Testimony of
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before the
Subcommittee on Health, Employment, Labor, and Pensions
Committee on Education and the Workforce
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Chairman Roe and members of the Subcommittee:

Thank you for this opportunity to testify before the Subcommittee regarding "Emerging Trends at the National Labor Relations Board."

The National Labor Relations Board (NLRB) is an independent federal agency that administers the National Labor Relations Act (NLRA). The Board has two primary functions: to prevent and remedy unlawful acts, *i.e.*. unfair labor practices by either employers or unions, and to determine, through secret-ballot elections, whether or not a unit of employees wish to be represented by a union in dealing with their employer and, if so, which union.

The NLRB has two major, separate components. The Board itself, consisting of up to five members, adjudicates unfair labor practice complaints on the basis of formal records in administrative proceedings and resolves election case issues. The second component is the Office of General Counsel. The General Counsel has independent prosecutorial authority and is responsible for the investigation and prosecution of unfair labor cases and for the general supervision of the NLRB's 32 Regional Offices and satellite offices in the processing of both unfair labor practice and representation cases.

I served as General Counsel from June of 2001 to January of 2006. Therefore, this statement will attempt to focus on arising issues within the General Counsel's purview. There are, however, compared to Board side activities, fewer clear guideposts from which to derive General Counsel prognoses. First, Acting General Counsel Lafe E. Solomon only has headed the Office since late June of 2010. The Obama Board, conversely, has nearly two years of published decisions, plus nearly a decade of dissents by Member Liebman (now

Chairman) from which to glean an anticipated decisional proclivity for the current Board.

Secondly, and most significant, the General Counsel's influence often is exercised subtly, *e.g.*, through enhanced enforcement of a certain class of cases, or through instructions to the Regional Directors, or in the way a case is presented, or even in performance evaluations of General Counsel Office employees. President Truman vetoed the Taft-Hartley Act (subsequently overridden by Congress in 1947), in part because of the concern that creation of an independent General Counsel, would result in creation of a labor czar. Prior to the vote to override the President's veto, Senator Taft answered criticism that the Act placed too much power in the hands of a single official, explaining:

> In order to make an effective separation between the judicial and prosecuting functions of the Board and yet avoiding the cumbersome device of establishing a new independent agency in the executive branch of the Government, the conferees created the office of general counsel of the Board…. We invested in this office final authority to issue complaints (and) prosecute them before the Board….
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> (H)e, of course, must respect the rules of decision of the Board and of the courts. In this respect his function is like that of the Attorney General of the United States or a State attorney general.

In practice, President Truman's concerns have proven unfounded. In large part, I believe, because of the integrity, as well as respect for the institution, of those who have served, and continue to serve, as General Counsel. And, of course, because of the extraordinary career staff in the Office of the General Counsel.

Consistent with its duties under the NLRA, the Office of the General Counsel should have no reluctance to present cases to the Board seeking reversal of current law when the Board signals some willingness to change its view or where a Supreme Court decision has called current Board law into question. The process, however, is not self-initiating. The General Counsel can issue a complaint only upon the filing of a charge alleging an impropriety.

In performing the duties of chief prosecutor and investigator under the NLRA, the General Counsel, through the Regional Office staffs, investigates, determines

merit, and thereafter either dismisses the unfair labor practice charges or, absent settlement, commences formal adjudication by issuing administrative complaints. In making these merit determinations, the General Counsel is guided by the body of decisions and orders of the Board.

In fiscal year 2010, more than 23,000 unfair labor practice cases were filed in the Regional Offices. Of these, slightly more than 35.5% were found meritorious, with the reminder dismissed or withdrawn by the charging party. 95% of the merit cases were settled. A high settlement rate is important, not only in preserving agency resources, but because it allows the parties to get back to work by putting the conflict to rest. This result was a major goal of Congress when creating the NLRB.

With the foregoing in mind, let us examine some GC memoranda issued by Acting General Counsel Solomon. They may prove revealing in terms of what can be expected of the Office of General Counsel in the next few years.

MEMORANDUM GC 11-04

GC 11-04 was issued on January 12, 2011. It has the potential to adversely impact the aforementioned settlement rate. The issue addressed is inclusion of default provisions, and the language used in those provisions, in informal settlement agreements. Heretofore, Regions had utilized default language where there was a substantial likelihood that the charged party/respondent would be unwilling or unable to fulfill its settlement obligations. Regional Directors had discretion to use, and modify, default language based on case circumstances.

GC 11-04 now requires the Regions to "…routinely include default language in all informal settlement agreement…." The concern, of course, is that charged parties may refuse to enter into informal settlements containing affirmative obligations. Clearly, default language may save agency resources in the event of a breach of a settlement agreement. However, these resource savings are lost, and other costs to the agency incurred, if charged parties/respondents avoid settlement. GC 11-04 cites experience of three regions (out of 32) to imply that settlement percentages will not be affected by the new policy. There is concern that this will not prove to be correct, particularly when default language subjects charged parties to a remedial order for all complaint allegations, not only the affirmative obligations contained in the settlement agreement.

GC 10-07

The Acting General Counsel here attempts to increase scrutiny afforded to unlawful discharges, referred to as nip-in the-bud violations, which occur during a union organizing campaign. The justification for this lies in the argument that other employees are chilled in the exercise of their section 7 rights because of fear that active participation in the campaign will result in similar punishment. Further, it is argued, that the discharge of union adherents deprives remaining employees of leadership of union supporters.

Countering these arguments, it should be noted that over 92% of the 1790 initial representation elections conducted in fiscal year 2010 were held pursuant to agreement of the parties, and over 95% of these elections were conducted within 56 days of the filing of the election petition. And, of course, these elections were conducted by secret ballot. Nonetheless, it cannot be gainsaid that unlawful discharges that occur during an organizing campaign should and must be remedied. The question that arises, and may be answered through review in the future of representation case statistics, is whether the remedial efforts can be justified.

GC 10-07 shortens in time frames for agency action in nip-in-the-bud cases. In addition, the use of 10(j) injunctive relief is to be considered in most cases, and the Acting General Counsel will personally review all pending organizing discharge cases found to have merit, to decide whether 10(j) authorization should be sought from the Board.

GC 10-07 notes that its required approach to nip-in-the-bud cases can drain resources in the field. Devoting scarce resources to a problem that may not be critical means that resources will be shifted from other issues, perhaps such as illegal secondary boycotts.

GC 11-01

GC 11-01 builds on GC 10-07, by outlining non-traditional remedies to be sought by the Regions for employer violations occurring during organizing campaigns. The memorandum both sets forth these remedies, and provides a rationale to be used by the Regions when arguing that certain extraordinary

remedies are necessary to "…restore an atmosphere in which employees can freely exercise their Section 7 rights."

The remedies set forth in GC 11-01 include:

- Public reading of Board notices, to the widest possible audience, by a responsible management official;
- Access to bulletin boards;
- Provide union with list of employee names and addresses, earlier than the current Excelsior list requirements;
- Union access to employer property;
- Access and time for union pre-election speeches.

GC 11-01 and GC 11-07 are directed only at employer misconduct.

GC 11-05

For over a half century, the NLRB has, through deferral to final and binding arbitration awards, encouraged parties to resolve their disputes by voluntary methods agreed upon by the parties. This approach recognizes that the NLRA was designed by Congress to promote industrial peace and stability, and that a collective bargaining agreement that contains a final and binding grievance/arbitration provision contributes to this objective.

The Board's deferral policy has not always been a smooth road. Over the years, some commentators, and some courts, have expressed concerns regarding possible abdication of the NLRB's role in protecting statutory rights by deferring that role to an arbitrator. However, at least 1984, the parameters of post-arbitral deferral have been relatively clear, and accepted and understood by the parties. The process is referred to as Spielberg/Olin deferral.

In a nutshell, where disputes involve both contract and NLRA issues (*e.g.*, did the termination of an employee violate the just cause provisions of the collective bargaining agreement, and also constitute an unfair labor practice), the Board has consistently deferred to an arbitration award if the process was fair and regular, all parties agreed to be bound by the determination, and the award was not repugnant to the purposes and policies of the NLRA. The arbitrator is considered to have adequately the alleged unfair labor practice

where the contract issue was factually parallel to the unfair labor practice issue, and the arbitrator was presented with facts generally relevant to resolving the unfair labor practice. The burden of showing that these requisites were not met is placed on the party objecting to deferral.

GC 11-05 would turn this well-established practice on its head. The memorandum, in effect, urges the Board to revise its approach to deferral. Regional Directors are therein instructed to defer only where it is shown that the statutory right in question is incorporated in the collective bargaining agreement or that the statutory issue was presented to the arbitrator, and the "arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue." Further, the burden is now placed on the party seeking deferral.

The Acting General Counsel seeks to revise the ground rules in all deferral cases, including pre-arbitral deferral, where an employer is alleged to have violated a collective bargaining agreement provision, and to have committed an unfair labor practice. If adopted, I fear that there will be fewer deferrals, greater expenditure of agency resources, and diminution in achievement of the Congressional goal of promoting industrial peace and stability.

Thank you for the opportunity to address these issues before the Subcommittee. I would be happy to try and answer any questions you may have.