



United States Government

NATIONAL LABOR RELATIONS BOARD

Office of the General Counsel

1015 Half Street, SE

Washington, DC 20570

August 14, 2020

The Honorable Patty Murray
United State Senate
154 Russell Senate Office Building
Washington D.C. 20510

The Honorable Bobby Scott
United States House of Representatives
1201 Longworth House Office Building
Washington D.C. 20515

The Honorable Rosa DeLauro
United States House of Representatives
2413 Rayburn House Office Building
Washington D.C. 20515

Dear Senator Murray, Representative Scott, and Representative DeLauro:

I have received your letter dated August 6, 2020. I understand that Congress receives substantial information from many sources, including people and organizations who promote a particular point of view. I also realize that Congress is often hard-pressed to find the time and resources to verify the accuracy of the information, especially given the current need to deal with the impact of the COVID-19 pandemic on people's health and the economy. I am happy to correct the record on the District IV Resource Sharing Plan. As you will see from the discussion below, certain conclusions that were apparently drawn from the misinformation provided to Congress were quite simply incorrect. Even worse, erroneous conclusions and spurious speculation appeared in the media, even before I received your letter, much less had an opportunity to respond. Predictably, some took the opportunity to press agendas, based on the misinformation, which is a disservice to those who practice before the Board, as well as the general public. Because of the widespread confusion and factual distortions, I will be making this response public. Hopefully in the future, there will be discussion prior to publication.

I have been assured by the Division of Operations-Management and a Regional Director involved that the District IV Resource Sharing Plan was developed by all the District IV Regional Directors, in consultation with their managers and supervisors and in collaboration with the Division of Operations-Management, to address chronic workload imbalances among the different Regions in District IV. Other than to encourage Regional Directors in all four Districts to explore new ways to deal with the imbalance in caseload, I was not involved in the

deliberations and development of the plan. As revealed below, the plan is not a “reorganization.” Rest assured that if and when I develop a plan for re-organizing or eliminating Regional offices, I will seek advice from Congress before implementation.

In formulating the plan, the Regional Directors of District IV did not decide to “demote” themselves or diminish their own authority. The transfer of cases from one Region to another for investigation and/or litigation has occurred in the Agency for decades and is not something novel or unexpected. This transferring of cases is one mechanism I have used to avoid closing regional offices, which my predecessors have done. Thus, I had no inclination, and see no reason now, to prevent District IV from trying out the plan they developed.

The Resource Sharing Plan has three components: 1) Assignment of Unfair Labor Practice Investigations, 2) Assignment of Unfair Labor Practice Trials, and 3) Remote Supervision. This response will relay accurate information concerning the plan, why the plan was necessary, and how the plan was developed in concert with the Regional Directors. I am happy to provide this information, which will demonstrate that the Agency’s actions best serve the public interest.

Background

Over the past decade, case filings have decreased approximately 2% per year. Over the past two decades, case filings have decreased approximately 3% per year. From FY2012 to FY2019, unfair labor practice case intake dropped from 21,622 to 18,913 – a nearly 13% decrease. As of August 10, case intake is down an additional 15.7% from the same period the previous year.

In addition, caseloads vary among the Regions and offices across the country. In FY2019, unfair labor practice charges (ULP) filings ranged from under 400 in some Regions to over 1100 in other Regions. Representation case filings are similarly varied. For instance, in Region 1 (Boston) 135 representation cases were filed during FY2019, but in Region 8 (Cleveland), only 39 representation cases were filed.

Further, the Agency has also seen dramatic fluctuations in case-intake within Regions on a monthly and quarterly basis. For example, in Region 19 (Seattle), in July 2019, 90 ULP cases were filed, but only 57 were filed in August 2019. In Region 1 (Sub-Regional Office Hartford) in February 2019, ULP cases were down by 28% but in May 2019, filings were up 48%.

Over the past decade, our full-time equivalent staff (FTEs) both in headquarters and in the field have also decreased. At the end of FY2012, the Agency had 1,698 FTEs with 1,195 in the field offices. At the end of FY2019, the Agency had 1,281 FTEs with 830 in the field offices. The steady decrease in staffing throughout the past decade occurred through attrition – there were no involuntary terminations or transfers. Although overall staffing is more than sufficient to process the current caseload, this reduction in staff through attrition has caused imbalances in staffing within Regional offices as well as among Regional offices. As is customary, the Agency’s Division of Operations-Management is constantly assessing the needs of each Region based on caseloads.

To address these imbalances and share resources, numerous meetings, the purpose of which were to collaboratively develop a plan to address these imbalances, were held with the Regional Directors of all Districts, including District IV, and the Division of Operations-Management.

Many of these Regional Directors also met with their managers and supervisors to solicit their input. Notably, given concerns your letter expresses about the plan’s impact on Black Regional Directors, the original proposal for case distribution was presented by one of the three African American Regional Directors in the District. The final version of the District IV’s Resource Sharing Plan is the result of intense collaboration among the District IV Regional Directors, managers, and supervisors and the Division of Operations-Management.

Assignment of Unfair Labor Practice Investigations:

The chart below represents the current staffing levels and case intake for each of the Regions in District IV for the period July 1, 2019 through June 30, 2020; it reveals that agents in some Regions are required to investigate more than twice as many cases per month as agents in other Regions. More importantly, the case intake numbers clearly reflect the imbalances in case intake among Regions in District IV. Such an imbalance in the workloads of agents and Regions is inherently inefficient and compromises our ability to provide timely service to the public across Regional boundaries. Regions with fewer agents-per-case resources are not in a position to process cases as efficiently or effectively as other Regions.

| Region | Case intake 7/1/2019-6/30/2020 | Monthly Case Intake | Agent FTE | Monthly cases per Agent FTE |
|--------|--------------------------------|---------------------|-----------|-----------------------------|
| 19 | 946 | 79 | 23.8 | 3.3 |
| 20 | 716 | 60 | 18.5 | 3.3 |
| 21 | 569 | 47 | 19.4 | 2.4 |
| 27 | 381 | 32 | 6 | 5.3 |
| 28 | 936 | 78 | 19 | 4.1 |
| 31 | 626 | 52 | 15.5 | 3.4 |
| 32 | 555 | 46 | 8.8 | 5.3 |

NLRB field offices’ success derives from the experience of Regional Directors and their staffs with a breadth of labor issues arising in diverse communities under the National Labor Relations Act, a federal law that applies uniformly throughout the United States. While exposure to recurring issues or parties can be of some benefit in certain cases, in our experience, equal or greater benefit results from exposing NLRB staff members to a broad spectrum of labor law issues and parties. Moreover, many unfair labor practice charges are now filed against employers and unions that conduct business on a multi-state or national level which makes regional expertise irrelevant. Transferring cases among Regions under the InterRegional Assistance Program (IRAP) is one method that has been used to address imbalances between intake and case handling capacity.¹ At best, it provides a temporary fix. Regions have historically requested

¹ The Interregional Assistance Program involves transferring cases from the Region in which they were filed to another Region for investigation and disposition. IRAP has been existence for decades.

IRAP only after they have fallen significantly behind, which perpetuates the workload imbalances.

Traditionally, assignment of cases is delegated by the Regional Director to a manager in the office, usually the Assistant to the Regional Director. This delegation frees up the Regional Director to spend more time deciding cases and managing the Region. Under the plan, each Region would select a representative to serve as the District Case Assignment Coordinator (DCAC) on a monthly rotation. Daily filings would go to the DCAC, who would distribute case investigations to each Region based on several considerations including:

- Priority Cases – 10(j) or 10(l) cases will go to the Region where dispute location resides
- Nature of the case: Cases requiring face-to-face affidavits will be directed first to the Region closest to the witnesses involved.
- Familiarity with Parties/Subject Matter
- Existing Regional Caseloads – Cases will be distributed across the Regions to address imbalances.

The DCAC would confer with Regions concerning particular cases as appropriate. Once the DCAC has assigned the case to a Region, the Region would assign it to the appropriate agent and supervisor. Neither the Division of Operations-Management, nor the General Counsel has been, or will be, involved in individual case assignments.

Having a single person – located in a Region and attached to that Region – assigned to manage District-wide intake and assignments to Regions ensures a holistic approach to resource imbalances and a better flow of information between and among Regions. Because of the prospect that some Regions may try to soldier on during an intake surge to avoid burdening other Regions, or because that Region is unaware of a recent drop in cases elsewhere within the District, having a single DCAC is a better solution than ad hoc transfer of cases.

Moreover, it is important to note that since March 2020, unfair labor practice and representation petitions have been investigated remotely. Therefore, proximity to potential witnesses is currently irrelevant.

Trial Assignment:

Another imbalance addressed by District IV's Resource Sharing Plan is Trial Assignments. Again, unfair labor practice cases have been transferred among Regions for decades. Indeed, at one point, District Litigation Specialists were created to handle complex litigation in the District. In recent years, litigation imbalances have become more acute. During Fiscal Year 2019, the Regions in District IV held 45 unfair labor practice hearings. Overall, District IV has four attorneys for every one trial conducted. As the chart below demonstrates, however, the imbalances of trial assignments among Regions is significant, ranging from zero ULP hearings per lawyer to one trial for every three lawyers. In my extensive litigation experience, I have found that an attorney must litigate periodically to maintain the necessary trial skills.

| Region | Unfair Labor Practice Hearings Closed in FY 2019 | Field Attorneys on Staff (Not FTE) | # of Trials Per Atty |
|--------|--|------------------------------------|----------------------|
| 19 | 7 | 17 | 2.4 |
| 20 | 8 | 11 | 1.4 |
| 21 | 6 | 16 | 2.7 |
| 27 | 0 | 7 | |
| 28 | 17 | 12 | 0.7 |
| 31 | 4 | 13 | 3.2 |
| 32 | 3 | 6 | 2.0 |

The solution to this imbalance is simple and straightforward. The plan creates a committee consisting of one representative (selected by the Regional Director) from each Region. Every other week, this committee will meet to discuss ULP complaints that have issued and assign attorneys to try those cases. This common-sense approach would allow lawyers in Regions with few (or no) trials to obtain trial experience to develop and maintain their skills; allow the flexibility to assign the most skilled lawyers in the District to the most complex cases (thus providing better service to the public); and ensure that lawyers in one Region (who also are required to investigate unfair labor practice charges) are not overloaded. Moreover, the Regional Director who issued the complaint would retain full control over the litigation and supervise whichever lawyer is assigned to the matter. Assigning trials to out-of-Region or out-of-District litigators is not a new development; the plan’s improvement on this practice is to facilitate regular communication among the Region’s litigation coordinators to foster cohesive planning, rather than a need for ad-hoc litigation assistance.

Remote Supervision:

The final imbalance addressed by the plan dealt with the ratio of employees to supervisors. Again, it should be emphasized that remote supervision is not new to the Agency. Indeed, since March 2020, all supervision has been performed remotely – a condition that will continue for the foreseeable future. As the chart below demonstrates, supervisors in some Regions are responsible for nearly twice as many employees as supervisors in other Regions.

| Region | # of Supervisors | Agent FTE | Agent FTE per Supervisor |
|--------|------------------|-----------|--------------------------|
| 19 | 4 | 23.8 | 6.0 |
| 20 | 3 | 18.5 | 6.2 |
| 21 | 4 | 19.4 | 4.9 |
| 27 | 1 | 6.0 | 6.0 |
| 28 | 3 | 19.0 | 6.3 |
| 31 | 4 | 15.5 | 3.9 |
| 32 | 2 | 8.9 | 4.4 |
| | 21 | 111.0 | 5.3 |

To address the problem, the plan would simply require some employees to report to a different supervisor. There was never any suggestion that any employee would have to change his or her physical location and, quite frankly, we are confused as to how our decision to have a different (less burdened) supervisor oversee an employee could be conflated with an “involuntary transfer.” Rather, the plan addressed the supervisory imbalances created because I have decided not to involuntarily transfer employees from one Region to another.

Finally, the plan described herein has never been finalized. The proposed plan was presented to the Agency’s internal union for discussion and bargaining as required. Since then, I have been informed that the District IV Regional Directors had decided, before your letter arrived, to modify the plan itself. I am looking forward to seeing the results of their continuing efforts to improve case processing and serve the public better. I applaud the initiative they have shown and regret that their fine efforts have drawn unwarranted criticism.

The answers to your enumerated questions are below:

- 1. A detailed explanation of the rationale for centralizing the process for assigning cases throughout the seven affected Regions. In describing this rationale, please state alternatives that were considered and why they were rejected.**

See explanation provided above.

- 2. All documents that demonstrate that the General Counsel sought Board approval for the District IV Resource Sharing Plan. If the General Counsel did not seek approval from the Board, then please provide a detailed explanation on the rationale for not seeking Board approval for the District IV Resource Sharing Plan and for not publishing a notice of such reorganization in the Federal Register.**

None. See above.

- 3. All documents detailing or relating to the District IV Resource Sharing Plan, including any documents detailing or relating to the process for assigning cases and the involuntary transfer of NLRB staff to different supervising Regions.**

See attached for documents relating to assigning of cases. There are no “involuntary transfer(s) of NLRB staff.”

- 4. All communications, including but not limited to solicitation of comments and related responses, about the development or implementation of the District IV Resource Sharing Plan between you or any person employed by your office, including the Division of Operations-Management, and the following individual(s):**
 - a. The Chairman, any Member of the NLRB, or the staff of the Chairman or of a Member; None**
 - b. Any Regional Director or employee of a Regional Office; To be provided at a later date.**

c. **Any person outside the NLRB.** None

5. **A detailed description of the efforts taken to brief Members of Congress representing districts and states affected by the District IV Resource Sharing Plan. If no such efforts have been made, please explain why the NLRB departed from its past practice.**

None. See above.

6. **A detailed description of the efforts made to provide public notice and comment on the District IV Resource Sharing Plan. If no such efforts have been made, please explain why the NLRB departed from the General Counsel's earlier commitment to providing notice and comment.**

None. See above.

7. **All communications, including but not limited to solicitation of comments and related responses, on the development or implementation of Memorandum ICG 18-06, regarding the centralization of decision-writing in representation cases, between you or any person employed by your office, including the Division of Operations-Management, and the following individual(s):**

a. **The Chairman, any Member of the NLRB, or the staff of the Chairman or of a Member;** None

b. **Any Regional Director or employee of a Regional Office;** To be provided at a later date.

c. **Any person outside the NLRB.** None

8. **A detailed description of any consideration the NLRB gave to the effect of the District IV Resource Sharing Plan or any reorganization plan on the diversity of the NLRB's Regional Directors or of the agency's Senior Executive Service. Please produce any relevant documents the NLRB developed on this issue.**

None. There is no plan to reorganize.

9. **A detailed description of what alternatives to involuntary transfer to different supervising Regions were considered and why they were rejected.**

None. There will be no involuntary transfers.

10. **A detailed description of whether a plan similar to the District IV Resource Sharing Plan is being considered in any other district of the NLRB. Please include all documents and communications related to any such plan, including but not limited to solicitation of comments and related responses, between you or any person**

employed by your office, including the Division of Operations-Management, and the following individual(s):

- a. The Chairman, any Member of the NLRB, or the staff of the Chairman or of a Member; None**
- b. Any Regional Director or employee of a Regional Office; and None**
- c. Any person outside the NLRB. None**

11. The current staffing levels, broken down by classification, of each field office throughout the agency.

This information is already being provided on a monthly basis.

12. The current case intake of each field office throughout the agency, broken down by case type, since January 1, 2019.

To be provided at a later date.

13. For each field office throughout the agency, the percentage of unfair labor practice charges filed since January 1, 2019, found to have merit.

To be provided at a later date.

14. A budgetary analysis of the costs of the District IV Resource Sharing Plan, including the costs of any travel expected as a result of the plan.

None

15. The number of employees, designated by classification and tenure, in each field office who will receive a notice of involuntary transfer. For each employee, please state the field office to which they will be expected to transfer.

None. There will be no involuntary transfers.

16. A detailed description of the efforts made to provide notice to and bargain with the National Labor Relations Board Union regarding the District IV Resource Sharing Plan. If no such efforts were made, please explain why not.

To be provided at a later date.

17. A detailed description of any plans related to the mandatory reopening of Regional Offices and terminating Regional Directors' discretion to continue operations virtually during the COVID-19 pandemic. Please include any communications related to this plan, including but not limited to solicitation of comments and related

responses, between you or any person employed by your office, including the Division of Operations-Management, and the following individual(s):

- a. The Chairman, any Member of the NLRB, or the staff of the Chairman or of a Member;**
- b. Any Regional Director or employee of a Regional Office; and**
- c. Any person outside the NLRB.**

All offices have remained open during the COVID-19 pandemic, albeit physical visits by the public are by appointment only. Currently all offices are operating in non-mandatory telework status. Currently there are no plans to require employees to physically report to the offices generally. Regional Directors have retained the authority to require certain employees to report for a specific purpose in extraordinary circumstances.

Thank you for the opportunity to provide this information. If you or your staff have any further questions or concerns, please do not hesitate to contact Edwin Egee in the Office of Congressional and Public Affairs at (202) 273-1991.

Sincerely,

A handwritten signature in cursive script that reads "Peter B. Robb".

Peter B. Robb
General Counsel