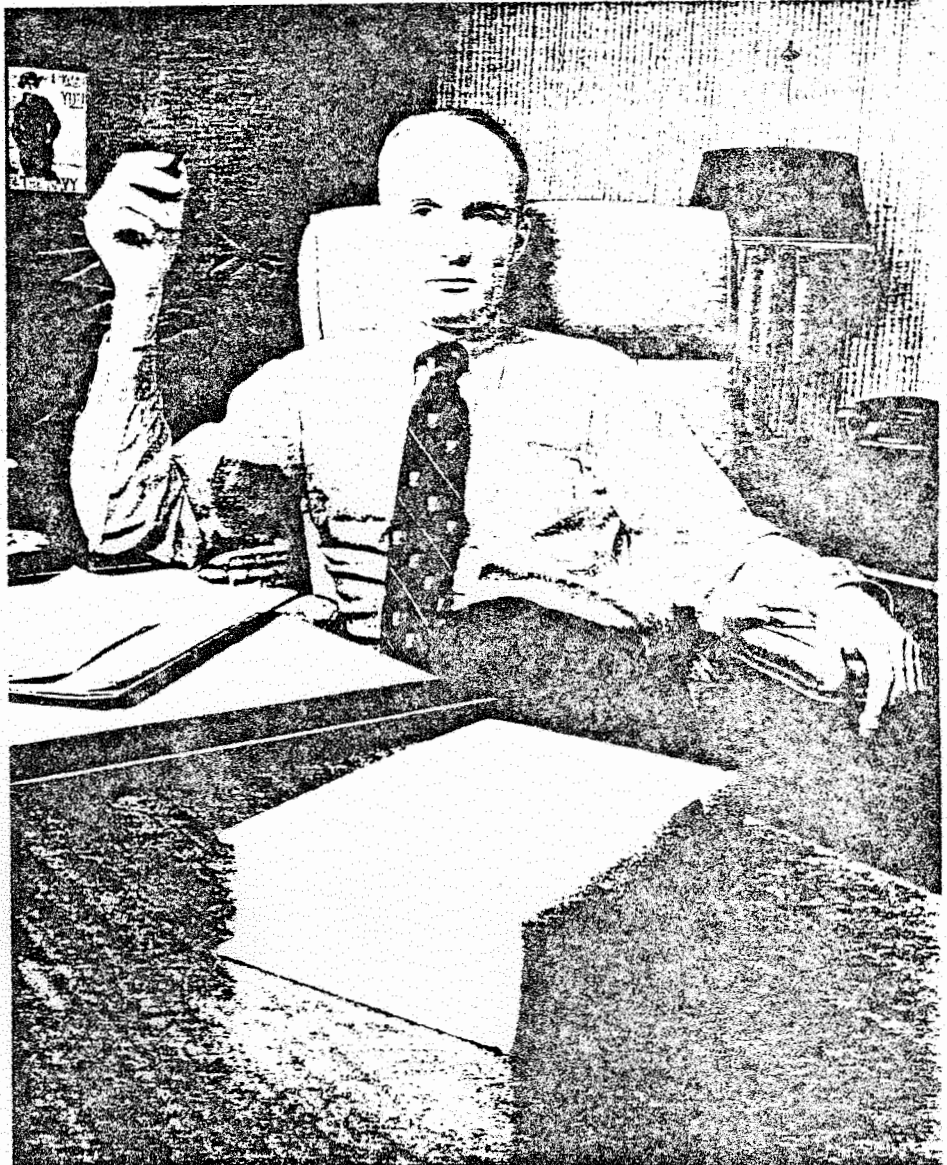
Labor law specialists from industry and the legal profession served on the task force, which also concluded that the board in many recent decisions involving representation cases has "helped fortify union positions in some areas and has helped unions secure a foothold in others."

Said the task force: "The board appears to interpret standards of conduct in election campaigns more strictly against employers than against unions, when one side or the other is seeking to set aside a board election."

"Similarly, board determinations with respect to procedural rules and remedies lack evenhandedness and balance. Recent bargaining-unit determinations of the board have facilitated union expansion, particularly into white-collar occupations."

Against that background, business is wondering what changes to expect in the NLRB's outlook, now that it has a majority of members, including the chairman, appointed by President Reagan.

The consensus of the experts: Change is coming more slowly than anticipated. But there are growing signs of a historic shift, within the next few



NLRB Chairman Donald L. Dotson believes it is not "in the best interest of wage earners for us to lose industries because of our inability to solve labor problems."

years, away from what business people have long considered the board's pro-union stance.

Reagan appointees now serving are:

- Donald L. Dotson, the chairman, who began his law career as an NLRB field attorney and later was labor counsel to major corporations. He has been critical of past NLRB decisions.

- Patricia Diaz Denis, who came to the

board from the law section of the American Broadcasting Company and previously worked for a nationally prominent law firm based in Los Angeles.

- Robert L. Hunter, who was chief counsel to the Senate Labor and Human Resources Committee under the chairmanship of Orrin Hatch (R-Utah), a leading congressional conservative.

The other two members are Howard

cal motivation. With the backing of the other board members, except Zimmerman (Denis had not yet begun service on the board), Dotson took responsibility for the management of the lawyers who represent the board in court.

Dotson's office will review all papers prepared by the lawyers, and he will have responsibility for hiring, promotions and terminations. Lubbers retains

congressionally mandated power to issue complaints in labor-management disputes, supervise regional investigations and prosecute in cases of alleged unfair labor practices.

The new arrangement was described by critics close to organized labor as a move to undercut Lubbers because of his Carter administration connections and longtime service under one of the

board's most unabashed friends—unions, former Chairman John Fanning.

But many other private-sector specialists on labor law defend the move. "It's a long overdue change," says John Penello, himself a former NLRB member now in private law practice in Washington.

There has been speculation that the Dotson move to curtail Lubbers will

## Concern for the Wage Earner

The NLRB's chairman believes in applying the law to large and small unions alike.

If the chairman of the National Labor Relations Board somehow seems like a U.S. Marine—even though he never was one—that is because he was raised in a Corps atmosphere.

Donald L. Dotson was born in 1938 in rural North Carolina, where his father was a small businessman and volunteer fireman. In 1945, the elder Dotson became the civilian fire chief at Quantico Marine Corps Base, just south of Washington. With the job came quarters on the base and officer-equivalent status.

Don Dotson attended the dependents' school on the base, where he was captain of the football team and president of the student council. He entered the University of North Carolina in 1957 with no career goals clearly in mind, but he did feel obligated to serve in the armed forces. He earned his bachelor's degree in international law and politics in three years, and he was accepted for naval aviation officer candidate school.

As a junior naval officer, Dotson served in an attack squadron, and one of his duties was to be squadron legal officer. After five years in uniform, he decided on a legal career. While in law school at Wake Forest University in Winston-Salem, N.C., he specialized in administrative law, including labor law.

Fresh out of law school, he went to work as a field attorney for the NLRB in Winston-Salem in 1968. His first case involved a paper company represented by a prominent attorney, who started the first meeting by saying: "Dotson, there's one thing I want you to know—next to the Equal Employment Opportunity Commission, we think you're the sorriest people on the face of the earth."

There were other rebuffs for Dot-

son, who as a field attorney from 1968 to 1973 handled the full gamut of NLRB activities—investigating cases, holding representation elections and hearings, and trying cases on allegations of unfair labor practices.

While with the NLRB, Dotson was president of an employee local. He had been a union member once before—while in law school, he worked a couple of summers as a Greyhound bus driver and joined the drivers' union.

In 1973 Westinghouse offered Dotson a job in its Pittsburgh headquarters as an attorney in the labor law division. Two years later Western Electric Company lured him away, and the following year Wheeling-Pittsburgh Steel Corporation hired him as its chief labor counsel. He was in that spot, and content, in 1981, when an unsolicited offer came from the White House personnel office—he was asked whether he would take a labor-related job in the Reagan administration.

Dotson was not interested in the NLRB, but he did accept the job of assistant Labor secretary for labor-management relations. Dotson's nomination was unopposed, and the Senate Labor and Human Resources Committee did not bother even to hold hearings on the nomination before sending it to the full Senate for confirmation.

In the Labor Department, Dotson's office was charged with enforcement of the Labor-Management Reporting and Disclosure Act and the Employee Retirement Income Security Act. Under his leadership the office became more aggressive. Dotson's staff developed an on-site auditing program for unions, and in two years the number of unions being audited was five times larger than before.

Dotson became aware that no international union had been audited in the seven years before he took office—a situation he soon rectified. "An international," he says, "as far as the law is concerned, is no different from a local or any other labor organization entity subject to the law or subject to the audit. It didn't seem right that the largest, or the groups that would tend to handle the most money, had apparently been put off limits."

Worse, some audits could not even begin without being cleared with some political figure. Dotson outlawed such clearances. During his tenure at the Labor Department, he added to his unfavorable rating with some union leaders by vigorously pursuing pension fund embezzlement investigations.

Dotson says that his only motive has been a desire to protect the interests of wage earners. "Over the years," he says, "the Labor Department's record in those areas was abysmal."

Late last year, when it became obvious that John Van de Water, President Reagan's original nominee to be chairman of the NLRB, was not going to win approval, Dotson was sounded out for the job. He preferred to continue at Labor, but he said, "If the President appoints me, I will accept."

In a letter to the Senate Labor Committee, AFL-CIO President Lane Kirkland expressed "grave reservations" about the Dotson nomination, but his letter was the only sign of dissent. Again Dotson's trip through the Senate confirmation process was smooth.

Whether his tenure as chairman will be nearly as smooth remains to be seen.

—Grover Heiman