NATIONAL LABOR RELATIONS BOARD

CASEHANDLING MANUAL

PART ONE

UNFAIR LABOR PRACTICE PROCEEDINGS

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

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INTRODUCTION

PREFACE

I am pleased to introduce this revised edition of the National Labor Relations Board Casehandling Manual for Unfair Labor Practice Proceedings. Last revised in June 1989, this comprehensive revision is more accessible and useful, increasing its value as a resource for the Agency and the public. This edition incorporates straightforward language to clarify instruction concerning ULP case processing; expands the scope of guidance in many areas and reorganizes the material to facilitate its use. In addition, several new sections address existing casehandling procedures and recent developments and update existing sections to reflect current case law and General Counsel policies.

I anticipate that the guidelines set forth in this revision will enhance the quality of casehandling and assist the Agency in its mission to fairly and efficiently process and resolve unfair labor practice cases.

This revised manual was prepared by a field committee composed of Richard Ahearn, Regional Director in Region 9; Michael C. Joyce, Assistant to the Regional Director in Region 6; Rik Lineback, Regional Attorney in Region 25; and Mark Carissimi, Deputy Regional Attorney in Region 8. Ellen Farrell, Deputy Associate General Counsel, Division of Advice made a significant contribution to the Manual in several areas. Individuals in Special Litigation Branch, Contempt Litigation and Compliance Branch and Regional Offices also played important roles in this project. As Chairman of the Committee Richard Ahearn deserves special recognition for his leadership and coordination of the Committee's work. Christina Stadtlander, Assistant Office Manager, Region 9, rendered invaluable assistance to the Committee in preparing this revision. Assistant General Counsel Nelson Levin coordinated this substantial project for the Division of Operations-Management. In closing, I wish to thank all the individuals who contributed to revising this Manual.

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Arthur Rosenfeld
General Counsel
September 2003

PURPOSE OF THE MANUAL

The Casehandling Manual is intended to provide procedural and operational guidance for the Agency's Regional Directors and their staffs when making decisions as to unfair labor practice and representation matters under the National Labor Relations Act. The Manual consists of three volumes: Part One—Unfair Labor Practice Proceedings; Part Two—Representation Proceedings; and Part Three—Compliance Proceedings.

This Manual has been prepared by the General Counsel for use by Agency personnel, pursuant to authority under Section 3(d) of the Act and as delegated by the Board. The Manual has been neither reviewed nor approved by the Board.

As to matters on which the Board has issued rulings, the Manual seeks to accurately describe and interpret Board law; while the Manual can thus be regarded as reflecting Board policies as of the date of its preparation, in the event of conflict, it is the Board's decisional law, not the Manual, that is controlling. Similarly, while the Manual reflects casehandling policies of the General Counsel as of the date of its preparation, such policies may be revised or amended from time-to-time.

The Manual is not a form of binding authority, and the procedures and policies set forth in the Manual do not constitute rulings or directives of the General Counsel or the Board. The Manual is also not intended to be a compendium of either substantive or procedural law, nor can it be a substitute for a knowledge of the law.

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Although it is expected that the Agency's Regional Directors and their staffs will follow the Manual's guidelines in the handling of cases, it is also expected that in their exercise of professional judgment and discretion, there will be situations in which they will adapt these guidelines to circumstances. Thus, the guidelines are not intended to be and should not be viewed as binding procedural rules. Rather, they provide a framework for the application of the Board's decisional law and rules to the facts of the particular situations presented to the Regional Directors and their staffs, consistent with the purposes and policies of the Act.

MANUAL FORM

This Manual is available in printed form from the U.S. Government Printing Office (GPO) and in electronic form at the Agency's web site (www.nlrb.gov). (Agency employees also have access to the Manual on an Agency electronic Bulletin Board.) Periodic revisions to the Manual can only be obtained electronically through the Agency's website, not through the GPO.

MODIFICATIONS TO THE MANUAL

Modifications to the Manual will be announced through memoranda issued by the Division of Operations-Management. These memoranda are available to the public

through the Agency's publication "Weekly Summary of NLRB Cases." At the time of announcement, the electronic versions of the Manual maintained on the Agency's web site (www.nlrb.gov) and internal Bulletin Board will be revised in accord with the modifications. All memoranda announcing modifications will be retained for one year at the website and Bulletin Board UPDATE PAGE.

Printed versions of the Manual available in Agency libraries will be kept current. Printed compilations of modifications will be prepared annually. Printed copies of the Manual distributed following its original publication date will contain the original Manual as well as all annual compilations.

INSTRUCTIONS

The Casehandling Manual consists of three volumes: Part One—Unfair Labor Practice Proceedings; Part Two—Representation Proceedings; and Part Three—Compliance Proceedings. The Compliance Manual was revised in 1993. The Representation Casehandling Manual was revised in 1999.

This Unfair Labor Practice Casehandling Manual revision was issued in 2002. This revision has updated the Common to All Cases Sections 117000–11886, which appear in both the Unfair Labor Practice Casehandling Manual and the Representation Casehandling Manual. Accordingly, the Common to All Cases portion of the Representation Casehandling Manual must be replaced with the version contained in this revision.

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10010–10040 INITIATION OF CASES

10010 Generally

The Agency can investigate unfair labor practice allegations only upon the filing of an appropriate charge. Sec. 101.2, Statements of Procedure and Sec. 10018.

10012 Prefiling Assistance/Information Officer

The Agency provides prefiling assistance to the public primarily through the Information Officer (I.O.) program. Under this program, Board agents are available daily in each field office to answer inquiries and, upon request, to assist members of the public who visit, telephone, or write the Regional Office in filing unfair labor practice charges and representation case petitions.

10012.1 Information

Board agents should answer public inquiries regarding the Act and the Agency accurately, completely, and as concisely as possible. Although Board agents are obligated to provide information, they may not give legal advice and should explain that advice cannot be given.

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In this regard, Board agents must be cautious and consult with Regional Office management as appropriate when responding to questions, particularly during an organizational campaign or a highly publicized labor dispute. Thus, an agent should not offer an opinion as to whether any specific conduct violates the Act. Rather, the Board agent should describe the types of conduct which, depending on all of the surrounding circumstances, may constitute a violation of the Act.

Furthermore, the Board agent should inform the individual that statements of the agent cannot be considered as an official pronouncement of law binding on the Agency. In circumstances where an individual is essentially seeking legal advice, the Board agent may suggest that the individual seek private counsel. Although under no circumstances should a specific attorney be recommended, the Board agent may direct an individual to an appropriate local bar association referral service.

10012.2 Assistance in Filing a Charge

If an individual describes circumstances which may indicate a violation of the Act, the Board agent should advise such individual of the right to file a charge. The Board agent should assist in the preparation of any charge to the extent necessary. Such assistance may include:

- Identifying the sections of the Act involved and the basic theory of the allegations
- Furnishing the appropriate charge form and reasonable clerical assistance

- Drafting the language of the charge
- Reading the completed charge form verbatim to the individual prior to the signing of the charge, if a charge is filed by an individual who does not read English
- Reading the completed charge form in the individual's native language, if the individual is a non-English speaker who does not read English. See OM Memo 09-44.

10012.3 Situation Not Covered by the Act

If an individual presents a situation that is clearly not covered by the Act, the Board agent should so indicate and discourage the filing of a charge. If an individual asserts, however, the right to file a charge, the Board agent should take a charge. In all situations where an individual chooses not to file a charge, the Board agent should specifically describe the 6-month statute of limitations set forth in Section 10(b) of the Act. Sec. 10052.2. If, however, the individual describes a situation that appears to come within the purview of other laws, the Board agent should direct the individual to the appropriate agency.

10012.4 Website

For additional information concerning the Act and the Agency, including charge and petition forms, as well as references to Federal and State agencies dealing with employment-related matters, individuals should be referred to www.nlrb.gov.

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10012.5 Case Activity Tracking System (CATS) Records

Each Board agent must record in CATS all prefiling assistance and inquiries from the public and other Government agencies.

Promptly after providing assistance, whether in person, by phone, mail or electronically, the Board agent should enter all information required in the appropriate CATS window. Normally, the Board agent should include a concise description of the inquiry in the summary section.

10012.6 Obtaining an Affidavit During Visit to Information Officer

In appropriate circumstances, the Board agent serving as Information Officer or another Board agent should take an affidavit from available charging party witnesses at the time a charge is filed in order to expedite processing the case. Such circumstances include:

- The witness has traveled a substantial distance to the field office
- The witness will be otherwise unavailable for a considerable period
- The nature of the charge requires immediate investigation

10012.7 Assistance in Remedying Defects in Charge

If the Regional Office receives a charge that is facially incorrect (e.g., a charge that uses the wrong numbers of the sections alleged to have been violated or that incorporates supporting affidavits by reference), the Regional Office should assist the charging party in remedying the defect.

In such cases, docketing should be delayed pending a prompt communication with the charging party. If, however, the filing party insists that the charge be docketed as is or delay will render the filing of the charge untimely under Section 10(b) of the Act, the Regional Office should docket and serve the charge.

10012.8 Service of Charge on Charged Party

Although the Regional Office will routinely serve a copy of a charge on the charged party following docketing of the charge, delays may occur before service is accomplished. Therefore, the Regional Office should advise the charging party that the primary responsibility in serving the charge on the charged party rests with the charging party.

10014 Case Designations

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Each unfair labor practice charge is assigned a case number which includes the number of the Regional Office in which the charge is filed, followed by two letters which represent the sections of the Act alleged to have been violated, as set forth below:

- CA 8(a)(1), (2), (3), (4), and (5)
- CB 8(b)(1)(A) or (B), (2), (3), (5), and (6)
- CC 8(b)(4)(i) or (ii)(A), (B), and (C)
- CD 8(b)(4)(i) or (ii)(D)
- CP 8(b)(7)(A), (B), and (C)
- CE 8(e)
- CG 8(g)

10016 Charge Forms

The following charge forms are available in all field offices and on the Agency's website (www.nlrb.gov) and are used for the purpose of filing unfair labor practice charges.

NLRB-501	Charge Against Employer	CA
NLRB-508	Charge Against Labor Organization or Agent	CB, CC, CD, CG, and CP
NLRB-509	Charge Alleging Unfair Labor Practices Under Section 8(e) of the NLRA	CE

The forms are self-explanatory and all sections of the forms should be completed before filing. As to CG charges, paragraph 1(e) of Form NLRB-508 should be modified by deleting reference to Section 8(b) and inserting reference to Section 8(g). The charging party must sign and date the charge. Sec. 102.12, Rules and Regulations.

10018 Charge Filing

A signed original charge and four copies should be filed, together with one copy for each additional charged party named, unless filed by facsimile. Sec. 102.11, Rules and Regulations.

10018.1 Facsimile Filing

A party may file a charge by facsimile pursuant to Sec. 102.114(f), Rules and Regulations. In such circumstances, the party should also file an original for the Agency's records. However, failure to do so shall not affect the validity of the filing by facsimile, if otherwise proper. Sec. 102.11, Rules and Regulations.

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10018.2 Who May File

Any person or organization may file a charge. Sec. 102.9, Rules and Regulations. Care should be taken that the charge form set forth the proper identity and correct legal names of the charging party and of the charged party.

10018.3 Where to File

A charge is normally filed in person, by mail or by facsimile at a field office in the Region in which the unfair labor practices are alleged to have occurred. If the alleged unfair labor practices occurred in more than one Regional Office, the charge may be filed in any of such Regional Offices. Sec. 102.10, Rules and Regulations. For filing with the General Counsel, see Sec. 102.33, Rules and Regulations. In addition, a charge may be filed with a Board agent away from the Regional Office, in which case the Board agent should indicate the date of receipt and notify the Regional Office for assignment of a case number.

10020 Charge Allegations

In all C cases, the facts alleged in a charge to constitute the unfair labor practices should be set forth with some specificity but should not contain detailed evidentiary matter. In this connection, a charge should not normally incorporate by reference

affidavits or other documents submitted in support of the charge. Suggested charge language for alleged violations of the Act is available in CATS and through Regional Office reference material.

10020.1 CA and CB Allegations

CA and CB charges should set forth the section of the Act alleged to have been violated and describe with adequate specificity the conduct alleged to be an unfair labor practice, including allegedly violative statements. For instance, where discriminatory acts are asserted, all known alleged discriminatees should be named when practicable. Where, however, the names of all alleged discriminatees are not known, the charge should expressly state those known and add "and others whose names are presently unknown."

10020.2 CC or CD Allegations

CC or CD charges should set forth the specific subsection(s) of 8(b)(4)(i) and/or (ii) alleged to have been violated. Even though CC allegations may involve numerous secondary employers, such allegations may be set forth in a single charge. See Secs. 10202–10204 regarding CC cases and Secs. 10206–10220 regarding CD cases.

10020.3 CE Allegations

In a CE charge, which may be filed against a labor organization, an employer or both, the allegations should include: the parties to the contract; the language of the clause at issue; and the date the clause was entered into or invoked. Secs. 10222–10224.

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10020.4 CP Allegations

CP charges should set forth the specific subsection(s) of Section 8(b)(7) alleged to have been violated. Sec. 10230–10236.

10022 Assignment of Case

After a case has been docketed, it is categorized under Impact Analysis and assigned to a Board agent for investigation. Assignments should be made to provide for the most efficient and expeditious handling of cases. Among the factors that should be considered in the assignment of cases are the following:

- Impact Analysis Category. See Sec.11740
- Potential need for injunctive relief
- Complexity of the case, relative to the respective skills of Board agents
- Availability of Board agents, including scheduled appointments, travel plans and proximity to witnesses and location of dispute
- Respective workloads of Board agents

- Location of alleged unfair labor practices, relative to cases presently assigned respective Board agents

- Familiarity with background of the case

- Regional Office specialization of work

- Need to interview non-English speaking parties or witnesses

Every effort should be made to assign a case so that the investigation can be concluded within time frames consistent with Impact Analysis.

A case may be assigned by telephone or other means to a Board agent who is out of town so that an investigation may begin immediately.

10024 Notification to Board

When an R case is pending at the Board, the Regional Office should notify the Office of the Executive Secretary or the Office of Representation Appeals, as appropriate, of any significant developments that occur regarding the processing of a related C case. Examples of such developments include:

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- The filing of a blocking charge when an R case with a scheduled election is pending in Representation Appeals. See Sec. 11730

- A settlement in a C case which, by its terms, would result in the withdrawal of an appeal in an R case pending before the Board

- The withdrawal of a charge which is blocking the processing of an R case pending before the Board

10025 Test of Certification Summary Judgment Cases

All Board agents, and particularly supervisory personnel assigning or otherwise processing incoming cases, must be alert to recognize test of certification cases which may lead to summary judgment proceedings and take appropriate steps from the outset to ensure that the expedited procedures described below are followed. Such cases involve an employer's general refusal to recognize and bargain with a union, which has been certified by the Regional Office or the Board after an election is conducted pursuant to Section 9 of the Act.

Once a summary judgment case is identified and the investigation establishes that respondent is refusing to recognize and bargain with the charging party union in order to test the certification, the complaint should be issued promptly. Absent extenuating circumstances, such complaints should issue within 14 days from filing of the charge. Since Motions for Summary Judgment in such cases follow the same general pattern and require similar attachments, such motions may be drafted prior to receipt of respondent's

answer. Normally, a Regional Office should file its Motion for Summary Judgment within 7 days after respondent files its answer. See Sec. 10282 for procedures when filing a Motion for Summary Judgment.

10026 Interim 8(a)(5) Charges

When a new 8(a)(5) charge (herein an interim charge) is filed after the Regional Office has issued complaint seeking to compel the employer to recognize and bargain with the union, the following procedures should be followed:

(a) *Charge Seeking Only Bargaining Order:* An interim 8(a)(5) charge that simply alleges a continuation of the refusal to recognize and bargain with the union does not warrant the issuance of a new complaint. As the Board pointed out in *Canton Sign Co.*, 186 NLRB 237 (1970), no useful purpose can be served by an order based on such an interim charge where the employer is already subject to an order to bargain. Thus, enforcement of the bargaining order sought in an outstanding complaint will provide an early and effective remedy for the violations alleged in the interim charges. Accordingly, the Regional Office should dismiss such charges.

(b) *Charge Seeking Additional Remedial Action:* If, however, the interim charge is meritorious and alleges a violation that would require a remedy beyond the bargaining order sought in the first case (e.g., furnish information, rescind a unilateral change, make whole employees who suffered a loss by reason of such change), then a new complaint should issue. *Clark United Corp.*, 319 NLRB 328 (1995).

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However, if respondent's sole defense is that no final bargaining order can be obtained in the first case, the Regional Office may suggest that litigation of the interim allegations can be avoided by a stipulation. Under such a stipulation, respondent would agree to remedy the interim violations if its position is ultimately rejected in the first case. Such a stipulation can be in the form of an informal or a formal settlement agreement, at the discretion of the Regional Office. In the former, respondent would agree with the Regional Director to take the remedial steps immediately after the court enforces the Board's order in the first case. In the latter, the respondent would agree that a Board order and court judgment providing such agreed upon remedial action can be entered immediately after the court enforces the Board's order in the first case. For its part, the Regional Office would agree to dismiss the charges if the Board's position in the first case is ultimately rejected.

10027 Potential 10(j) and 10(l) Cases

Cases raising potential 10(j) and 10(l) injunctive relief should be identified as soon as possible after the filing of the case. See Secs. 10310-10320 for 10(j) relief and Secs. 10200-10248 for 10(l) relief.

10028 Communications with Parties

Agency policy concerning correspondence and communications with parties, including those involved in unfair labor practice proceedings, is set forth in Secs. 11842–11844. Specific guidelines for communications with represented parties are set forth in Secs. 10058, 11842, and 11844 and address:

- Attorney representatives, see Sec. 10058.2 and 11842.3
- Designated representatives who are not attorneys, see Sec. 10058.3 and 11842.4

10030 Public Access to Filings

All field offices will maintain and make readily available files containing copies of all charges for inspection by members of the public. However, absent unusual circumstances, charges will not be made available to the public until the day after they have been served on the charged party. Copies of charges should be maintained for the current and immediately preceding calendar years.

10040 Initial Notice to Parties Upon Filing of Charge

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10040.1 Acknowledgment of Receipt

Immediately upon docketing of a charge, the Regional Office sends initial letters by regular mail to the charging party and to the charged party which provide notice and acknowledgment of the filing and the name of the assigned Board agent. The initial letters should:

- Encourage E-Filing and attach the Agency's Policies and Procedures for Electronic Communications, see OM Memo 09-41
- Enclose Forms NLRB-4541 and 4701 and
- Refer the parties to the Agency's Website for customer service standards.

10040.2 Right to Counsel and Notice of Appearance

Form NLRB-4541 advises a party of the right to be represented by counsel and summarizes the Board procedures with respect to the charge. Form NLRB-4701, Notice of Appearance, permits a party to conveniently notify the Agency of the name and address of its counsel or other representative. Sec. 10058.1(b).

10040.3 Updating Service Sheet

The service sheet maintained in the file and in CATS should be updated to reflect the current and correct representatives of the parties as well as their addresses and telephone numbers.

10040.4 Initial Letter to Charging Party

The Regional Office's initial letter to the charging party, as described in Sec. 10040.1, should also request prompt submission of a complete written account of all the facts and circumstances on which the charge is based, copies of all relevant contracts and/or other documents and the names and addresses of witnesses. In statutory priority and other appropriate cases, the Board agent may make such a request telephonically, by e-mail or by facsimile; the nature and form of the request should be tailored to fit the urgency of the situation. If the charging party is an employer, the initial letter should also request appropriate commerce information. The letter should also advise the charging party that the Agency is moving toward a fully electronic records system and strongly encourage submission of documents and other materials to the Regional Office through the Agency's E-Filing system on its website. See Sec. 10040.1 and OM Memo 09-41.

10040.5 Initial Letter to Charged Party and Service of Charge

The Regional Office's initial letter to the charged party, as described in Sec. 10040.1, serves a copy of the charge with an affidavit of service retained in the file. The initial letter also advises the charged party of the right to counsel and invites full and complete cooperation. If the charged party is an employer, the letter also requests appropriate commerce information. If the charged party is not an employer, a letter to the employer should request commerce information. The letter should also advise the charged party that the Agency is moving toward a fully electronic records system and strongly encourage submission of documents and other materials to the Regional Office through the Agency's E-Filing system on its website. See Sec. 10040.1 and OM Memo 09-41.

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The initial letter should specifically request that the charged party submit a statement regarding the facts and circumstances that form the basis of the charge and should advise the charged party that full and complete cooperation includes, where relevant, timely providing all material witnesses under its control to a Board agent so that witnesses' statements can be reduced to affidavit form and providing all relevant documentary evidence requested by the Board agent.. The letter should also advise that the Regional Office will accept no limitation on the use of any statement of position submitted by the charged party in response to the charge. Sec. 10054.6. Further, the letter should assure the charged party that no organization or person seeking to represent them has any "inside knowledge" or favored relationship with the Agency and information regarding this matter is only that which must be made available to any member of the public under the Freedom of Information Act (FOIA).

Upon docketing a CD charge, the Regional Office serves a copy of the charge and the Notice of Charge Filed by regular mail on all parties, with an affidavit of service retained in the file.

10040.6 Notification to Potential Parties in Interest

In addition to the initial contacts with the charging party and the charged party described above, a copy of the charge should be served by regular mail on potential

parties in interest, as soon as their identity becomes known, with an affidavit of service retained in the file. In such circumstances, the parties in interest should be advised of the right to be represented and sent copies of Forms NLRB-4541 and 4701 and the Agency's Policies and Procedures for Electronic Communications.

Examples of such parties include:

- Any labor organization alleged to be dominated or assisted in an 8(a)(2) charge
- Any employer involved in a CC or CD case
- Any labor organization involved in a CD case
- In an 8(b)(2) case, any employer whom the charged union is allegedly causing or attempting to cause to violate Section 8(a)(3)
- Any party to a collective-bargaining agreement alleged to be invalid or unlawful, including CE situations
- Any business entity that is performing work alleged to have been subcontracted unlawfully

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If appropriate, the Regional Office should also send a letter to such parties in interest requesting a written account of the pertinent facts and circumstances. The letter should also advise such parties that the Agency is moving toward a fully electronic records system and strongly encourage submission of documents and other materials to the Regional Office through the Agency's E-Filing system on its website. See Sec. 10040.1 and OM Memo 09-41.

10040.7 Authorized U.S. Postal Service Representatives

The U.S. Postal Service designates authorized representatives to receive exclusive service of all charges arising in specified areas. Service of charges should be made on these agents and constitutes service within the meaning of Sec. 102.114 of the Rules and Regulations. This designation shall remain valid until a written revocation, signed by an appropriate official of the Postal Service, is filed with the General Counsel.

10050–10070 INVESTIGATION

10050 Objective of the Investigation and Role of Board Agent

The purpose of the investigation is to ascertain, analyze, and apply the relevant facts and law in order to arrive at the proper disposition of the case. The case may be as simple as ascertaining whether certain statements were made and, if so, whether they constitute violations of Section 8(a)(1) or 8(b)(1)(A). Or, the case may be as complex as ascertaining whether the parties' overall conduct over the course of protracted contract negotiations violated Section 8(a)(5) or 8(b)(3). In either situation, the Board agent is required in the course of the investigation to:

- Identify the appropriate theory of the case
- Prepare and modify, as necessary, an investigative strategy to obtain material evidence
- Execute the investigative strategy
- Perform necessary legal research
- Analyze the facts and law
- Make recommendations to the Regional Director as to the disposition of each element of the case and
- Effectuate, to the extent assigned to do so, the Regional Office determination

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The planning and organization of Board agents' approach to each case must be guided, at least in part, by the application of the principles set forth in the Agency's Impact Analysis program. Sec. 11740. Thus, Board agents should prioritize and balance their casework to ensure the time goals set for the disposition of each case are met to the extent possible. Appropriate supervisory direction should be sought.

As impartial investigators, Board agents should identify themselves as agents of the Board to all witnesses and parties, should explain the purpose of the investigation and should avoid conveying a prosecutorial image. Although Board agents should not

provide advice to the parties and must remain neutral throughout the investigation, Board agents should freely identify and discuss the theories underlying the charge with both parties. This is particularly true with respect to individual charging parties who do not typically have any expertise in Agency law and procedures. Throughout the investigation, Board agents should assertively seek out all material evidence in the spirit of providing the Regional Director with a complete picture of the events so as to permit an informed decision on the case.

10051 Guidance for High Quality Investigations

In order to consistently maintain the highest quality investigations, Regional Offices and Board agents should routinely consult this Manual, the Rules and Regulations, Board and Court decisions, and OM and GC memoranda. In particular the Agency's quality committee periodically reviews field office performance in the various facets of casehandling throughout the country and issues memoranda recommending practices for ensuring the highest quality investigations. See GC Memo 08-06, OM Memo 08-76 and subsequent memoranda. Regional Offices and Board agents should be guided by these recommendations in conjunction with their own experience and should follow the practices set forth in the memoranda.

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10052 Preliminary Review and Contacts

10052.1 Initial Review of Charge and Preparation for Investigation

Upon receipt of an unfair labor practice assignment for investigation, the Board agent should follow the procedures set forth below.

- Review the charge form to assure that it is correct on its face, i.e., that the charge contains the correct and full name of the parties and that the text corresponds to the sections of the Act alleged to have been violated

- Review Regional Office records to determine whether there is any relevant history of charges or petitions involving the parties

- Initially consider whether the Agency has jurisdiction over the dispute giving rise to the charge and

- Perform preliminary legal research on issues raised in the charge to become familiar with the appropriate areas of the law

10052.2 Statute of Limitations/Section 10(b)

The Board agent, with appropriate supervision, must make an initial assessment as to whether the charge is filed in a timely manner with respect to Section 10(b) of the Act. Section 10(b) provides that no complaint may issue on matters occurring over 6 months prior to the filing of a charge and the service of a copy of the charge on the charged party, unless the charging party is prevented from filing because of service in the armed forces. Board agents should be alert to 10(b) issues and promptly advise charging party of such issues and provide an opportunity to amend the charge as appropriate. The following considerations apply to determining application of Section 10(b):

- The 10(b) period does not begin to run until the aggrieved party has received actual or constructive notice of the conduct that constitutes the alleged unfair labor practice, unless the aggrieved party has failed to exercise "reasonable diligence" which would have discovered the unfair labor practice. See, e.g., *Concourse Nursing Home*, 328 NLRB 692, 693–694 (1999); *R. G. Burns Electric*, 326 NLRB 440, 441 (1998).

- If the individual is in the armed forces, the 6-month period commences on the day of discharge from the service. See Section 10(b) of the Act.

- "Closely related" amendments to a charge relate back to the initial 10(b) period. *Ross Stores*, 329 NLRB 573 (1999). *Redd-I, Inc.*, 290 NLRB 1115, 1118 (1988).

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- In circumstances where the charging party is attempting to reopen a dismissed case by the filing of an untimely charge, see Sec. 10123.

- In cases where the charged party has engaged in "fraudulent concealment," the 10(b) period begins to run from the date the charging party obtains actual notice of the event giving rise to the charge. *Brown & Sharp Mfg. Co.*, 312 NLRB 444 (1993); *Kanakis Co.*, 293 NLRB 435 (1989).

- In cases where the Board views the violation as continuing in nature, Section 10(b) does not preclude further processing. *Chesapeake & Potomac Telephone Co.*, 259 NLRB 225 (1981), enfd. 687 F.2d 633 (2d Cir. 1982).

If the Regional Office determines that the charge was filed untimely, it is appropriate to promptly solicit withdrawal.

10052.3 Telephone Contact and Correspondence with Charging Parties or Witnesses

At the earliest possible date consistent with other casehandling priorities, the Board agent should:

- Determine the appropriate charging party representative to contact. Sec. 10058.

- Contact the charging party or, if appropriate, the charging party representative by telephone and inquire about the allegations of the charge, the background, the facts, and the names of witnesses. Such a conversation should be sufficiently detailed to permit the Board agent to gain a preliminary understanding of the case. See Sec. 10052.4 when using Confidential Witness Questionnaires.

- Encourage the charging party to electronically submit documents and other materials to the Regional Office through the Agency's E-Filing system on the website.

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During the initial contact, the Board agent should schedule an appointment to obtain a confidential witness affidavit from the charging party and/or its witnesses. The Board agent should emphasize that it is imperative for the charging party to bring all relevant documents to the interview and should assist the charging party in identifying those documents. The Board agent should also ask the charging party to assist in scheduling other witnesses in a manner which will allow adequate time to conduct the interviews. Sec. 10054.1.

When contacting the charging party or witnesses by e-mail or other forms of correspondence, the Board agent should:

- Be professional and aware that correspondence may be producible at a formal proceeding and could reflect on the credibility and/or neutrality of the Region and the Board Agent.

- If the inquiry concerns a substantive matter, absent unusual circumstances, avoid eliciting a written response. Rather, a Board affidavit is the preferred method of obtaining such evidence.

- Make the charging party or witnesses aware that correspondence may be producible at a formal proceeding.

10052.4 Confidential Witness Questionnaires

In limited circumstances, Confidential Witness Questionnaires may be used as a helpful initial screening device. If the witness is represented, the questionnaire should be sent to the attorney or other representative. A questionnaire may assist in directing the course of the investigation and, in some situations, may obviate the need for further investigation. As issues of literacy, English fluency, ability and willingness to complete a narrative may affect the accurate completion of a questionnaire, caution should be exercised in relying upon the responses. Absent extraordinary circumstances, a case should not go to trial without sufficient sworn testimony received in affidavit form setting forth the evidence to support the complaint.

Questionnaires may also assist in cases where there is a large number of witnesses from whom similar types of evidence is needed, for instance, when authenticating authorization cards (Sec. 10066.1) and in salting and refusal to hire successor cases.

The following should be incorporated in all questionnaires:

> This Confidential Witness Questionnaire is considered a confidential law enforcement record by the National Labor Relations Board and will not be disclosed unless it becomes necessary to produce this document in connection with a formal proceeding.
>
> If I remember anything else that is relevant, or desire to make any changes to the Confidential Witness Questionnaire, I will immediately notify the Board agent. I understand that this Questionnaire is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.
>
> I understand that if I retain a copy of the Confidential Witness Questionnaire for my records and if the document is shared with others it could reduce the Agency's ability to protect the document from compelled disclosure.

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10052.5 Initial Contact with Charged Parties

After obtaining a preliminary understanding of the case from the initial contact with the charging party, the Board agent should:

- Telephone the appropriate charged party representative, as set forth in Sec. 10058, to make certain inquiries.
- Inform the charged party that the investigation is at its earliest stages and that it will be advised of any additional developments.
- Broadly describe the allegations of the charge and solicit the charged party's position.
- Seek sufficient details regarding such position to enable the Board agent to examine the charging party regarding the charged party's position.
- Request that the charged party submit a written statement of position.

- Encourage the charged party to electronically submit documents and other materials to the Regional Office through the Agency's E-Filing system on the website.
- Seek, in an appropriate case, to schedule an interview with the charged party's witnesses and advise the charged party that full cooperation entails allowing Board prepared affidavits.

Early contact with the charged party frequently leads to a prompt resolution of the charge, which experience has shown is beneficial to all parties and the public interest. Thus, prompt determination of a nonmeritorious charge ends the dispute in a cost effective and efficient manner, without the need for a protracted investigation. On the other hand, prompt determination of a meritorious charge provides an opportunity for a timely remedy before resolution becomes more costly or more difficult.

10052.6 Strategy for Investigation

Following the initial contacts with the parties, the Board agent, with appropriate supervision, should develop a strategy for the investigation, which normally would include:

- Identification of specific allegations and issues
- The theory of the case
- Areas of inquiry
- Areas of legal research
- A list of witnesses to contact
- A list of documents to obtain
- Approaches to reluctant witnesses
- Appropriate remedies, including consideration of 10(j) relief
- A schedule in which the above tasks will be completed

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The strategy should be reviewed and revised on an ongoing basis in order to adjust to developments in the investigation.

10052.7 Identification of Issues

Although the charging party should be asked to specify the allegations of the charge and the facts in support of them, many individual charging parties and others do not possess the knowledge or expertise to identify all possible issues. While the Board agent must remain neutral and not be an advocate for either party, the agent should provide assistance in identifying issues. In this regard, the Board agent should candidly apprise the charging party of any potential issues and provide the charging party an opportunity to amend the charge in a timely fashion, if necessary, in order to pursue additional allegations. Sec. 10062.

10052.8 Legal Research

As soon as the Board agent recognizes that a case raises legal issues with which the agent is not thoroughly familiar, the agent must, with appropriate supervision, begin to research the appropriate case law and Agency procedural memos. It is necessary for the Board agent to be knowledgeable in the areas of the law raised by the investigation in order to properly direct the investigation, adduce all necessary evidence and develop a thorough understanding of the case.

10052.9 Injunctive Relief Under Section 10(j)

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(a) *10(j) Relief Generally:* As part of the initial review of a case, the Board agent should be alert to the possible appropriateness of injunctive relief under Section 10(j) of the Act. Such relief may be requested by the charging party or considered by the Regional Office on its own initiative. Sec. 10310. If the nature of the allegations in the charge suggests the possible need for 10(j) relief, the charge must be classified as a category III case under Impact Analysis and given the highest priority. Sec. 11740. In such circumstances, the Board agent, when initially meeting with the charging party's witnesses, generally must obtain evidence as to whether injunctive relief is "just and proper." If charging party's evidence points to a prima facie case on the merits, and suggests the need for injunctive relief, the Region should notify the charged party in writing that the need for 10(j) relief is being seriously considered and request its position on that issue.

(b) 10(j) Relief in Nip-in-the-Bud Discharge Cases: In addition to the guidance set forth in (a) above, where the case involves a nip-in-the-bud discharge, the expedited procedures for the investigation and subsequent processing as set forth in GC Memo 10-07 should be carefully followed, including:

- Taking the lead affidavit within 7 calendar days from the filing of the charge, where possible.
- Obtaining all of the charging party's evidence within 14 days from the filing of the charge, where possible.
- Requesting that the charged party's position on the need for 10(j) relief be submitted to the Regional Office within 7 days after the written notification. Such

notification can be combined with the letter putting the charged party on notice of the allegations, and should generally be sent within 21 days from the filing of the charge.

10052.10 Repeat Violators-New Charge Filed (Contempt)

When a charge is filed against a respondent named in, or subject to, an outstanding court judgment, the question of possible contempt action should be examined.

If the charge is meritorious and the allegations are arguably encompassed by the provisions of the judgment, the case should be referred to the Contempt Litigation and Compliance Branch for consideration. Secs. 10590.1, 10590.3, and 10590.4, Compliance Manual. The Regional Office should not proceed administratively to issue complaint or to settle the case without the authorization of the Contempt Litigation and Compliance Branch.

10052.11 Social Security Numbers

In order to protect the privacy rights of individuals, Regional Offices should not include social security numbers on any document that is or may become public, unless required to do so. Thus, social security numbers should be omitted from documents such as affidavits, proofs of claim and compliance specifications, as well as any attachments thereto. To the extent it is necessary to identify claimants by social security numbers in any such document only the last four digits of the social security numbers should be used, i.e., XXX-XX-____. Board agents should, however, make notations in the case files of potential claimants' social security numbers.

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Social security numbers may be used in documents and correspondence sent to claimants, employer respondents and the Social Security Administration and in inquiry letters to the Internal Revenue Service, state agencies and outside contractors when searching for missing claimants.

If a document containing a social security number must be released to the public, the Regional Office should redact the number from the document. See OM Memo 04-16.

10054 The Investigation

Since the investigation serves as the basis for all action eventually taken in a case, it must reveal the totality of the circumstances, including relevant background information. Initially, wherever possible, the investigation should focus on interviews with the charging party and with witnesses offered by the charging party. While the charging party may suggest other witnesses or sources of information, the Board agent should contact those witnesses only if they appear to have material evidence, as it is the responsibility of the Board agent to avoid unnecessary expenditure of time and energy.

On the other hand, it is the responsibility of the Board agent to take steps necessary to ascertain the truth of the allegations of a charge and all promising leads should be followed. The Board agent should exhaust all lines of pertinent inquiry, whether or not they are within the control of, or are suggested by, the charging party.

Throughout the investigation, the Board agent should maintain a current record in the case file of the agent's activities and contacts. The Board agent should also encourage all parties and other sources of information to electronically submit documents and other materials to the Regional Office through the Agency's E-Filing system on the website.

10054.1 Responsibility of the Charging Party

(a) *Cooperation Required:* It is the responsibility of the charging party to comply with the Board agent's requests to:

- Identify the conduct claimed to be violative of the Act
- Meet with the Board agent at a reasonable time and place
- Fully cooperate in the preparation of an affidavit(s) by a Board agent
- Provide all relevant documents within its possession
- Comply with all other reasonable requests necessary to complete the investigation

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In addition, institutional charging parties are responsible for presenting all witnesses within their control to the Board agent for the purpose of taking affidavits. However, if, despite reasonable and diligent efforts, the charging party is unable to present witnesses who possess relevant evidence, the Board agent should independently contact such witnesses, with the assistance of the charging party, where possible. Sec. 10054.3.

(b) *Lack of Cooperation:* The charging party should be ready to promptly submit evidence in support of the charge. If the charging party delays in presenting evidence without good cause, the Board agent should send written notice to the charging party or to counsel of the obligation to promptly present evidence and of the duty to cooperate in the investigation. The notice should include a deadline for the submission of evidence and should advise that if the deadline is not met, the charge will be subject to dismissal for lack of cooperation, absent withdrawal.

10054.2 Charging Party Interview

(a) *Generally:* In Category II and III cases, the preferred method of obtaining affidavits is through a face to face meeting. See Sec. 11740 for a discussion of Category II and III cases. On the other hand, in Category I cases where the issues are generally more straightforward, telephone affidavits may be appropriate. Sec. 10060.10.

The affidavit should cover the topics set forth below and may be developed (include who, what, when, where and why information for all important conversations and events) in the following order:

- Information relative to the identity of the affiant, the employer and the union if appropriate
- Job information
- Background information
- Chronological account of the events
- Other evidence, i.e., alleged disparate treatment, facts concerning disputed supervisory status of individuals, etc.
- Charging party's response to charged party's expected defenses
- Backpay and/or remedy information

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The investigative checklists for Section 8(a)(1), (3), and (5) and 8(b)(1)(A) allegations, attached to GC Memo 08-06, provide useful guidance for Board agents.

During the course of the interview, the Board agent should probe the testimony of the witness as to statements which appear to be unreliable, improbable or contrived and seek documentation which would support or refute assertions made by the affiant. Indeed, all relevant and available documents should be obtained from the affiant during the interview. If necessary, specific arrangements should be made for submission of such documents immediately following the interview.

With respect to all aspects of the investigation, the Board agent should consider whether proffered evidence may be privileged. The Regional Office should direct any questions regarding possible privileges to Special Ethics Counsel.

The Board agent should also review with the affiant the identity of other witnesses, the degree of anticipated cooperation from them, when and where to reach the additional witnesses and other information which may be helpful to develop an approach to achieve cooperation of the witnesses. Such information should not be contained in the affidavit but rather memorialized in a file memorandum.

(b) *Backpay and Other Remedy Information:* During the initial investigation, unless the case is clearly nonmeritorious, the Board agent should inquire of each alleged discriminatee concerning interim earnings and search for work and should place this information in the file for use in settlement or compliance efforts. Further, the Board agent should obtain for the file the address, telephone number and other means of communicating with each alleged discriminatee. Potential discriminatees should be advised of their obligation to search for work and to report all interim earnings, inasmuch as a failure to do so may result in a loss or reduction of any backpay to which they might be entitled in the event that their case is found to be meritorious. They should also be advised to keep written records of their search for work and interim earnings. In potentially meritorious cases, the investigative file should contain for each alleged discriminatee information relevant to backpay and reinstatement, such as rate of pay, wage history, job classification and duties, job history, shift, average hours worked and, if possible, the name of a coworker similarly situated to each alleged discriminatee.

(c) *Identification of Other Parties and Derivative Liability:* The Board agent should also explore with the charging party whether any entities other than those already named in the charge may be liable to remedy the alleged unfair labor practices. Thus, in certain circumstances where an unnamed party, such as an alter ego, successor, partner, individual or trustee in bankruptcy, may be derivatively liable for remedying the alleged unfair labor practices, amendment of the charge should be sought to reflect such party as derivatively liable. Sec. 10062 and Sec. 10596, Compliance Manual. Prompt action, including the filing of a proof of claim, is particularly important when a party is in bankruptcy, since failure to file such a claim may preclude the Regional Office from obtaining a full remedy.

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(d) *Supervisory Status:* The Board agent should fully explore the supervisory status of possible supervisors and alleged discriminatees whose supervisory status may be in dispute. GC Memo 07-05 sets forth comprehensive casehandling guidance regarding issues addressed by the Board in *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006), and related cases, including:

- The Board's definitions of certain terms and phrases contained in Section 2(11), including "assign," "responsibly to direct" and "the use of independent judgment"
- Quality of evidence necessary to meet the burden of proof to establish Section 2(11) status
- Status dependent on supervisory assignments made on a rotating basis

(e) *Electronic Notice Posting:* In certain cases, it may be appropriate to seek electronic notice posting in addition to a traditional posting where the charged party customarily communicates with its employees or members electronically and/or where the charged party utilized its e-mail and/or intranet systems in committing an unfair labor practice. Accordingly, the Board agent should investigate the related facts and circumstances during the initial investigation. OM Memo 06-82 and Sec.10132.4(b). Such an inquiry should include testimony and documentation regarding:

- The existence of the charged party's intranet and the frequency and types of postings included on that site

- The existence of the charged party's e-mail system, use of that system to make broadcast e-mails to groups of employees or members and the subject matters covered by such

- The number and accessibility of traditional notice-posting areas at the worksite and the degree to which employees work offsite or would otherwise be unlikely to see traditional notices

- The parties' positions as to the propriety of electronic notice posting in addition to the notice posting sites

(f) *Foreign Language Notice Posting:* In certain cases, it may be appropriate to seek a foreign language notice posting in addition to a notice written in English. In such circumstances, the Board agent should:

- Inquire into related facts, such as:
  - Whether a substantial number of employees are primarily non-English speaking
  - The extent to which the charged party communicates, either orally or in writing, with employees in a foreign language
- Solicit the parties' positions as to the propriety of a foreign language notice posting

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See OM Memo 09-44 (CH).

10054.3 Third-Party Witnesses

Witnesses who are not parties to the case or whose testimony cannot bind a party are often critical and necessary sources of information. These may include other employees, contractors, customers and suppliers of the employer, representatives of other labor organizations and representatives of other Government agencies, with the exception of representatives of the Federal Mediation and Conciliation Service, who are prohibited from testifying in Board proceedings.

If witnesses offered by the charged party are not supervisors or agents, Board agents should exercise caution in evaluating the appropriate location for interview. For instance, interviews with employees of the charged party at its facility should be avoided. Sec. 10054.4

Third-party witnesses also have a right to be represented by their individual attorney or other representative but normally should not be interviewed in the presence of a representative of a party to the case. For further discussion and exceptions, see Sec. 10058.4.

Due to a variety of circumstances, including fear, bias or disinterest, the Board agent often faces significant challenges in fulfilling the responsibility of obtaining a complete and truthful affidavit from third party witnesses.

(a) *Cooperative Witnesses:* If it is anticipated that a prospective witness will cooperate, the Board agent should arrange an appointment at a mutually convenient time and place.

(b) *Reluctant Witnesses:* If it is anticipated that a witness may be reluctant to cooperate, the Board agent should carefully consider whether initial contact by telephone would be effective in obtaining the witness' cooperation. Thus, in certain circumstances, an unannounced personal visit by the Board agent may be most effective. However, if a witness is represented by an attorney or other representative for the purpose of giving testimony in the case under investigation, arrangements for an interview of such a witness must be made through the attorney or other representative.

Upon meeting the witness, the Board agent should carefully assess the witness' sympathies in the case, reason(s) for the reluctance, if any, and the approaches which are likely to result in cooperation. For instance, if the witness fears reprisal from one of the parties to the case, informing the witness of the confidentiality and protection afforded witnesses under the Act may be helpful.

(c) *Refusal to Swear to Affidavit:* When a witness refuses to swear to an affidavit, the Board agent should seek to have the witness sign or initial the affidavit without taking an oath. Sec. 10060.7.

Franki v. UTH Corp., No. 10-15984, archived on August 29, 2010

(d) *Uncooperative Witnesses:* If all informal efforts fail to achieve cooperation, the Regional Office should assess whether issuance of an investigative subpoena is appropriate. Regional Directors and their designees are authorized to issue subpoenas ad testificandum and duces tecum to third-party witnesses whenever the evidence sought would materially aid in the determination of whether a charge allegation has merit and whenever such evidence cannot be obtained by reasonable voluntary means. Sec. 11770 and GC Memo 00-02.

10054.4 Subsequent Charged Party Contact and Interview

If consideration of the charging party's evidence and the preliminary information from the charged party suggests a prima facie case, the appropriate charged party representative should be contacted to provide additional and more complete evidence, including all relevant documents. Sec. 10058. The Board agent should seek a meeting with the charged party in order to take affidavit testimony from individuals identified by the Board agent and supervisors or agents offered by the charged party in support of its position. With respect to those witnesses offered by the charged party who are not supervisors or agents and are thus third-party witnesses (Sec. 10054.3), Board agents should exercise caution in evaluating the appropriate location for such interviews. For instance, interviews with employees of the charged party at its facility should be avoided.

The arrangements for the presentation of the charged party's evidence and position should be documented in a letter from the Board agent to the charged party's representative setting forth the due date for the presentation of the information. If the charged party declines to provide witnesses for the Board agent-prepared affidavits, the

letter should also state that the Board agent's request for such had been rejected and that such refusal constitutes less than full cooperation. See Sec. 10054.5 and GC Memo 07-06.

When communicating with the appropriate charged party representative to obtain evidence, Board agents should relate the basic contentions that have been advanced with regard to all violations alleged. For example, when the charging party's evidence points to a prima facie 8(a)(1) violation involving threats of discharge, the Board agent normally would disclose such information as the general nature of the conduct (e.g., threat of discharge), the general locale, the identity of the supervisor involved, and the date of the conduct. Although such disclosure may be a decisive factor resulting in the charged party's full cooperation, the degree of disclosure should be commensurate with the level of cooperation anticipated from the charged party. Since the identity of a witness should be protected, the Board agent should, whenever possible, avoid providing details that would likely disclose the identity of the witness.

Particularly when the case includes pivotal questions of law, the Board agent should candidly disclose the legal theories under consideration and invite the charged party to file a statement of position or memorandum of law regarding such matters, provided it is submitted consistent with the time goals for the case.

Board agents should probe the testimony of charged party witnesses to the same degree as charging party witnesses. Sec. 10054.2.

Frankly v. HHMC Corp., No. 10-15984 archived on August 29, 2011

10054.5 Full and Complete Cooperation by Charged Party

(a) *Cooperation Defined:* It is Agency policy that full and complete cooperation, as that term is used in EAJA litigation, from a charged party includes, where relevant, timely providing all material witnesses under its control to a Board agent so that the witnesses' statements can be reduced to affidavit form and providing all relevant documentary evidence requested by the Board agent. The submission of a position letter or memorandum, or the submission of affidavits not taken by a Board agent, does not constitute full and complete cooperation. Unless the Board agent is certain that the charged party will extend full and complete cooperation, the Board agent should document in a letter to the appropriate charged party representative details of the Regional Office's request for such cooperation, including a deadline for compliance.

(b) *Lack of Cooperation:* If the charged party fails to provide full and complete cooperation, the Regional Office may, depending upon a careful assessment of all the circumstances:

- Decide the case on the basis of all evidence obtained
- Issue investigative subpoena(s) to obtain relevant and necessary evidence
- If the charged party is not represented by an attorney, contact and obtain sworn testimony from material witnesses. Sec. 10058.3(c)

- If the charged party is represented by an attorney, contact and obtain sworn testimony from material witnesses in the limited circumstances set forth in Secs. 10058.2 and 10058.5

10054.6 Conditional Position Statements

Pursuant to OM 99-35, Regional Offices should ensure that docketing letters specifically inform charged parties that the evidence and statements of position submitted by the parties will be used without qualification or condition. See also Federal Rules of Evidence 801(d)(2)(C).

10054.7 HIPAA's Privacy Rule Disclosure Procedures for Medical Information

Before attempting to secure medical information, Board agents should consult OM Memos 07-60 and 08-34, which contain a comprehensive treatment of issues relative to the Health Insurance Portability and Accountability Act of 1996 (HIPAA).

HIPAA and a set of implementing regulations promulgated by the Department of Health and Human Services, known as the Privacy Rule, establish a legal protocol governing the use and disclosure of individually identifiable health information from "covered entities". Covered entities include most doctors and other health care providers, health plans and health care clearinghouses that transmit health information electronically. "Health care provider" is further defined to include a "provider of health and mental services . . . and any other person who furnishes, bills, or is paid for health care."

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HIPAA and the Privacy Rule prohibit covered entities from disclosing individually identifiable health information unless the request complies with an applicable exception. As set forth below, there are two exceptions that most typically arise in NLRB investigations:

- Valid written authorization for disclosure of protected health care information from the individual. See medical and psychotherapy notes authorization patterns attached to OM Memo 08-34, which revise those patterns provided in OM Memo 07-60.

- Subpoenas which are subject to special requirements set forth in the Privacy Rule under its law enforcement standard, which applies to the Agency. The subpoena must:

    - Be specific and limited in scope

    - Seek only information that is relevant to a legitimate law enforcement inquiry, and

- Request protected health care information only because de-identified health information could not reasonably be used

De-identified information is by definition not covered by HIPAA or the Privacy Rule restrictions because it is not protected health care information. Information is de-identified if:

- Identifiers such as name, street address, birth date, and social security number of the individual or of relatives, employers, or household members of the individual, are removed and
- "The covered entity does not have actual knowledge that the [remaining] information could be used alone or in combination with other information to identify an individual who is a subject of the information." 45 C.F.R. Section 164.514(b)(2)(ii)

The exceptions to, and procedures under, the Privacy Rule are complex and, therefore, Regional Offices should carefully comply with guidance provided in OM Memos 07-60 and 08-34. Of special concern is that willfully flouting HIPAA's disclosure rules could expose Board agents to "aiding and abetting" liability under HIPAA's criminal provisions and could also expose Board attorneys to sanctions for breach of the ethical responsibility to honor "legal restrictions on methods of obtaining evidence from third parties." See Model Rules of Prof'l Conduct R. 4.4 cmt. 1.

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10054.8 Review and Completion of Investigation

Following completion of the affidavits and receipt of the evidence and positions of all parties and witnesses, the Board agent should carefully review the investigative file to identify any gaps or conflicts in the evidence in light of applicable legal precedent. The Board agent should make every reasonable effort to resolve any material issues, including credibility (see Sec. 10064) by re-interview of any party or witness for additional testimony and/or documents.

10056 Ability to Comply with Remedy Including Possible Bankruptcy

Unless the charge is clearly nonmeritorious, Board agents should be alert to, and continually assess, the charged party's ability to comply with any remedy which may be sought by the Agency. Any issues of potential inability to remedy the alleged unfair labor practices should be promptly and thoroughly investigated. Such investigation may be triggered by the circumstances set forth in Sec. 10508.4, Compliance Manual. The Regional Office's bankruptcy coordinator should be given prompt notice whenever the Regional Office becomes aware of a possible bankruptcy of a charged party. For bankruptcy matters, see generally Sec. 10670, Compliance Manual.

Following the investigation of these issues, it may be appropriate to seek protective relief (see Sec. 10674, Compliance Manual) or take other appropriate action, such as to seek amendment of the charge to name other charged parties, including any alter ego, successor or individual, as derivatively liable for remedying the alleged unfair

labor practices. Charging party and witnesses should be advised to notify the Board agent immediately of any significant change in the charged party's operation, identity or financial condition so that appropriate action can be taken.

10058 Contacts with Represented Parties and Witnesses

All parties and witnesses are entitled to be represented by attorneys or by designated representatives who are not attorneys. The Agency's requirements regarding the filing of a notice of appearance are set forth in this section. The Agency's policies regarding contacts with represented parties and witnesses and guidance for compliance with those policies are also set forth in this section and may be revised as new developments occur. See also Secs. 11842 through 11844.

The Agency's policies have been formulated in consideration of both the ethical standards applicable to Agency attorneys as members of the bar, particularly the American Bar Association's Model Rule of Professional Conduct 4.2, the skip counsel rule (MR 4.2) (formerly Sec. 7-104(A)), and the Board's Rules and Regulations, while permitting vigorous and orderly administration of the Act. As a general rule, unless otherwise authorized by law, all attorneys, including Agency attorneys, must comply with the ethics codes adopted by their licensing State or States and/or those adopted by the state in which their contact with the witness occurs, and with the ethics codes adopted by the Federal courts before which they appear. Although ethics rules may vary from jurisdiction to jurisdiction, all State bar and Federal court ethics codes contain essential elements of MR 4.2.

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MR 4.2 prohibits contact with a person whom an attorney knows to be represented by an attorney in the ULP case, without the prior consent of that attorney. As a matter of Agency policy, all Board agents, including field examiners, will be held to the same standards as attorneys. Further, because MR 4.2 does not apply to representatives who are not attorneys, at times the instructions contained herein for communicating with parties may differ significantly depending on whether the parties are represented by attorneys or by individuals who are not attorneys.

The interpretation of ethics rules varies from jurisdiction to jurisdiction and Agency attorneys who violate ethics rules may be subject to disciplinary sanctions. To ensure compliance with ethics requirements, Board agents should follow instructions and guidance provided by Special Ethics Counsel. In addition, the Regional Office must contact Special Ethics Counsel before engaging in ex parte contacts with:

- Current supervisors/agents of a party, represented by an attorney, who come forward voluntarily (Sec. 10058.2(b)).
- Individuals whose supervisory/agency status remains unclear after preliminary contact (Sec. 10058.2(c)).
- Former supervisors/agents of a party represented by an attorney where agencywide guidance has not authorized contacts (Sec. 10058.2(d)).

In addition, the Regional Office may contact Special Ethics Counsel for guidance in response to noncooperative conduct by either the charging party (Sec. 10058.5(a), the

first option), or the charged party (Sec. 10058.5(b), the first option) with regard to access to current supervisors or agents. Special Ethics Counsel is available to provide guidance when unsettled skip counsel issues and other ethics issues arise, including but not limited to issues involving the inadvertent receipt of attorney-client privileged or other legally protected information.

In analyzing all jurisdiction-specific ethics questions, Special Ethics Counsel must determine which ethics rules govern the Regional Office's investigation of the case by:

- Examining the ethics rules of the licensing jurisdiction of the Board attorney conducting the investigation, or of the supervisory attorney if the investigation is being conducted by a field examiner;
- Examining the ethics rules of the situs of the contact and of any eventual trial; and
- Determining which jurisdiction(s) would assert disciplinary authority over the contact and, when appropriate, as a choice-of-law, which jurisdiction's ethics rules would apply.

If a case in which a skip counsel issue arose during investigation is appealed to the Office of Appeals or submitted to the Division of Advice, the Regional Office should note the following in its Comment on Appeal or Advice submission:

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- The precise skip counsel issue or issues.
- How such issue(s) was/were resolved, with reference to any ethics guidance given by Special Ethics Counsel and inclusion of that guidance in the case file.
- Which jurisdiction or jurisdictions' ethics rules governed the investigation.
- Any witnesses the Regional Office either was told it could not interview ex parte or was aware that it could not interview ex parte based on Special Ethics Counsel's guidance distributed agency-wide.
- Whether the Regional Office was proffered a witness statement that it could not use in the investigation. Such statements that are part of the case file should be segregated in sealed and clearly marked envelopes before sending the file with such statements to Appeals or Advice.

10058.1 Notice of Appearance/Notice for Receipt of Documents

(a) *Notice of Appearance:* Regional Offices should provide parties Form NLRB-4701 with the service of all charges filed. Upon receipt of a completed Form NLRB-4701, or its equivalent, signed by an attorney or other representative, or sent electronically through the Agency's website (see Sec. 11846.4), all communications with the party should be through such attorney or representative, except:

- If the party's representative is an attorney, the Regional Office may communicate with and/or serve documents on the party with the consent of the attorney. See Sec. 11842.3.

- Even absent such consent from the attorney, the Regional Office should serve on the party certain documents as set forth in Secs. 11842.3(a), (b), and (c). Further guidance in this regard is provided in Secs. 11842 through 11844.

- If the party's designated representative is not an attorney, the Regional Office may serve documents and other correspondence on both the representative and the party but should otherwise communicate with the party and its supervisors/agents in accordance with the guidelines set forth in Secs. 10058.3 and 10058.5. See also Secs. 11842.4(a), (b), and (c) and 11844.

(b) *Notice of Appearance Required to Establish Representational Relationship:* If an attorney or other representative wishes to represent a party or a witness in a specific case, a specific Notice of Appearance, Form NLRB-4701, or its equivalent, must be filed with the Regional Director.

(c) *Notice for Receipt of Documents:* An attorney or other representative may submit to a Regional Director an Annual Notice for Receipt of Charges and Petitions (Form NLRB-4702), or its equivalent, for all matters involving a particular client coming before the Regional Office. Such a notice should be honored by the Regional Office for the 12-month period specified.

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10058.2 Supervisors/Agents of Parties Represented by Attorneys

The following policies apply to contacts by Board agents, whether attorneys or field examiners, with supervisors or agents of a party represented by an attorney. For situations where a party is not represented by an attorney, i.e., where MR 4.2 does not apply, see Sec. 10058.3.

(a) *Current Supervisors/Agents of Party:* Where the Regional Office has been advised that a party is represented by an attorney, a Board agent must contact and obtain consent from the party's attorney before initiating contact with or interviewing a current supervisor or agent, except for the circumstances described in (b), (c), and (e) below. Absent such circumstances, if the party's attorney refuses to make a current supervisor/agent available for questioning, the Board agent cannot proceed with the interview. The Regional Office may, however, exercise any of the appropriate options set forth in Sec. 10058.5 respecting uncooperative conduct by parties.

(b) *Current Supervisors/Agents Who Come Forward Voluntarily:* If current supervisors or agents come forward voluntarily and indicate that they do not wish to have the party's attorney present, the Regional Office must contact Special Ethics Counsel before interviewing or taking a statement from such a witness.

(c) *Uncertain Supervisory/Agency Status:* In cases involving individuals whose supervisory or agency status is initially uncertain, a Board agent should inquire about the individual's status prior to conducting a substantive interview and proceed as follows:

- If it becomes clear that the individual is a supervisor or an agent of a party, the Board agent cannot proceed with the interview without the consent of the party's attorney.

- If it remains unclear whether the individual is a supervisor or an agent of a party, the Board agent should interrupt the interview and consult with the Regional Office.

- If the Regional Office concludes that the individual is a supervisor or agent of a party, the Board agent may not resume the interview without the consent of the party's attorney.

- If, on the other hand, it becomes clear either through the preliminary interview or through consultations with the Regional Office that the individual is not a supervisor or agent of a party, the Board agent may conduct the substantive interview of the witness without informing or obtaining consent from the party's attorney.

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(d) *Former Supervisors/Agents:* Jurisdictions have differing approaches with respect to ex parte communications with former supervisors or agents of a party represented by an attorney. Special Ethics Counsel will authorize Regional Offices to contact and interview witnesses ex parte where permitted by the applicable jurisdiction(s). If the proposed interview would occur in a jurisdiction and under circumstances in which Special Ethics Counsel's guidance distributed agency-wide has authorized such contacts, prior clearance is not required before interviewing former supervisors or agents of a represented party without consent of the party's attorney. In all other cases, the Regional Office must contact Special Ethics Counsel before conducting such interviews. See Sec. 10058.7 regarding limitations on privilege.

(e) *Supervisors/Agents as Charging Parties and Alleged Discriminatees:* When current or former supervisors or agents of the charged party are charging parties or alleged discriminatees named in a charge, Board agents may contact and interview them about matters relating to their claim, without contacting or obtaining consent from the charged party's attorney.

If the Regional Office has any questions about the application of the above guidance, it should contact Special Ethics Counsel .

10058.3 Supervisors/Agents of Parties Not Represented by Attorneys

The following policies apply to contacts by Board agents with supervisors or agents of a party either not represented or represented by a designated representative who

is not an attorney. For situations where a party is represented by an attorney, i.e., where MR 4.2 applies, see Sec. 10058.2.

(a) *Current Supervisors/Agents:* Where the party is either unrepresented or not represented by an attorney and cooperation is being extended to the Regional Office in its investigation, the party or its representative should be contacted and afforded the opportunity to make available for interview any current supervisor or agent of the party. This policy will normally apply in circumstances where:

- The Regional Office is receiving cooperation from the party or its representative, if any

- The party or such representative makes the individual available for interview with reasonable promptness so as not to delay the investigation and

- During the interview the party or such representative does not interfere with, hamper or impede the Board agent's investigation

(b) *Uncertain Supervisory/Agency Status:* Where the party is either unrepresented or not represented by an attorney and a witness' supervisory or agency status is initially uncertain, a Board agent should inquire about the individual's status prior to conducting a substantive interview and proceed as follows:

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- If it becomes clear that the individual is a supervisor or an agent of a party, the Board agent should not proceed with the interview without affording the party or its representative the opportunity to be present if such party is cooperating.

- If it remains unclear whether the individual is a supervisor or an agent of a party, the Board agent should interrupt the interview and consult with the Regional Office.

- If the Regional Office concludes that the individual is a supervisor or agent of a party and the party is cooperating, the Board agent should not resume the interview without affording the party or its representative the opportunity to be present.

- If, on the other hand, it becomes clear either through the preliminary interview or through consultations with the Regional Office that the individual is not a supervisor or agent of a party, the Board agent may conduct the substantive interview of the witness without informing the party or its non-attorney representative.

(c) *Party Not Cooperating:* If the party not represented by an attorney is not cooperating in the investigation within the meaning of Secs. 10054.1, 10054.5, and 10058.3(a), the Board agent may contact and obtain sworn testimony from individuals regardless of their supervisory or agency status without informing the party or its representative.

(d) *Former Supervisors/Agents of Parties:* Board agents may initiate contact with former supervisors and agents of parties who are not represented by an attorney and obtain affidavits from such individuals without informing the party or its representative. However, where the party is represented by an attorney, see Sec. 10058.2(d).

(e) *Current Supervisors/Agents Come Forward Voluntarily:* Where the party is not represented by an attorney, Board agents are also free to interview and obtain an affidavit from current supervisors or agents who come forward voluntarily and indicate that they do not wish to have the party or its representative present, without informing the party or its representative.

10058.4 Third-Party Witness and Attorney/Representative

Witnesses who are not supervisors or agents of a party (herein third-party witnesses) have a right to be represented in Board agent interviews, as set forth herein. Thus, following a Notice of Appearance (see Sec. 10058.1) to the Regional Office that a third-party witness wishes to be represented in the proceeding before the Agency, Board agents should follow the procedures described below.

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(a) *Witness Represented by Nonparty Attorney:* Where the Regional Office has notice that a third-party witness is represented by an attorney who does not represent a party, Board agents must interview the witness in the presence of that attorney unless they contact and obtain consent from the attorney to interview the witness ex parte. If the attorney refuses to produce the witness or consent to an ex parte interview, the Board agent cannot proceed absent issuance of an investigative subpoena with notice to the attorney.

(b) *Witness Represented by Nonparty Representative:* Where a third-party witness is represented by an individual who is not an attorney and who does not represent a party, such representative should be afforded the opportunity to be present for the interview, so long as the representative's presence does not unduly delay or hamper the interview. If the presence of the representative unduly delays or hampers the interview, the Board agent may attempt to continue the interview without the representative or terminate the interview. In addition, the Regional Office may issue an investigative subpoena to the witness and exercise its discretion, considering all the circumstances, whether to give notice to the representative and/or allow the representative to be present at the interview.

(c) *Third-Party Witness and Party Attorney/Representative:* Longstanding Board policy provides that the attorney or other representative of a party to the case will not normally be allowed to be present at an interview of a witness who is not a supervisor or agent of that party. If the witness insists on the party attorney or representative being present, the Regional Office should exercise discretion whether to proceed with such an

interview. If the Regional Office declines to proceed with the interview of the witness in the presence of such attorney or other representative, the Regional Office may issue an investigative subpoena to the witness without notice to the party's attorney or representative. Alternatively, the Regional Office may permit the witness to submit documentary evidence or a statement that, if timely submitted, will be considered.

If, however, it is asserted that an attorney of a party to a case actually represents a third-party witness as an individual, both the attorney and the witness should be directed to provide written notice that the attorney represents the witness, including the filing of a Designation of Representative and a specific Notice of Appearance.

Even with a Notice of Appearance, if the circumstances raise questions as to whether a consensual attorney-client relationship exists or whether the attorney's interactions with an employee witness were consistent with employee Section 7 rights, including the dictates of *Johnnie's Poultry Co.*, 146 NLRB 770 (1964), or if the Regional Office has a substantial basis to believe that the presence of an attorney of a party would impede the Agency's investigation, the Regional Office should consult with Special Ethics Counsel on how to proceed. See also Sec. 10058.6, regarding the Board's rules requiring attorneys and other representatives at all stages of any Agency proceeding to conform to the standards of ethical and professional conduct required before the Courts.

If, however, the Regional Office is satisfied that there is a consensual attorney-client relationship, that the attorney has not violated the employee witness's Section 7 rights, and that the presence of the attorney would not impede the investigation, then the Regional Office, in its discretion, may decide to interview the witness, but it may do so only with the attorney present. Where appropriate, the Regional Office may issue an investigative subpoena with notice to the attorney. If, on the other hand, the attorney consents to an interview without the attorney's presence, the Board agent may proceed to interview the witness

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If it is asserted that a non-attorney representative of a party also represents a third-party witness as an individual, the Regional Office may exercise its discretion whether or not to conduct the interview in the presence of such non-attorney representative. Alternatively, the Regional Office may issue an investigative subpoena to the witness without notice to the non-attorney representative.

10058.5 Response to Uncooperative Conduct by Parties

(a) *Charging Party:* If the charging party's attorney refuses to make a current supervisor/agent available for questioning, or if the Regional Office concludes that the charging party, its attorney or representative has interfered with, unduly delayed, or impeded the investigation, including the Board agent's interview, the Regional Office may:

- Contact Special Ethics Counsel to determine whether ex parte contacts and interviews are permitted by the applicable jurisdiction(s)

- Dismiss all or part of the charge for lack of cooperation

- Decide the case on the basis of the evidence otherwise obtained

- In limited circumstances, such as when the rights of others may be dependent upon the testimony or evidence from a charging party, issue an investigative subpoena for necessary documents or for an interview under oath with notice to the attorney or representative

- If a party is not represented by an attorney, the Board agent may directly contact and obtain sworn testimony from supervisors and agents. Sec. 10058.3.

(b) *Charged Party:* If the charged party's attorney refuses to make a current supervisor/agent available for questioning, or if the Regional Office concludes that the charged party, its attorney or representative has interfered with, unduly delayed, or impeded the investigation, including the Board agent's interview, the Regional Office may:

- Contact Special Ethics Counsel to determine whether ex parte contacts and interviews are permitted by the applicable jurisdiction(s)

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- Decide the case on the basis of the evidence otherwise obtained

- Issue an investigative subpoena for necessary documents or for an interview under oath with notice to the attorney or representative

- If a party is not represented by an attorney, the Board agent may directly contact and obtain sworn testimony from supervisors and agents. Sec. 10058.3.

(c) *The Use of Subpoenas in the Above Circumstances:* An investigative subpoena for an interview under oath with notice to the attorney or other representative in the circumstances set forth above in (a) or (b) permits the Regional Office to conduct the interview in a formal setting by questions and answers. Sec. 11770.2.

10058.6 Misconduct by Attorneys or Party Representatives

The Board's Rules require attorneys and other representatives at all stages of any Agency proceeding to conform to the standards of ethical and professional conduct required before the courts. Sec. 102.177, Rules and Regulations and OM 97-2. Where appropriate, a Board agent should advise an attorney or other representative of the Board's Rules requiring that their conduct conform to the above noted standard.

Misconduct by attorneys or other representatives should, where appropriate, be referred to the Division of Operations-Management. Sec. 102.177(e), Rules and Regulations, OM 97-2 and OM 01-80. The range of consequences for violations of the Board's ethical and professional standards and for other misconduct include:

- Suspension and/or disbarment from practice before the Agency and/or other sanctions for misconduct of an aggravated character. Sec. 102.177(d), Rules and Regulations.

- Summary exclusion from a hearing for misconduct at a hearing before an Administrative Law Judge, hearing officer or the Board. Sec. 102.177(b), Rules and Regulations.

- Notification to the appropriate state bar(s), with additional notice to the ABA National Lawyer Regulatory Data Bank, of any disciplinary sanctions imposed on an attorney pursuant to the Board's Rules.

- Referral of the allegations to the state bar(s) in which an attorney practices, rather than pursuing action under the Board's misconduct Rules.

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10058.7 Attorney-Client Privilege

Ethics rules generally prohibit eliciting attorney-client privileged information, absent an appropriate waiver by the client. When an organization is represented by an attorney, the relevant privilege exists between the organization and the attorney and, therefore, certain individuals, although 2(11) supervisors or 2(13) agents, may not be able to effectively waive the organization's privilege. Even if ex parte contacts with former managers, supervisors, or employees of an organization are appropriate (see Sec. 10058.2(d)), it is not appropriate to obtain from them attorney-client privileged information that belongs to the organization, absent either a waiver by a current officer or manager of the organization or an exception to the applicability of the privilege. If a Regional Office has a question about the application of this rule, any waiver or whether any exception applies, it should contact Special Ethics Counsel.

10058.8 Skip Counsel Issues in Advice and Appeals Cases

If a case in which a skip counsel issue arose during investigation is appealed to the Office of Appeals or submitted to the Division of Advice, the Regional Office should note the following in its Comment on Appeal or Advice submission:

- The precise skip counsel issue or issues.
- How such issue(s) was/were resolved, with reference to any ethics guidance given by Special Ethics Counsel and inclusion of that guidance in the case file.
- Which jurisdiction or jurisdictions' ethics rules governed the investigation.
- Any witnesses the Regional Office either was told it could not interview ex parte or was aware that it could not interview ex parte based on Special Ethics Counsel's guidance distributed agencywide.
- Whether the Regional Office was proffered a witness statement that it could not use in the investigation. Such statements that are part of the case file should be segregated in sealed and clearly marked envelopes before sending the file to Appeals or Advice.

If, while the case is in Appeals or Advice, any party proffers a witness who is a former or current supervisor/agent of an organization represented by counsel, Appeals or Advice will assess the appropriate course of action and, if necessary, consult with Special Ethics Counsel. See generally OM Memo 05-63. As a choice-of-law matter, for purposes of considering ethics obligations of attorneys in Appeals in connection with an appeal or in Advice in connection with a case submitted to Advice, the relevant ethics rules are those that governed the Regional Office's investigation of the case. See generally OM Memo 05-63 and also Secs. 10122.8 and 11750.1.

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10060 The Confidential Witness Affidavit

The face-to-face affidavit taken by a Board agent is the "keystone" of the investigation and is the preferred method of taking evidence from witnesses, particularly in category II and III cases. Affidavits set forth exactly what each witness recalls and provide a permanent record of the testimony, which can be relied upon in making a decision regarding the case. In taking an affidavit, the Board agent should record the testimony of the witness as accurately and in as much detail as is possible and appropriate. See also Secs. 10051 and 10054.2.

10060.1 Non-Board Affidavits or Statements

Except in category I cases or other situations determined appropriate by Regional management, when affidavits or statements have been prepared and submitted by non-Board personnel (e.g., by the charging party), the witnesses should be re-interviewed on all pertinent points; they should not be asked merely to reswear to the accuracy of the previously submitted materials.

10060.2 Avoid Group Interviews

Even though a number of witnesses might have knowledge of the same incident, group interviews and mass affidavits should be avoided. The degree to which concerted questioning may serve to eliminate minor discrepancies is usually outweighed by the "corrective'' pull on each participating witness and by the possibility that any such witness will fail to make an individual contribution that would be offered if interviewed privately.

10060.3 Achieving Confidence

Initially, Board agents should introduce themselves and explain the purpose of the interview. Board agents must clearly convey their complete neutrality, that they are merely seeking the truth and otherwise create an atmosphere conducive to achieving confidence. Board agents should develop a rapport with the witness, and, if appropriate, should appeal to the witness' sense of civic pride and remind the witness that the ability of the Agency to enforce the law is dependent upon their full cooperation.

10060.4 Site of Interview

Board agents should select interview sites which:

- Maximize privacy
- Enhance cooperation
- Avoid locations where employees might be unlikely to provide full and candid testimony, e.g., charged party's facility
- Avoid circumstances which could result in the interview being used as a pretext for a general employee or membership meeting and
- Provide a safe and appropriate environment for Board agents and witnesses

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10060.5 Assurances of Confidentiality

At the beginning of the interview, the Board agents should give the following confidentiality assurance, which should also be incorporated in the affidavit:

> I have been given assurances by an agent of the National Labor Relations Board that this Confidential Witness Affidavit will be considered a confidential law enforcement record by the Board and will not be

> disclosed unless it becomes necessary to produce the Confidential Witness Affidavit in connection with a formal proceeding.

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An affidavit may be disclosed pursuant to Sec. 102.118(b), Rules and Regulations (Jencks Act) after a witness has testified in a Board proceeding and in some instances the affidavit may become public without the necessity of proceeding to a formal hearing (e.g., where the affidavits are attached to a petition for injunctive relief or where they are attached to a Motion for Summary Judgment). Where the witness has particular concerns about the consequences of providing an affidavit, the Board agent should explain that the Act proscribes retaliation against witnesses by either employers or labor organizations. Where the witness expresses a willingness to testify truthfully but wishes to avoid the appearance of favoring one side, the Regional Office should consider issuance of an investigative subpoena.

Board agents should not tell a witness that it will never be necessary to testify or that the Agency could provide "protection" under all circumstances.

10060.6 Testimony Reduced to Writing

The testimony should be reduced to writing at an appropriate time during the interview. Generally, the Board agent should review the witness' testimony before reducing it to writing. The witness should understand that the Board agent is memorializing the facts as the witness knows them and that the witness will be asked to sign and swear to the truth of what is being said. Affidavits should be written in the first person. Although they need not be verbatim, they should, to the degree possible, contain language used by the witness.

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A typical affidavit opens with "I [name] being first duly sworn upon my oath, hereby state as follows.'' It then recites the confidentiality assurances and sets forth the witness' employer, home address and other contact information. The affidavit concludes with:

> I am being provided a copy of this Confidential Witness Affidavit for my review. If, after reviewing this affidavit again I remember anything else that is relevant, or desire to make any changes, I will immediately notify the Board agent. I understand that this affidavit is a confidential law enforcement record and should not be shown to any person other than my attorney or other person representing me in this proceeding.
>
> I have read this statement [have had this statement read to me], consisting of _____ pages, including this page, I fully understand its contents and I certify that it is true and correct to the best of my knowledge and belief.

When completed, the witness should read the affidavit or, if necessary, the Board agent or other individual should read the affidavit to the witness. The witness should be encouraged to make or point out any necessary corrections and should initial each page and each correction and sign the affidavit.

10060.7 The Oath

After the witness has read and, if necessary, corrected the affidavit, the Board agent should formally administer the oath. Section 11(l) of the Act. With both individuals' right hands upraised, the Board agent should ask, "Do you solemnly swear/affirm that the affidavit you have just given is the truth, the whole truth and nothing but the truth, so help you God?''

Upon receiving an affirmative answer, the Board agent should complete and sign the jurat—"Subscribed and Sworn to Before me at _____ this _____ day of _____,'' in the presence of the witness.

If the affiant refuses to execute the affidavit under oath, the affiant should be advised of the option to affirm and sign the affidavit. Finally, if the affiant declines to sign the affidavit, the Board agent should prepare a file memo outlining the circumstances of the interview and the reasons for the refusal to sign.

10060.8 Translation/Certification of Affidavits Taken in a Foreign Language

When an affidavit is taken in a foreign language and the Regional Office has it translated into English, the translator should add the following certification at the end of the affidavit:

> I hereby certify that I am fluent in English and [insert name of foreign language being translated] and that the attached English language translation is an accurate translation of the attached [insert name of foreign language that was translated] language original affidavit.

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_____ _____

Date [Type name of translator]

10060.9 Copies of Affidavits

Immediately at the conclusion of the affidavit session, or as soon thereafter as practicable, the Board agent should:

- Give a copy of the signed affidavit to the witness and obtain written acknowledgement of receipt
- Advise the witness that the affidavit is being provided so that he/she can further review it and advise the Region of any inaccuracies or omissions
- In order to enhance the confidentiality of the affidavit, instruct the witness not to share the affidavit with anyone other than his/her attorney or designated representative (i.e., one who is entitled under the General Counsel's policy to be present during the affidavit interview (Sec. 10058) whether or not such person was actually present during the interview)

Except as set forth below, prior to the hearing, copies of affidavits should not be given to persons other than the respective affiants. For production of affidavits during the hearing, see Sec. 10394.7. Copies of affidavits may be provided to counsel or other representative in the following circumstances:

- When a party to the case is represented by counsel or other representative and a witness who is an agent of such party, or the counsel or other representative, makes a written request to provide a copy of the affidavit to their counsel or representative

- When a witness who is not a supervisor or an agent of any party provides a written designation of counsel or other representative and the witness or counsel or other representative makes a written request that a copy of the witness' affidavit be provided to that counsel or representative

When an unrepresented affiant requests that a copy of his/her affidavit be provided to a counsel or other representative who also represents a party to the case, that request will not be honored.

10060.10 Telephone Confidential Witness Affidavits

Frenkl v. HTH Corp., No. 10-15984 archived on August 29, 2011

In category I cases, telephone affidavits are generally appropriate. In category II and III cases, face-to-face interviews are the preferred method for obtaining affidavits, although instructions may change due to budgetary considerations. OM Memos 99-75 and 06-54. As to the latter categories of cases, Board agents may take telephone affidavits only with supervisory authorization and should prepare file memoranda setting forth the justification. When a telephone affidavit is taken, the Board agent interviews the witness by telephone, prepares a written affidavit and then sends the affidavit by mail, e-mail or facsimile to the witness for reading, correction, and signature. In all circumstances, the Board agent should give the assurances of confidentiality (Sec. 10060.5) and instruct the witness to:

- Read the affidavit carefully

- Make any necessary corrections

- Initial all changes and each page

- Sign and date the affidavit, and

- Return the affidavit to the Regional Office promptly

Where appropriate, the Board agent should make arrangements to contact the witness after the witness has received and reviewed the affidavit. At that time, the Board agent should administer the oath after the affiant has made any changes, but before he/she signs it. The Board agent should then ask, "Do you solemnly swear/affirm that the affidavit you have just given is the truth, the whole truth and nothing but the truth, so help you God?" To accurately reflect that the affidavit has been taken and sworn by telephone, the Board agent should use the following jurat language, "Subscribed and Sworn to before the Board Agent by Telephone on (date)," followed by the signature line and the Board agent's name. The date of the jurat should be the date the Board agent administers the oath and the location of the affidavit should reflect the location of the witness. The witness should then be instructed to immediately return the affidavit to the Regional Office. See GC Memo 07-06. The witness should also be instructed in accordance with the directions in Secs. 10060.6 and 10060.9.

In the alternative, the Board agent may administer the oath by telephone during the interview process or may change the normal concluding paragraph of the affidavit so that instead of the witness certifying that the affidavit is true and correct to the best of the witness' knowledge and belief, it provides: "I state under penalty of perjury that the foregoing is true and correct."

10061 Potential Undocumented, Bilingual, or Non-English-Speaking Witnesses

Frankl v. HTH Corp., No. 10-00984 archived on August 29, 2011

Board agents should be aware of and sensitive to issues that may affect individuals' willingness and/or ability to cooperate during an investigation.

10061.1 Potential Undocumented Witnesses

Board agents should inform witnesses who raise concerns about not being a citizen or a documented worker that the Agency is not associated with the U.S. Immigration and Customs Enforcement (I.C.E.). Board agents should also advise these witnesses that while the Act provides certain protections, the Agency cannot guarantee that action will not be taken by I.C.E. against them because of immigration status. See OM Memo 09-44 (CH).

10061.2 Bilingual or Non-English-Speaking Witnesses

When the Board agent takes a confidential witness affidavit from a bilingual or non-English-speaking witness, the interview should be conducted in English if the witness is sufficiently comfortable *speaking* English and the affidavit should:

- Be written in English if the witness is sufficiently comfortable *reading* English

- Set forth, regarding significant conversations, the:

  - Language that was spoken

- Statement(s) in English with quotation marks, notwithstanding that the remainder of the affidavit is in the native language of the witness, if the statement(s) was spoken in English and the witness can relate the statement(s) in English
- Witness' understanding as to the meaning of the statement(s) in the native language of the witness

- State whether the witness could read and understand any relevant documents written in English

10062 Amendments to the Charge

10062.1 Preparation

A charge is amended by typing "Amended'' (or "Second Amended,'' "Third Amended'') before the word "Charge'' on the regular charge form and by rewriting the contents of the charge to include the desired changes.

10062.2 Service of Copies

Copies of amended charges must be served on the charged party and other interested parties and appropriate counsel and other representatives for whom service is necessary. Service may be by regular mail and proof of service should be placed in the file. Sec. 11842.

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10062.3 Assistance

The charging party, prior to Regional Office action, may file an amended charge. Board agents should, upon request, assist charging parties with the filing of such amendments. Sec. 10012.2.

10062.4 Filed after Dismissal

An amendment received after dismissal of a charge should be docketed as a new charge and assigned a new number.

10062.5 Allegations not Contained in Charge

Where the investigation uncovers evidence of unfair labor practices not specified in a charge, Board agents, with appropriate supervision, must determine whether the charge is sufficient to support complaint allegations covering the apparent unfair labor practices found. For example, the charge should allege the type of conduct, such as:

- Interrogation
- Threats of discharge
- Threats of violence

- Mass picketing

If the allegations of the charge are too narrow, not sufficiently specific or otherwise flawed, the charging party or its representative should be apprised of the potential deficiency in the existing charge and given the opportunity to file an amended charge. The charging party should also be advised that failure to file the amended charge may affect the Regional Office determination of the case and that any complaint can cover only matters closely related to the allegations of the charge.

10062.6 Amend to Correct Names and Delete Allegations

The Board agent should seek an amended charge when necessary to correct the names of parties or alleged discriminatees or to delete allegations which the Regional Office determines are without merit. With respect to amending charges after a Regional Office decision to issue a complaint, see Sec. 10264.1.

10064 Credibility Resolutions in Investigations

Frankl v. HTH Corp., No. 10-16084 archived on August 29, 2011

Regional Offices are expected to resolve factual conflicts only on the basis of compelling documentary evidence and/or an objective analysis of the inherent probabilities in light of the totality of the relevant evidence. In order to reduce credibility conflicts and permit administrative resolution of certain factual conflicts, the following observations may be helpful.

Factual conflicts may arise from a misunderstanding of the Board agent's questions or from the nature of the questions asked or the lack of specificity in the answers given. Asking the question in plain language may help resolve the conflict. Board agents should obtain factual details rather than the opinions and conclusions of the witnesses. Probing into details is appropriate in order to determine the reliability of a witness' memory. Board agents should stress the need for witnesses to testify to the specific language used in critical conversations, such as those involving 8(a)(1) or 8(b)(1)(A) statements. When a witness is contradicted regarding relevant testimony and further interview of the witness might help resolve the issue(s) administratively, the Board agent should re-interview the witness.

Third-party witnesses may often be helpful in providing evidence to assist in an administrative resolution of factual conflicts or credibility disputes. Thus, Regional Offices should, where appropriate, contact such witnesses and consider issuance of an investigative subpoena where necessary.

If, after applying the principles set forth above, the Regional Office is unable to resolve credibility conflicts on the basis of objective evidence regarding matters which would affect the Regional Office's merit determination, a complaint should issue, absent settlement.

10066 Remedial Bargaining Order Cases

The Regional Office should be aware that cases that involve a possible remedial bargaining order, such as *Gissel* type cases (*NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969)), present special investigation concerns, particularly with respect to proof of majority status.

10066.1 Authenticity of Cards or Other Documents

In all cases where an employer's alleged unfair labor practices are sufficient to require a remedial bargaining order, the Regional Office must determine the authenticity of authorization cards or other proof of majority status before issuance of a complaint seeking such an order. Thus, the Regional Office should obtain evidence from the charging party regarding the facts and circumstances concerning the solicitation and procurement of cards or other documents (e.g., a petition), including the names of solicitors, such as union agents, who can authenticate such cards or other documents. Thereafter, the Regional Office should obtain affidavits from such persons relating to the cards or other documents that they can authenticate.

Alternatively, and particularly where a question concerning the circumstances of the signing arises, individual card signers may also be contacted and an affidavit taken from each of them. If the card signers are so numerous that it is not possible or practical to take an affidavit from each one, a questionnaire mailed to each card signer should be considered. Responses to such questionnaires would determine the particular witnesses from whom affidavits should be taken. Where, despite diligent effort, the Regional Office cannot locate card signers or qualified witnesses, it may be necessary to use expert testimony to determine the validity of the cards. Whatever the method, it is incumbent on the Regional Office in every case to undertake whatever investigation is reasonably required to determine the validity of the cards.

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In order to ensure authenticity, Regional Offices should place a date-stamp on the reverse side of cards or other documents when received. In addition, all undated cards should be stamped "UNDATED" in the space for the date.

10066.2 Payroll Records

In order to determine the names of all unit employees and the potential majority status of the union at the relevant time, the Regional Office should seek appropriate payroll records from the employer. If the employer refuses the Regional Office's request to submit such records and the Regional Office has been unable by alternative means to determine the names of all unit employees, it should issue an investigative subpoena for the payroll records and other relevant documents bearing on the unit issue.

10066.3 Evidence of Forgery

Whenever investigation as to the authenticity of authorization cards discloses evidence of forgery, the Division of Operations-Management should be notified for the consideration of referral to the Department of Justice for further appropriate action. Depending upon the circumstances, further processing of the case may be suspended

pending advice from Operations-Management with respect to further handling of the case. GC Memo 00-03.

10067 Where Unlawful Union-Security Clause Disclosed

An investigation of a charge alleging a discriminatory discharge or refusal to hire may also disclose the existence of a union-security clause in a contract which is unlawful on its face without referring to any extrinsic evidence. The Regional Office should, absent settlement, allege the unlawful clause in a complaint, provided that the allegations of the charge are sufficiently broad. The Regional Office should so proceed even though the charging party will not amend and the matters specifically alleged lack merit.

Where, on the other hand, an apparently unlawful but unwritten union-security practice is found in such a case, the charging party should be informed of this fact; if the party refuses to amend, the Regional Office should not pursue that issue.

10068 Conclusion, Report, Decision and Implementation

10068.1 Review and Supplemental Investigation

Prior to presenting the case for Regional Office decision, the Board agent, with appropriate supervision, must carefully review the case file to be certain that all relevant evidence is contained therein, including that bearing on material credibility conflicts. If additional evidence is required, the agent must expeditiously obtain it prior to presenting the case for Regional Office determination. In addition, the Board agent must also complete legal research to address all issues raised by the case to the extent necessary to make reasoned recommendations as to the disposition of all issues.

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10068.2 Report and Determination

Cases may be presented for Regional Office determination at the conclusion of an investigation either by written or oral report to the Regional Director or other Regional Office official, pursuant to Regional Office policy. The Regional Director has the final authority and responsibility to make all casehandling decisions within the Regional Office.

(a) *Written Report:* The formats for written reports vary but all require a recitation of the allegations of the charge, the facts of the case, identification of the issues in dispute, an analysis of the facts and law and a recommended disposition. The Regional Office determination should be memorialized in writing. See GC Memo 07-06 for guidance concerning length and organization of FIRs and other decisional documents.

(b) *Oral Agenda:* In lieu of a written report, a case may, depending upon Regional Office policy, be presented for determination orally to the appropriate designated Regional Office official. The presentation must contain the same elements described in (a) above and the determination should be memorialized in writing.

10068.3 Implementation of Determination

The Board agent normally is responsible for notifying the parties of the Regional Director's determination.

(a) *Meritorious Charge:* If the charge is determined to have merit, the Board agent must notify the parties and solicit settlement of the charge before complaint issues. Secs. 10124–10142.

(b) *Nonmeritorious Charges:* If no merit is found to the charge, the Board agent need inform only the charging party of the determination and the basis for it, and provide the charging party with an opportunity to withdraw the charge. Sec. 10120. If the charging party elects to withdraw, the charged party generally should not be informed of the Regional Office's determination. If the charging party declines to withdraw, the charge should be dismissed promptly. Sec. 10122.

(c) *Deferral Charges:* If the Regional Office determines that the charge should be deferred, the Board agent should inform the parties and take the necessary steps to implement the Regional Office's determination. Sec. 10118.

10070 Violations of Other Statutes and Misconduct

Persons who bring to the attention of any member of the Regional Office staff evidence of a possible violation of other Federal statutes, independent of our processes and not uncovered during the investigation of a case, should be referred to appropriate authorities.

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When potential violations of other statutes are uncovered during an investigation, Regional Offices are not required to obtain clearance from the Division of Operations-Management before referring such conduct to the appropriate agency. However, when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury or obstruction of justice in connection with NLRB proceedings) clearance from Operations-Management is required. Sec. 10058.6.

The Agency also has an obligation to report attorney misconduct in Agency proceedings to State bars and disciplinary officials. The standards set forth in the relevant jurisdiction's rule(s) regarding reporting professional misconduct provide guidance as to when reporting is required. When Agency referral of unethical attorney conduct may be appropriate, the matter should be referred to Operations-Management. Sec. 10058.6.

Special Ethics Counsel is available for consultation to Board attorneys acting in their individual capacities who consider reporting misconduct in Agency proceedings regarding themselves or other attorneys to bars or disciplinary officials.

10070.1 Titles I-VI of Labor-Management Reporting and Disclosure Act

When possible violations of Titles I-VI of the Reporting and Disclosure Act are brought to the attention of a Board agent, the Regional Office should refer the matter to the nearest field office of the Office of Labor Management Standards, U.S. Department of Labor. The Region should notify the Division of Operations-Management of such referral.

10070.2 OSHA and MSHA

Certain conduct protected under the Act as union or concerted may also be protected under the Occupational Safety and Health Act and the Mine Safety and Health Act. Such situations arise most commonly in charges alleging retaliation for reporting safety concerns. The General Counsel has entered into agreements with both the Occupational Safety and Health Administration (OSHA) and the Mine Safety and Health Administration (MSHA) setting forth procedures for handling such overlapping jurisdiction. GC Memos 75-29, 76-14, and 79-4 and OM 80-10.

10070.3 Obstruction of Justice and Perjury

Board agents should be sensitive to acts of obstruction of justice or perjury by individuals involved in Board proceedings. The Regional Office should report immediately any acts of alleged obstruction of justice or perjury to the Division of Operations-Management. Appropriate cases will be referred by Operations-Management to the Department of Justice for its consideration.

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10118–10123 DEFERRALS, WITHDRAWALS, DISMISSALS, AND APPEALS

10118 Deferrals

Under certain circumstances, it may be appropriate for a Regional Director to defer making a determination on the merits of a charge pending the outcome of proceedings on related matters. Such matters may be pending in the parties' contractual grievance procedure or before the Agency or other Federal, State, or local agencies or courts. Whenever a Regional Director decides to defer action on a case, all parties should be notified of that decision and the basis for it.

10118.1 Deferral to Contractual Grievance Procedure

Upon a determination of arguable merit, a Regional Director generally will be required to defer a charge to an available grievance procedure. If the charging party fails to process the ULP issue through the grievance procedure, deferral will generally not be appropriate and dismissal of the charge will be required. Deferral is generally not appropriate in certain circumstances, such as:

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- Where the charge alleges a violation of Section 8(a)(4). *Food & Commercial Workers Local 1776*, 325 NLRB 908 (1998).

- Where the charge alleges a party has failed to supply information in violation of Section 8(a)(5) or 8(b)(3). *Clarkson Industries*, 312 NLRB 349, 353 (1993).

- Where the charged party's defense is not reasonably based on an interpretation of the collective-bargaining agreement. *Oak Cliff-Golman Baking Co.*, 202 NLRB 614, 616–617 (1973). (But see GC Memo 02-05 regarding collection cases.)

- Where the case involves the resolution of unit determination or other representation type issues. *St. Mary's Medical Center*, 322 NLRB 954 (1997).

(a) *Collyer Deferral:* Under the Board's policy set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984), certain charges must be deferred to the contractual grievance procedure if the conduct is cognizable under the grievance procedure, the grievance procedure culminates in final and binding arbitration and the charged party waives all timeliness defenses to the grievance. The Board's policy and the procedures implemented in furtherance of this policy by the General Counsel are complex. Thus, current Board decisions, Advice memos, Appeals memos, and OM and GC memos should be consulted as needed. See generally General Counsel's Memorandum, Arbitration Deferral Policy under *Collyer*—

Revised Guidelines, May 10, 1973 (Deferral memorandum). Also see Pattern for *Collyer* Deferral letter at Sec. 10118.6.

(b) *Dubo Deferral:* Where a deferral under *Collyer* is inappropriate, the Regional Office may, in appropriate circumstances, defer a charge pursuant to the Board's decision in *Dubo Mfg. Corp.*, 142 NLRB 431 (1963). See generally GC Memo 79-36.

Under the Board's *Dubo* policy, unlike the *Collyer* policy, a charging party is not required to utilize a grievance procedure or face dismissal of its charge and is not entitled to appeal the *Dubo* deferral to the General Counsel. Thus, the Regional Office will defer under *Dubo* only if the charging party has initiated and continues to process a grievance involving the same issue. See General Counsel's Memorandum, Arbitration Deferral Policy under *Collyer* - Revised Guidelines, May 10, 1973 at page 38.

10118.2 Review Following Arbitration

Following issuance of an arbitration award, the Regional Office should determine whether the award meets the Board's standards as set forth generally in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984). If the award meets the Board's standards, the charge should be dismissed, absent withdrawal. Whenever the Region determines that deferral to the award is not, or may not be, appropriate the case must be submitted to the Division of Advice. See OM Memo10-13.

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10118.3 Review Following Grievance Adjustments

Following an adjustment of a grievance, the Regional Office may, in appropriate circumstances, dismiss the charge, absent withdrawal, based on the grievance adjustment. See generally *Catalytic, Inc.*, 301 NLRB 380 (1991); *Alpha Beta Co.*, 273 NLRB 1546 (1985).

10118.4 Administrative Deferral

A Regional Office may postpone determination of a ULP charge due to the pendency of closely related matters in other proceedings. In these circumstances, the Regional Office should notify the parties of such decision and the basis for it. Although the Regional Office will normally consider the disposition of the related matter in its eventual determination, the Regional Office is not generally required to defer to the result in the related matter, except for controlling General Counsel determinations or Board decisions. Administrative deferral of a charge may be appropriate in the following circumstances:

(a) *Other Charges:* The Regional Office may postpone determination where the outcome of a closely related ULP charge may affect the disposition of the charge to be deferred. Common circumstances include cases pending administrative appeal and where complaint has issued.

(b) *Representation Cases:* The Regional Office may postpone determination of a ULP charge where the disposition of representation cases before the Regional Office or the Board may impact significant issues raised in the ULP case. Such issues may include supervisory status, appropriate unit or unit clarification issues.

(c) *Other Government Agencies and Courts*: The Regional Office may postpone making a determination of a ULP case where the outcome of a closely related matter pending before other Federal, State, or local Government agencies may significantly impact the disposition of the case to be deferred. For examples, see Sec. 10070. See also Sec. 10118.5.

(d) *Collection Cases*: These cases involve an allegation that an employer has failed, in violation of Section 8(a)(5), to make contractually-required contributions such as payments to pension funds, health and welfare funds, and vacation funds. In such cases, the Regional Office should follow the guidance in GC Memos 02-05 and 95-8 in order to determine if it is appropriate to postpone the processing of the charge. See also Sec. 10670.4(b) of the Compliance Manual.

10118.5 Periodic Review of Status of Deferred Cases

In order to determine whether deferral remains appropriate, the Regional Office should, on a quarterly basis, ascertain from the parties the status of the proceedings to which the Regional Office has deferred. Once a response is received, the Regional Office should determine whether all parties are meeting their obligations imposed as conditions for deferral by the Region and what action, if any, should be taken. Upon resolution of the related proceedings, the Regional Office must promptly review the disposition of the related proceedings and take whatever action is appropriate.

10118.6 Pattern for *Collyer* Deferral Letter

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The following pattern should be used for deferral under *Collyer* and addressed to both parties as follows:

- If an attorney represents a party, the letter should be addressed to the attorney with a copy to the party.

- If the party is not represented by an attorney, the letter should be addressed to that party with a copy to its representative.

***Collyer* Deferral Letter**

[Charging Party's and Charged Party's Attorneys—
otherwise, list the party if not represented by an attorney.**]**

Re: **[**Case Name**]**
[Case Number**]**

Appropriate Salutation:

The Region has carefully considered the charge filed against [Charged Party name] alleging it violated the National Labor Relations Act. As explained below, I have decided that further proceedings on that charge should be handled in accordance with the Board's deferral policy.

Deferral Policy: **The Board's deferral policy provides that this Agency withhold making a final determination on certain unfair labor practice charges when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *United Technologies Corp.*, 268 NLRB 557 (1984). This policy is based, in part, on the preference that the parties should resolve certain issues through their contractual grievance procedure in order to achieve a prompt, fair and effective settlement of their dispute. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Regional Office will defer the charge. However, this policy requires that a charge be dismissed if the charging party thereafter fails to promptly file and attempt to process a grievance on the subject matter of the charge.**

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Decision to Defer: **Based on our investigation, I am deferring further proceedings on [**(the charge) or (that portion of the charge described below)**] to the grievance/arbitration process for the following reasons:**

1. **The charge alleges*:*** **[**Describe allegations being deferred.**]**

2. **The Employer and the Union have a collective-bargaining agreement currently in effect that provides for final and binding arbitration.**

3. **The Employer is willing to process a grievance concerning the above allegations in the charge and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.**

4. **Since the above allegations in the charge appear to be covered by certain provisions of the collective-bargaining agreement, it is**

likely that such allegations may be resolved through the grievance/arbitration procedure.

Further Processing of the Charge: **As explained below, while the charge is deferred, the Region will monitor the processing of the grievance and, under certain circumstances, will resume processing the charge.**

Charging Party's Obligation: **Under the Board's *Collyer* deferral policy, the Charging Party has an affirmative obligation to file a grievance, if a grievance has not already been filed. If the Charging Party fails either to promptly file or submit the grievance to the grievance/arbitration process, or declines to have the grievance arbitrated if it is not resolved, I will dismiss the charge.**

[Note: If charge is filed by an individual, add the following paragraph.]

Union/Employer Conduct: **If the Union or Employer fails to promptly process the grievance under the grievance/arbitration process; declines to arbitrate the grievance if it is not resolved; or if a conflict develops between the interests of the Union and Charging Party, I may revoke deferral and resume processing of the charge.**

Frankl v. HTH Corp., No. 16-15984 archived on August 29, 2017

Charged Party's Conduct: **If the Charged Party prevents or impedes resolution of the grievance, raises a defense that the grievance is untimely filed or refuses to arbitrate the grievance, I will revoke deferral and resume processing of the charge.**

Inquiries and Requests for Further Processing: **Approximately every 90 days, the Regional Office will ask the parties about the status of this dispute to determine if the dispute has been resolved and whether continued deferral is appropriate. However, I will accept and consider at any time requests and supporting evidence submitted by any party to this matter for dismissal of the charge, for continued deferral of the charge or for issuance of a complaint.**

Notice to Arbitrator Form: **If the grievance is submitted to an arbitrator, please sign and submit to the arbitrator the enclosed "Notice to Arbitrator" form to ensure that the Region receives a copy of an arbitration award when the award is sent to the parties.**

Review of Arbitrator's Award: **If the grievance is arbitrated, the Charging Party may request that this office review the arbitrator's award. The request must be in writing and addressed to me. The request should discuss whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the arbitrator, and whether the award is clearly repugnant to the Act. Further guidance on the nature of this review is provided in *Spielberg Mfg. Co.*, 112 NLRB 1080 (1955), and *Olin Corp.*, 268 NLRB 573 (1984).**

Charging Party's Right to Appeal: **The National Labor Relations Board Rules and Regulations permit the Charging Party to obtain a review of this action by filing an appeal with the GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, the Charging Party is encouraged to submit a complete statement setting forth the facts and reasons why the Charging Party believes that the decision to defer the charge was incorrect.**

Frankly v. HHR Corp., No. 99-15984 archived on August 29, 2011

Means of Filing**: An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal <u>MAY NOT</u> be filed by fax. To file an appeal electronically, go to the Agency's website at <u>www.nlrb.gov</u>, click on E-GOV, select E-FILING, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.**

Appeal Due Date and Time: **<u>The appeal is due on [14 days from issuance]</u>. If you file the appeal electronically, it will be considered timely filed if the transmission of the <u>entire document</u> through the Agency's website is accomplished no later than 11:59 p.m. Eastern time on the due date. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.**

If you mail the appeal or send it by delivery service, it must be received by the General Counsel in Washington, D.C., by the close of business at 5 p.m. Eastern time or be postmarked no later than [1 day before the due date set forth above].

Extension of Time to File Appeal: **Upon good cause shown, the General Counsel may grant an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. The fax number is (202) 273-4283. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless electronically filed, a copy of any request for extension of time should be sent to me.**

Confidentiality/Privilege: **Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential sources, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and 7(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.**

Fanky v. HHA Corp., No. 10-15984 Archived on August 29, 2011

Notice to Other Parties of Appeal: **The Charging Party should notify the other party(ies) to the case that an appeal has been filed.**

Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

Enclosure

cc: Charging Party (unless addressed above because not represented by an attorney)
Non Attorney Representative of any Party
Charged Party (unless addressed above because not represented by an attorney)
Union and Representative (unless Union is the Charging Party)
General Counsel, Office of Appeals

Frankl v. HTH Corp., No. 02-15984 archived on August 29, 2011

10120 Withdrawals

A charging party may submit a request to withdraw an unfair labor practice charge or any portion thereof at any time. However, the Regional Director has discretion whether to approve the withdrawal request. Upon receipt of a withdrawal request, the Board agent, with appropriate supervision, should promptly prepare and submit to the Regional Director a recommendation regarding approval of the withdrawal.

10120.1 Unsolicited Withdrawals

The charging party may initiate the withdrawal of the entire charge or any portion of it. The Agency's withdrawal request form may be used to request withdrawal but any unequivocal written or, under certain circumstances, oral expression of a desire to withdraw is sufficient.

When the charging party makes an unsolicited request to withdraw the charge or a portion of it, the Board agent should ascertain the reasons for withdrawal, which should be included in the Board agent's recommendation to the Regional Director.

Although the Regional Director otherwise has discretion to approve a withdrawal, where complaint has been authorized by the Office of Appeals or Division of Advice, clearance should be obtained from the appropriate branch.

10120.2 Solicited Withdrawals

Following a Regional Office determination to not issue complaint, the Board agent should give the charging party the opportunity to withdraw any allegations of the charge determined to be non-meritorious. The Board agent should advise the charging party orally or otherwise of the reasons for the Regional Office's determination in detail and that, unless the charge is withdrawn by a reasonable deadline, the charge will be dismissed. If the charging party declines to withdraw, the charging party must be informed that a detailed explanation of the reasons for dismissal will be included in the dismissal letter, commonly referred to as a long-form dismissal, unless the charging party requests that the detailed explanation be excluded. The charging party must also be informed that the charged party will receive a copy of any dismissal letter. See also Secs. 10122.1–10122.3.

10120.3 Oral Withdrawal Requests

Regional Directors are authorized to approve oral withdrawal requests from any charging party. However, if there are potential 10(b) problems and/or the Regional Office has concerns about whether the oral withdrawal request should be relied upon, the Regional Office may require that the request be in writing. Absent such concerns, an oral withdrawal request generally should be processed in the same manner as a written request.

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10120.4 Adjusted Withdrawals

Whenever a charging party requests withdrawal of a potentially meritorious charge, the Board agent should ascertain if there was an adjustment of the underlying dispute after the charge was filed. If there has been such an adjustment, the Board agent should include the details of the resolution, particularly the amount of any backpay, in the recommendation regarding approval of the withdrawal. A closed case report should then be completed.

10120.5 Conditional Withdrawals

The Regional Office may also approve withdrawals conditioned on the charged party fulfilling its obligations under a non-Board adjustment. Sec. 10142.3.

10120.6 Positions of Other Parties

Upon receipt of a withdrawal request, it is unnecessary to ascertain the position of the charged party. However, the Board agent should contact and solicit the position of any alleged discriminates and other individuals or entities who may be adversely affected by approval of the request. The Regional Director should carefully consider the positions of such persons and all relevant circumstances in considering whether to approve the withdrawal of the charge. The Regional Director's discretion in this regard is governed

by the standards set forth in *Independent Stave Co.*, 287 NLRB 740 (1987), and *Alpha Beta Co.*, 273 NLRB 1546 (1985).

10120.7 Refiling of Same Allegation

A closing of an unfair labor practice case pursuant to a withdrawal request constitutes a disposition of the issues without prejudice to filing a new charge over the same matter. The filing of a new charge does not constitute a reopening of the withdrawn charge. Moreover, the 10(b) period is not tolled by the initial filing and will apply with respect to any refiling of the same allegations. Sec. 10052.2.

10120.8 Withdrawal Request after Dismissal

If a withdrawal request is received after the charge has been dismissed but before the date the appeal must be received, the dismissal should be revoked and the withdrawal request approved. If a withdrawal request is received while the case is pending on appeal, the Regional Director should consult with the Office of Appeals before revoking the dismissal and approving the withdrawal. See Pattern at Sec. 10122.14(c).

10120.9 Notification to Parties

On approval of a withdrawal request, the Regional Office must notify all parties by letter that the charge, or a portion thereof, with the Regional Director's approval, has been withdrawn. No reasons for the withdrawal of the approval should be given in the notification.

On the other hand, if the charging party requests withdrawal before service of the charge, the Regional Office may approve the withdrawal without service of the charge or any other notification to the parties.

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10122 Dismissals/Appeals

Following a determination not to issue complaint and absent withdrawal of the charge by the charging party, the Regional Director will, except for certain CD cases, dismiss the charge, which may be appealed to the General Counsel. For the disposition of CD charges, see Secs. 10206–10220.

10122.1 Notification

Having first given the charging party an opportunity to withdraw, as set forth in Sec. 10120.2, the Regional Director should issue a dismissal letter by regular mail to charging party, with a copy to the charged party, providing notification of the determination not to issue complaint. The dismissal letter should contain a detailed explanation of the reasons for refusing to issue complaint, unless the charging party has specifically rejected the long-form dismissal, as described in Sec. 10122.2(a).

10122.2 Dismissal Letter

(a) *Long Form:* A long-form dismissal letter must provide a detailed summary of the basis for the Regional Office determination. A dismissal letter should be sufficient to

permit the charging party to direct an appeal to the dispositive aspects of the dismissal and should not be merely a statement of the ultimate conclusion. Thus:

- The particular reason(s) for a determination should be set forth, e.g., the charging party was notified of the discipline on a specific date, more than 6 months before the filing of the charge.
- The material element of the charge that was found unsupported should be clearly identified, such as lack of evidence of disparate treatment or knowledge of union activity.
- When there are alternatives or multiple bases for disposition, they should all be listed, e.g., the alleged unilateral change was not material and substantial and, moreover, the union had waived its right to bargain over the issue.

See Pattern at Sec. 10122.14(a) for dismissal letter.

(b) *Short Form:* Where a detailed explanation has been rejected by the charging party, a short-form dismissal letter should issue which follows the pattern set forth at Sec. 10122.14(a) with the decision to dismiss language limited to a brief statement. Such a statement should be concise and based on specific grounds such as the following:

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- Lack of cooperation by charging party
- Lack of jurisdiction
- Charge filed outside 10(b) period
- Insufficient evidence to establish a violation
- Formal proceedings will not effectuate the purposes of the Act (e.g., isolated unlawful conduct, policy determinations)

(c) *Merit Dismissal:* In certain circumstances, such as when an otherwise meritorious allegation is isolated and/or the remedy available does not warrant formal proceedings, a merit dismissal letter may be appropriate. See GC Memos 02-08 and 95-15 and OM 02-15. See Patterns at 10122.14(d) and (e).

10122.3 Service

The names and addresses of all interested parties and counsel who have entered appearances on their behalf during the investigation should be listed on the dismissal letter and copies mailed to such persons. At the time the dismissal letter is mailed to the parties, the Regional Office should electronically transmit the dismissal letter to the Office of Appeals.

10122.4 Appeal Rights

All dismissal letters must provide instructions for filing an appeal with the General Counsel and may include Form 4938 for this purpose. Normally, the charging party must be given 14 days in which to file an appeal. Sec. 102.19, Rules and Regulations. For computation of time periods, see Sec. 102.111, Rules and Regulations.

However, the charging party is given only 7 days in which to file an appeal when an 8(b)(7)(C) charge is dismissed and an expedited election is directed. Sec. 102.81(a), Rules and Regulations and Sec. 10232.2(c). The 7-day appeal period also applies to any other charges that are dismissed in connection with the 8(b)(7) proceeding. Sec. 102.81(c), Rules and Regulations.

All dismissal letters should include Form NLRB-4767, Appeal Form, and request that the person filing an appeal use such forms to notify the other parties. The General Counsel's acknowledgment of the filing of an appeal, as well as any ruling on a request for extension of time to file an appeal, will be served on all parties. Sec. 102.19, Rules and Regulations.

10122.5 Partial Dismissal

Where the Regional Office determines that only a portion of the charge lacks merit, the nonmeritorious allegations should be dismissed, absent withdrawal. In such situations, the partial dismissal letter should clearly identify those allegations being dismissed and provide the usual opportunity to file an appeal. This letter must also state that the remaining allegations are being retained for such further disposition as may be appropriate.

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(a) *Complaint on Meritorious Allegations:* Although complaint may issue as to the meritorious allegations, if the partial dismissal is appealed, the hearing should not be held until after disposition of the appeal, absent unusual circumstances.

(b) *Settlement of Meritorious Allegations:* Although a settlement agreement may be entered into as to the meritorious allegations, approval of the settlement should be withheld until after the expiration of the time for filing an appeal or the disposition of an appeal.

10122.6 Countercharges

Countercharges involve circumstances arising out of the same situation where each party has filed a charge(s) against the other, e.g., 8(a)(5) and 8(b)(3) or 8(b)(7) and 8(a)(5) charges. Often the disposition of one charge affects the processing of the related countercharge. Therefore, where the Regional Office finds merit to one of the charges but dismisses the other, the issuance of complaint may be withheld until after the expiration of the time for filing an appeal or the disposition of an appeal.

10122.7 Extension of Time to File Appeal

On receipt of a copy of request for extension of time to file an appeal, the Regional Director should, if compelling circumstances exist, immediately advise the Office of Appeals if the Regional Office objects to granting the request and the basis for

such objection. If the charge is partially dismissed, see Sec. 10122.5 for permissible action during the appeal period or while the appeal is pending.

10122.8 Regional Office Action Upon Receipt of Appeal

Upon receipt of an appeal, the Regional Office should carefully review the appeal and determine whether reconsideration of the dismissal or further investigation is warranted.

(a) *Submission to Appeals:* If the appeal does not raise new issues or evidence, the Regional Office may so state and need not comment further regarding the appeal, unless it would be instructive to the Office of Appeals in its review. If the appeal raises issues or evidence the Regional Office has not previously considered, the Regional Office should analyze the new material in its comment on appeal. If the Regional Office concludes that the appeal raises issues requiring further investigation, the Office of Appeals should be notified and the investigation promptly completed. If the additional investigation leads the Regional Office to conclude that dismissal of the charge continues to be warranted, the Regional Office should prepare a written document memorializing that determination. Sec. 10068.2. The Regional Office should then note the results of its additional investigation in its comments on appeal. Before sending the Regional Office file to Appeals, the file should be examined to assure that memos and reports are accurate and legible and that the file contains all relevant information.

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If any skip counsel issues arose during the investigation, the Regional Office's comment on appeal should note the information listed in Sec. 10058.

(b) *Revocation of Dismissal by Regional Office:* If the appeal or further investigation leads the Regional Office to conclude that allegations in the charge warrant complaint, it should telephonically or electronically notify the Office of Appeals, prior to revocation, of its intention to revoke the dismissal. The Regional Director should then revoke the dismissal letter and take appropriate action. See Pattern at Sec. 10122.14(b).

10122.9 Submission of Case File to Office of Appeals

The Regional Office should submit the case file to the Office of Appeals within 14 days of the Regional Office's receipt of the appeal. If the Regional Office is unable to submit the case file within 14 days, the Regional Office should forward a memo to Appeals explaining the reason for the delay and the estimated date of submission.

The Regional Office's transmittal memo should set forth the Impact Analysis category of the case and whether there are any related pending cases. In such circumstances, the case number, filing date and current status of such cases should be noted.

10122.10 Request for Expedited Processing of Appeal

Under certain circumstances, the Regional Office may request expedited processing of an appeal. The transmittal memo or the comment on appeal should set forth the basis for such request, such as:

- Trial is scheduled in a related case (include date of hearing)
- Complaint has issued on other allegations in the case pending before the Office of Appeals
- Unilateral settlement in a related case is pending approval or on appeal
- Charge is blocking a representation petition
- Related matters are currently pending before the Board (e.g., a report on objections) or
- Related picketing or other economic action continues

10122.11 Notification to Office of Appeals of New Developments

If, after the Regional Office sends the transmittal memo or comment to the Office of Appeals, a new related charge is filed or other relevant developments occur, a memo containing that information should be forwarded to Appeals. In such circumstances, the Regional Office should notify Appeals of any changes in the status of the new related charge during the pendency of the appeal. Notification may be made by telephone, facsimile, memorandum or electronically, depending on the urgency of the situation.

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10122.12 Appeal Sustained

If the appeal is granted, the Regional Office should issue complaint or take other appropriate action directed by the Office of Appeals. While the Regional Director has the authority to settle according to existing guidelines, the Director should contact the Division of Operations-Management if there are questions regarding the appropriateness of accepting a particular settlement.

10122.13 Appeals Remanded to Regional Offices for Further Investigation

Upon remand by the Office of Appeals to the Regional Office for further investigation, the Regional Office should promptly conduct the investigation and return the remanded case to Appeals within 7 days after receipt. If the nature or extent of the investigation or a conflict with other pressing matters of a higher Impact Analysis category prevents prompt resubmission, the Regional Office should promptly notify Appeals of the reason for the delay and give an estimate of the additional time required. The information requested may be transmitted by telephone, facsimile, memorandum, or electronically.

10122.14 Patterns Related to Dismissals

The following patterns related to dismissals of unfair labor practice charges should be served as follows:

- If the charging party is represented by an attorney, the letter should be addressed to the attorney with a copy to the charging party.
- If the charging party is not represented by an attorney, the letter should be addressed to the charging party with a copy to its representative.
- Copies of the letter should also be sent to the charged party and its representative.

(a) *Pattern for Dismissal of Charges:* The following pattern should be used for dismissal of an unfair labor practice charge. The normal appeal period is 14 days; see, however, Sec. 10122.4 for circumstances relating to Section 8(b)(7) in which the appeal period is reduced to 7 days.

[Charging Party's Attorney—otherwise,
Charging Party if not represented by an attorney.]

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Re: [Case Name]
[Case Number]

Appropriate Salutation:

The Region has carefully investigated and considered your charge against _____ alleging violations under Section 8 of the National Labor Relations Act.

Decision to Dismiss: **Based on that investigation, I have concluded that further proceedings are not warranted, and I am dismissing your charge for the following reasons:**

Your charge alleges [, among other things,] that [Briefly describe closely related allegations and reasons for dismissal in the same paragraph.]

Your charge also alleges that. . . .

Finally, your charge also alleges that. . . .

Your Right to Appeal: **The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, you are encouraged to submit a complete statement setting forth the facts and reasons why you believe that the decision to dismiss your charge was incorrect.**

Means of Filing: **An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.**

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Appeal Due Date and Time: **The appeal is due on [14 days from issuance]. If you file the appeal electronically, it will be considered timely filed if the transmission of the entire document through the Agency's website is accomplished no later than 11:59 p.m. Eastern time on the due date. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.**

If you mail the appeal or send it by delivery service, it must be received by the General Counsel in Washington, D.C., by the close of business at 5 p.m. Eastern time or be postmarked no later than [1 day before the due date set forth above].

Extension of Time to File Appeal: **Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. The fax number is (202) 273-4283. A request for an extension of time to file an appeal must be received on or before the original appeal due**

date. A request for an extension of time that is mailed or given to a delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality/Privilege: **Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential sources, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and 7(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.**

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Notice to Other Parties of Appeal: **You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.**

Very truly yours,

Regional Director

Enclosure

cc: Charging Party (unless addressed above because not represented by an attorney)
Non Attorney Representative of Charging Party
Charged Party and Representative
Other Parties and Representatives
General Counsel, Office of Appeals

(b) Pattern for Revocation of Dismissal While Appeal is Pending:

[Charging Party's Attorney—otherwise
Charging Party if not represented by an attorney**]**

Re: [Case Name**]**
[Case Number**]**

Appropriate Salutation:

By letter dated [date**], I dismissed the charge [**you/charging party**] filed against [**name of charged party**]. On [**date**] [**you/charging party**] appealed the dismissal of your charge to the General Counsel.**

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<u>Revocation of Dismissal</u>: After further review, I have reconsidered my conclusion and have now determined that additional proceedings on [your/the**] charge are warranted. In view of my reconsideration, on behalf of the General Counsel, I am informing you that [**your/the**] charge is being returned to the Regional Office for further processing. Since I have determined that further proceedings are warranted on [**your/the**] charge, I am revoking my earlier dismissal of [**your/the**] charge.**

[An opportunity to settle in absence of complaint can be set forth here.]

Very truly yours,

Regional Director

cc: Charging Party (unless addressed above because not represented by an attorney)
Non Attorney Representative of Charging Party
Charged Party and Representative
Other Parties and Representatives
General Counsel, Office of Appeals

(c) *Pattern for Approval of Request to Withdraw Appeal and Charge:*

[Charging Party's Attorney—otherwise,
Charging Party if not represented by an attorney.**]**

Re: [Case Name**]**
[Case Number**]**

Appropriate Salutation:

By letter dated [date**], I dismissed the charge [**you/charging party**] filed against [**name**]. On [**date**] you appealed the dismissal of your charge to the General Counsel. On [**date**] you requested to withdraw the charge in this matter.**

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Because of the pending appeal, [your/that**] request to withdraw the charge is considered to be a request to withdraw both [**your/the**] appeal and the charge in this matter. Accordingly, on behalf of the General Counsel, I approve [**your/the**] request to withdraw the appeal. I also approve [**your/the**] request to withdraw the charge in this matter.**

Very truly yours,

Regional Director

cc: Charging Party (unless addressed above because not represented by an attorney)
Non Attorney Representative of Charging Party
Charged Party and Representative
Other Parties and Representatives
General Counsel, Office of Appeals

(d) *Pattern for Merit Dismissal – Conditional Decision to Dismiss:*

[Charging Party's Attorney—otherwise
Charging Party if not represented by an attorney.**]**

Re: **[**Case Name**]**
[Case Number**]**

Appropriate Salutation:

The Region has carefully investigated and considered your charge against _____ alleging violations under Section 8 of the National Labor Relations Act.

Conditional Decision to Dismiss: **I have concluded that further proceedings on the arguably meritorious allegations disclosed by the investigation are not warranted at this time. For the reasons set forth below, I have conditionally decided to dismiss your charge 6 months from this date.**

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Your charge alleges [Describe the arguably violative conduct.**]**

I have conditionally decided to dismiss because there were no prior meritorious unfair labor practice charges against the Charged Party within the past several years, and [Set forth additional circumstances which make the conditional decision to dismiss appropriate, such as:

- the conduct is isolated in nature; or
- there is no ongoing unlawful effect on an employee's terms and conditions of employment; or
- there is neither impact on other employees nor other accompanying violations which require a Board remedy; or
- the conduct has minor group impact; or
- the conduct is of limited duration.**]**

I intend to dismiss your charge 6 months from this date unless a new meritorious charge is filed within that time alleging that the Charged Party has engaged in other unfair labor practices that make

dismissal of your charge inappropriate. Accordingly, I will hold your charge in abeyance for 6 months from the date of this letter. If a meritorious charge involving other unfair labor practices is filed against the Charged Party during that period, I will reconsider whether further proceedings on this charge are warranted.

Your Right to Appeal: **The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, you are encouraged to submit a complete statement setting forth the facts and reasons why you believe that the decision to dismiss your charge was incorrect.**

Means of Filing: **An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to addressed to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.**

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Appeal Due Date and Time: **The appeal is due on [14 days from issuance]. If you file the appeal electronically, it will be considered timely filed if the transmission of the entire document through the Agency's website is accomplished no later than 11:59 p.m. Eastern time on the due date. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.**

If you mail the appeal or send it by delivery service, it must be received by the General Counsel in Washington, D.C., by the close of business at 5 p.m. Eastern time or be postmarked no later than [1 day before the due date set forth above].

Extension of Time to File Appeal: **Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. The fax number is (202) 273-4283. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.**

Confidentiality/Privilege: **Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential sources, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and 7(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.**

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Notice to Other Parties of Appeal: **You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the**

enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.

Very truly yours,

Regional Director

Enclosure

cc: Charging Party (unless addressed above because not represented by an attorney)
Non Attorney Representative of Charging Party
Charged Party and Representative
Other Parties and Representatives
General Counsel, Office of Appeals

(e) *Pattern for Merit Dismissal Following Conditional Decision to Dismiss:*

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[Charging Party's Attorney—otherwise,
Charging Party if not represented by an attorney.**]**

Re: [Case Name**]**
[Case Number**]**

Appropriate Salutation:

The Region has carefully investigated and considered your charge against _____ alleging violations under Section 8 of the National Labor Relations Act.

Decision to Dismiss: **On [**date**], I informed you of my intention to dismiss this charge in 6 months unless a new meritorious charge was filed within that time alleging that the Charged Party has engaged in other unfair labor practices that make dismissal of your charge inappropriate. No such charge has been filed. Accordingly, I have**

concluded that further proceedings are not warranted and I am dismissing your charge.

Your Right to Appeal: **The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, you are encouraged to submit a complete statement setting forth the facts and reasons why you believe that the decision to dismiss your charge was incorrect.**

Means of Filing: **An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be sent to me.**

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Appeal Due Date and Time: **The appeal is due on [14 days from issuance]. If you file the appeal electronically, it will be considered timely filed if the transmission of the entire document through the Agency's website is accomplished no later than 11:59 p.m. Eastern time on the due date. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.**

If you mail the appeal or send it by delivery service, it must be received by the General Counsel in Washington, D.C., by the close of business at 5 p.m. Eastern time or be postmarked no later than [1 day before the due date set forth above].

Extension of Time to File Appeal: **Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlrb.gov,**

click on E-GOV, select E-FILING, and follow the detailed instructions. The fax number is (202) 273-4283. A request for an extension of time to file an appeal <u>must be received on or before the original appeal due date</u>. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.

Confidentiality/Privilege: **Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential sources, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and 7(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.**

Frankl v. HHH Corp., No. 12-15984 archived on August 29, 2014

Notice to Other Parties of Appeal: **You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.**

Very truly yours,

Regional Director

Enclosure

cc: Charging Party (unless addressed above because not represented by an attorney)
Non Attorney Representative of Charging Party
Charged Party and Representative
Other Parties and Representatives
General Counsel, Office of Appeals

10123 Reopening of Dismissed or Withdrawn Cases

Pursuant to the General Counsel's authority under Section 3(d) of the Act, Regional Directors may reopen a case within the 10(b) period. In such circumstances, the Regional Director should issue a letter to all parties advising that the prior dismissal of the charge or the prior approval of the withdrawal request has been revoked and that the charge is reinstated.

10123.1 Cases After 10(b) Period

Franki v. HTH Corp., No. 10-15684 archived on August 29, 2011

In certain limited circumstances, a timely filed charge that was dismissed or withdrawn may be reinstated after the expiration of the 10(b) period. Thus, a Regional Director may, in appropriate circumstances, revoke a dismissal or approval of a withdrawal, reopen a case for reconsideration and issue complaint regarding events occurring within 6 months of the date the charge was filed. Such circumstances include:

(a) *Fraudulent Concealment:* Where the charged party has fraudulently concealed evidence. *Kanakis Co.*, 293 NLRB 435 (1989); cf. *Brown & Sharpe Mfg. Co.*, 312 NLRB 444 (1993); *Morgan's Holiday Markets*, 333 NLRB 837 (2001).

(b) *Subterfuge in Non-Board Adjustments:* Where the charged party has fraudulently entered into a non-Board adjustment as a subterfuge to avoid its liability under the Act. *Norris Concrete Materials*, 282 NLRB 289 (1986).

In all circumstances other than those set forth above, the Regional Office must obtain authorization from the Division of Advice if reinstatement of the charge would occur outside the 10(b) period.

10123.2 After Appeal Filed or Denied

When an appeal is pending, the Regional Office should, prior to revocation, telephonically or electronically notify the Office of Appeals of its intention to revoke the dismissal. When the Regional Office's dismissal has been sustained on appeal, the Regional Office must obtain clearance from Appeals in order to revoke the dismissal. The reinstatement of such charges may not be utilized in order to permit withdrawal of those charges. Sec. 10122.8.

10123.3 Conditionally Withdrawn Cases

If the Regional Office determines that the charged party failed to comply with its obligations pursuant to a non-Board adjustment in which the charge has been withdrawn conditionally (Sec. 10120.5), the Regional Office should revoke approval of the conditional withdrawal and reinstate the charge.

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

10124–10170 SETTLEMENTS

10124–10142 SETTLEMENTS/NON-BOARD ADJUSTMENTS

10124 Settlements/Non-Board Adjustments

Unfair labor practice cases may be resolved through informal or formal Board settlement agreements or through non-Board adjustments. Regional Offices should seek to obtain an informal or, where appropriate, a formal settlement agreement, which carry with them the Agency's imprimatur, including compliance policed by the Agency. Non-Board adjustments, which are an important settlement tool, are agreements between the parties that result in the withdrawal of the charge.

10124.1 Policy

It is the policy of the Board and the General Counsel to actively encourage the parties to reach a mutually satisfactory resolution of issues at the earliest possible stage. Moreover, the Administrative Procedure Act (Sec. 5(b)) requires that the Agency consider "offers of settlement, or proposals of adjustment where time, the nature of the proceeding, and the public interest permit." (5 U.S.C. § 554(c)(1)). Since voluntary remedial action is a high priority, diligent settlement efforts should be exerted in all meritorious cases. Settlement of a meritorious case is the most effective means to: (1) improve relationships between the parties; (2) effectuate the purposes of the Act; and (3) permit the Agency to concentrate its limited resources on other cases by avoiding costly litigation expenses.

Franki v. HTH Corp., No. 10-15984 archived on August 29, 2011

10124.2 Principal Factor in Achieving Settlement

The principal factor affecting a Regional Office's success in achieving settlement is the confidence of the public in the ability, impartiality and integrity of the Regional Office. When the public is satisfied that the Regional Office, when proposing or negotiating settlement, has fully investigated and considered the facts of the case and is convinced that the formal prosecution of the case would result in the finding of unfair labor practices, the chances of settlement are considerably increased.

10124.3 Scope of Remedy

Public confidence is also nurtured by the history of the nature and extent of the settlements sought and obtained by the Regional Office. The Regional Office should seek a settlement agreement which substantially remedies all unfair labor practices deemed meritorious. The proposed remedy generally should not exceed that which would be expected from a fully favorable Board decision, except in areas where the General Counsel has announced initiatives in seeking more effective remedies, including first contract bargaining cases. See Sec. 10131.1 and .4 and GC Memo 07-08. Practical considerations, such as the quality of the evidence regarding certain allegations or the desires of the charging party, may, however, result in the approval of a settlement agreement with a lesser remedy if it will effectuate the policies of the Act to do so.

Although settlement of a charge is limited to securing compliance with the Act, the parties should be encouraged to resolve other collateral disputes as well if it would assist in settling the case before the agency. In this regard, it should be noted that the unfair labor practice charge might be only one element of a broader dispute between the parties.

10124.4 Limitations on Regional Office Authority

In any case where the Regional Office is considering approval of a settlement agreement which is based on new or novel remedies, or where the notice posting is waived or is for less than 60 days, clearance should be sought from the Division of Advice. Regional Offices may also be directed to obtain clearance before approving settlement agreements in cases in which complaint has been authorized by Advice or the Office of Appeals.

10126 Timing of Settlement Attempts

10126.1 Prior to Regional Office Determination

Voluntary resolution at an early stage in the processing of a charge is highly desirable. Thus, if it becomes apparent to the Regional Office, even as early as the initial contacts with the parties, that a settlement or non-Board adjustment might quickly be achieved, resolution should be explored, consistent with Regional Office policy. A Regional Director must exercise care in the delegation of settlement responsibility to Board agents and supervisors, particularly before Regional Office determination on the merits of a case. Parameters may be established regarding the scope of settlement responsibility for individual Board agents, eg., requiring advanced telephonic authorization or any other appropriate limitations. The processing of the charge should not, however, be unduly delayed while settlement is pursued.

Frankl v. HTH Corp., No. 10-15584 archived on August 29, 2017

10126.2 After Regional Office Determination

Following a Regional Office determination as to the merits of a case, the Board agent should pursue settlement before issuance of complaint. Indeed, experience indicates that action taken during this period is critical in obtaining settlements.

The investigative agent is directly responsible for making these settlement efforts. In light of the effectiveness of Regional Office settlement coordinators, it is anticipated that coordinators will participate directly in settlement efforts, when appropriate, thereby increasing the likelihood of achieving settlement. In addition, other Regional Office managers, including the Regional Director, may also directly participate in settlement negotiations when warranted.

The Regional Office should carefully assess the impact that issuance of complaint will have on the likelihood of achieving a settlement. Thus, the Regional Director may choose to delay issuance for a short period, if such would be helpful. However, issuance of complaint should not be unreasonably delayed. Where it is clear that settlement at this stage will not be achieved, complaint should issue immediately.

Prior to the submission of a proposed settlement agreement to the parties, the Board agent must be certain that the proposal, if accepted by the parties, will be approved by the Regional Director. Absent unusual circumstances, the amount of backpay should be calculated at the outset of negotiations and should be specified in the proposed settlement agreement. In an *informal* settlement, listing the amount of backpay in the notice is in the Regional Director's discretion; in a formal settlement agreement, consult Sec. 10164.6 as to this issue.

If the settlement proposal is modified during negotiations, the Board agent should caution the parties that all changes are subject to review and approval by the Regional Director. The Board agent should also stress that the Regional Office may take a different position as to settlement terms should settlement efforts fail.

10126.3 Postcomplaint

Settlement efforts should, of course, continue at all stages of the proceeding, including after the hearing opens. Settlement efforts after complaint should be continued in accordance with Regional Office practice by either the investigative agent, the attorney assigned to the case or the settlement coordinator. The person assigned to continue settlement negotiations should review all previous efforts and be flexible in exploring additional approaches which may lead to a settlement.

If the Regional Office has not already done so, it should submit a proposed settlement agreement in writing to the charged party promptly after issuance of complaint. The charged party should also be invited to meet with the Regional Office settlement coordinator or other appropriate Regional Office supervisory or managerial officials to discuss settlement.

Frankl v. HTH Corp., No. 16-15984 archived on August 29, 2011

10128 Techniques of Settling

10128.1 Knowledge of the Case and the Law

A complete and thorough knowledge of the facts of the case and the underlying law is essential to successful settlement efforts. Such knowledge will enable the Board agent to display the necessary confidence to represent the Regional Office effectively.

10128.2 Conduct of Board Agent

The charged party's reaction to the Board agent's initial approach to settlement of a case is important in achieving a resolution. Therefore, at all stages of settlement negotiations, particularly during the initial conference with the charged party, the Board agent should display objectivity and professionalism.

10128.3 Limitation of Disclosure During Settlement Discussions

In attempting to settle a meritorious case, the Board agent must reveal only enough information to demonstrate the merits of the Regional Office's position, but must not endanger successful prosecution of the case should settlement negotiations fail. In no event should the Board agent reveal names of witnesses or other confidential sources of

information. In sum, the Board agent should focus on the complaint allegations and indicate in general terms the nature of the evidence that supports those allegations.

The following are examples of the type of information that, in appropriate circumstances, may be revealed to the charged party:

- With respect to an allegation of surveillance, inform the charged party that there is evidence from more than one witness that a supervisor [give name] was observed on the night of [give date] about [give time] in an automobile [describe] and further indicate that our witnesses have been able to describe the manner in which the supervisor was dressed.

- In an 8(a)(3) case where the charged party is asserting that the alleged discriminatee was discharged because of absenteeism, indicate that there is evidence that the supervisor orally excused the absences of the alleged discriminatee and that there is evidence from several employee witnesses that absences of a similar nature were also excused by several employer supervisors.

- In an 8(b)(7)(C) case, indicate that witnesses overheard, on a particular date and at a particular place, the business representative explaining to the steward that the purpose of picketing was not area standards, but was recognitional and organizational.

Frankl v. NTH Corp., No. 10-15084 archived on August 29, 2011

In determining the specificity of the evidence which the Regional Office may reveal, consideration should be given to the likelihood that disclosure of such information will advance the opportunity for settlement.

10128.4 Contact with the Charged Party

The Board agent should approach the charged party with a positive attitude, conveying the Regional Office's desire to resolve the dispute. In cases where the charged party is open to settlement, it may be achieved by the submission of the proposed settlement agreement followed by brief discussions. In other situations, a settlement meeting as described below should be considered and employed, where appropriate.

10128.5 Settlement Meeting with the Charged Party

Absent unusual circumstances, the initial settlement meeting should include only the charged party and its representatives. Since it is necessary to convince both the charged party and its representative of the benefits of settlement, it may be appropriate to request through the representative that both be present during settlement discussions. Although experience with a particular charged party or its representative may suggest that settlement is unlikely, it is, in most instances, worthwhile to have such a meeting to ensure that there is no misunderstanding as to the terms of the proposed settlement and the benefits of settling.

The Regional Office's representative should begin with a summary of the scope of the allegations deemed meritorious, the theory of the case and a brief description of the

facts and the law supporting the Regional Office's position. As noted, the Regional Office's representative should be careful not to reveal more than is necessary about the facts of the case; however, a sufficient degree of detail should be provided in order to persuade the charged party of the soundness of the Regional Office's case. The ability to convincingly articulate the Regional Office's position is critical at this juncture, particularly if the principals of the charged party are present during the discussions. However, the discussion should focus on settlement and should not be allowed to evolve into a protracted debate over the merits of the case.

The Regional Office's representative should explain the substance of the settlement, noting that the elements of the proposal are based upon standard Board policies with respect to the types of allegations found to be meritorious. The Regional Office's representative should listen carefully to the charged party's position and consider whether any accommodation can be made to address objections raised to the proposal.

10128.6 Factors Favoring Settlement

No matter how experienced the representatives of the charged party are, the advantages of settling versus the risk of litigation should almost always be frankly discussed. Certain common factors which may be discussed at the discretion of the Regional Office's representative are set forth below:

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- The cost of litigation is often significant and it is appropriate to ask the charged party to estimate for itself such cost

- Prompt settlement allows the parties to put the dispute behind them, avoids ongoing disruption to the parties' operations and relationship and provides certainty in terms of timing and outcome

- It is advantageous to the charged party to "voluntarily" post a notice to employees pursuant to a settlement agreement, rather than posting a notice to employees pursuant to a Board Order or a Court Judgment

- Settlement avoids the emotional impact of a trial on all participants

- The charged party should be invited to assess the impact on it if the testimony of top officials is discredited or if an adverse decision is rendered

- Most often, the amount of the backpay is substantially less at the settlement stage than following protracted litigation, which could take more than a year

- Prompt settlement will allow a charged party to take advantage of current circumstances and cut off future liability, e.g., an alleged discriminatee employed elsewhere may be subsequently laid off, causing backpay liability to resume

10128.7 Contact with Charging Party

The Regional Office should keep the charging party apprised of the status of settlement efforts. The Regional Office should also inform the charging party of the advantages of settlement as well as other factors, as set forth below:

- The Regional Office's representative should discuss with the charging party the scope of the allegations deemed meritorious, the theory and the strengths and weaknesses of the case. It is particularly important that the charging party understands the scope and the limitations of the remedies to be sought in litigation.

- Alleged discriminatees should be encouraged to provide full, complete, and accurate interim earnings information.

- An individual entitled to reinstatement under the General Counsel's theory of the case should not be pressured in any way to waive reinstatement, since reinstatement is one of the most effective remedies available under the Act. Of course, for a variety of reasons, individuals may elect to waive reinstatement in response to a settlement offer from a charged party.

Frankl v. HTH Corp., No. 18-15984 archived on August 29, 2019

10130 Substance of Settlement Agreement

10130.1 Generally

Since settlements are as varied as the circumstances of cases, the principles appearing in this subsection are offered as guidelines.

Issues involving reinstatement; computation of backpay, interest, deductions and withholdings; and lump sum settlements are substantially the same as those encountered when dealing with compliance with formal Board or court decisions and orders. Accordingly, substantially the same principles described in the Compliance Manual should be applied.

Unless the amount of interest is set forth in the agreement, both formal and informal settlement agreements that provide for interest on backpay should include the following:

> Interest shall be added to [here insert backpay, dues, fees and/or assessment, as appropriate] to be computed in the manner set forth in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

10130.2 Backpay and Interest

(a) *Backpay*: The backpay calculations should be made consistent with Agency policy and methods as set forth in the Compliance Manual and relevant General Counsel

memoranda. For guidance, including clearance from the Division of Operations-Management, concerning backpay settlements amounting to less than 80 percent or more than 100 percent of net backpay, see Sec. 11752 and Secs. 10592.1, .4, and .8 of the Compliance Manual. The Board agent should be alert to include all appropriate losses in computing gross backpay, as set forth in the Compliance Manual, Secs. 10540–-10546. The procedures for calculating the offsetting interim earnings and adjustments thereto are set forth in the Compliance Manual, Secs. 10550–10560. The parties should be advised that the standard employee Social Security contribution and payroll tax deductions must be made from the net backpay owed to the alleged discriminatees, but not from any interest or reimbursement of medical expenses.

(b) *Interest*: Interest is charged on net backpay and other monetary liabilities due in an unfair labor practice case and should routinely be included in all settlements. In certain circumstances, such as where the backpay period is short, the monetary liability is relatively small regardless of the length of the backpay period and/or there are particular risks of litigation, the Regional Office may exclude interest in order to facilitate settlement. Accordingly, Regional Directors have the authority to accept settlements of backpay without interest if the settlement otherwise effectuates the purposes of the Act.

10130.3 Reinstatement Not Immediately Available

Where, because of lawful changes in the employer's operations, reinstatement to an alleged discriminatee's former position is not feasible, it may be agreed that there will be reinstatement to another position or that employment will be offered at some time in the future. Compliance Manual, Sec. 10528. In such cases, the settlement agreement should set forth specific details in order to avoid future misunderstandings.

Frankly, HTH Corp., No. 10-15984 archived on August 29, 2011

10130.4 Reinstatement Declined or Not Desired

If an offer of reinstatement is declined or the alleged discriminatee does not desire reinstatement, the settlement agreement should so state. In such circumstances, any alleged discriminatee who is not a charging party should execute a separate waiver of reinstatement.

10130.5 Joint and Several Liability

In companion CA-CB cases growing out of the same acts of discrimination, the settlement agreements may require the charged employer and the charged union jointly and severally to make whole the alleged discriminatees. Under the concept of joint and several liability, if one party fails to meet its obligation, the other party is responsible for the entire amount. It is advisable to ascertain the exact amount of the liability and to apportion it appropriately within the settlement agreement so long as there is no concern about either party fulfilling its commitment. Where there is such concern, the agreement should not attempt to apportion the liability between the employer and the union.

In cases in which all charged parties indicate a desire to settle, each should pay its equal share. If one charged party is willing to settle, but the other insists on trial of the case, a settlement agreement may be taken from the party willing to settle. Appropriate provisions should, however, assure that the settling charged party will bear only its proportionate share of the backpay liability, unless efforts to obtain payment of the

remaining portion of the backpay from the other respondent(s) should fail following successful prosecution of the case. It is suggested that the full amounts of backpay (including the portion owed by the party refusing to enter into the settlement) be set opposite the names of the alleged discriminatees in the "make-whole" provisions of the agreement and that language similar to the following be inserted in another paragraph of the agreement:

> For purposes of this agreement [stipulation], the respective amounts of backpay set forth herein represent the full loss of earnings of these employees respectively to this date. Upon [approval of this agreement] [entry of a Board order pursuant to this stipulation], [the settling charged party] will pay immediately to each of said employees one half of the amount set forth opposite that individual's name. If the General Counsel succeeds in litigation against [the other charged party], [the settling charged party] will pay the remaining portion of each such amount on being informed by the Regional Director that reasonable efforts to obtain payment from [the other charged party] have failed.

10130.6 Departure from Equal Proportions Basis

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One of two potential joint-and-several charged parties may be willing to settle by paying its share of the backpay, as well as the share of the other charged party. Such offer should not be solicited as part of the settlement agreement. However, if such desire is a voluntary one and all reasonable efforts to obtain settlement from the other charged party have failed, full payment may be accepted from one in order to avoid hardship to the individuals involved. Any such agreement should provide the following:

- The Regional Office may, in all other respects, process the case further against the other charged party
- The payment satisfies the make whole requirements
- The Regional Office will not seek any payment from the other charged party

In certain circumstances, including where the acceptance of such a settlement offer is contrary to the public interest, the Regional Office should reject the offer.

For a period when only one charged party is liable, the agreement should provide for backpay liability only for the one charged party. For example, a labor organization may toll its liability for backpay by giving notice to the employer and the employee involved that it no longer objects to the employment of the alleged discriminatee by the charged employer. Under these circumstances, backpay liability should not be apportioned for the period after the charged union has tolled its liability.

10130.7 Insolvent Charged Parties

When there are several charged parties involved in a case and one or more becomes insolvent before paying its share, the unpaid amount should be solicited without delay from the other charged parties. (See Compliance Manual, Secs. 10596 and 10600 regarding issues of derivative liability and charged party's inability to comply, respectively.)

10130.8 Nonadmission Clauses

Nonadmission clauses should not be routinely incorporated in settlement agreements. A nonadmission clause may be incorporated in a formal settlement only if it provides for a court judgment. Sec. 10168, par. 10. It is Board policy that nonadmission clauses should not be included in notices. See *Independent Shoe Workers of Cincinnati, Ohio (U.S. Shoe Corp.)*, 203 NLRB 783 (1973). If it comes to the Regional Office's attention that the charged party intends to post a settlement agreement containing a nonadmission clause along with the notice, the Regional Office may wish to consider denying the charged party's request for the nonadmission clause. See *Bangor Plastics, Inc.*, 156 NLRB 1165 (1965), enf. denied 392 F.2d 772 (6th Cir. 1967). In the alternative, the Regional Office may require a clause in the settlement agreement that prohibits the Charged Party from posting such a settlement agreement with the notice.

10130.9 Position of Alleged Discriminatees

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If the charged party wishes to know whether alleged discriminatees desire reinstatement and the amount of backpay due, every effort should be made to ascertain and convey this information. However, experience demonstrates that alleged discriminatees often defer taking a position on reinstatement until the charged party makes a bona fide offer of settlement. Moreover, no effort should be made to persuade the alleged discriminatees to waive reinstatement for the purposes of obtaining a settlement.

10130.10 Default Language

The Regional Office should include in the informal settlement agreement default language as set forth in Sec. 10146.7. See GC Memo 11-04.

10130.11 Confessions of Judgment

In circumstances such as backpay installment payment plans and other situations in which the ability of a charged party or respondent to meet its backpay obligations is uncertain, Regional Offices should consider using a Confession of Judgment, also called a "consent judgment." In a Confession of Judgment, the charged party or respondent acknowledges that the total sum to be paid in installments is "justly due the NLRB," and authorizes the entry of a judgment of record "against it and in favor of the NLRB" for the total sum owed. A Confession of Judgment can be used at all stages of Board proceedings, including settlement agreements and in compliance with Board or court orders.

A Confession of Judgment, which is filed in the appropriate United States district court, does not require Board approval, but must comply with all statutory requirements and legal precedent of the state of filing. Once filed, Regions may utilize the postjudgment collection procedures of the Federal Debt Collection Procedure Act (FDCPA) to obtain compliance, thus allowing actions such as execution against assets, garnishment of bank accounts and/or accounts receivable, and discovery under FRCP Rule 69.

Regional Offices should confer with the Contempt Litigation and Compliance Branch when use of a Confession of Judgment is contemplated. See OM Memo 09-58.

10131 Specific Remedies

Specific remedies may be appropriate in particular circumstances such as those described below.

10131.1 Remedies in First Contract Bargaining Cases

Serious harm to the collective-bargaining process may result from violations committed during initial contract bargaining and may warrant additional remedies. See GC Memo 08-09. In order to directly and effectively address the consequences of bad-faith bargaining and other violations during first contract negotiations and restore the pre-violation conditions and relative positions of the parties, additional remedies should be considered, such as:

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- Requiring bargaining on a prescribed or compressed schedule
- Requiring periodic reports on bargaining status
- A minimum six-month extension of the certification year
- Reimbursement of bargaining costs
- Union access to bulletin boards

When the impact of unfair labor practices on the collective-bargaining process requires additional remedies, Regional Offices should consider the appropriateness of Section 10(j) relief as well.

10131.2 *Beck* Remedies

Cases involving *Beck* objectors, that is, nonmembers covered by a contractual union security clause who object to paying fees for union activities unrelated to collective bargaining, contract administration or grievance adjustment, often raise complex remedy issues. See e.g., *Communications Workers v. Beck*, 487 U.S. 735 (1988), and *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Stang v. NLRB*, 119 S.Ct. 47 (1998). The

Regional Office should take care to follow the most recent Board decisions in formulating proposed settlements. See GC Memo 98-11 and any subsequent GC and OM Memos in this developing area.

10131.3 Exclusive Hiring Hall Remedies

In many instances, referrals to jobs pursuant to an exclusive hiring hall arrangement are made from a list based on seniority, the number of hours worked or other criteria. Careful consideration should be given to the hiring hall standing of the alleged discriminatee in settling this type of case. The settlement agreement, in addition to backpay, should provide that the alleged discriminatee be given credit in the hiring hall formula based upon the employment allegedly denied.

10131.4 Remedial Initiatives

The Agency has a responsibility to periodically reexamine and update its remedial strategies. Accordingly, the Regional Office should be alert to any remedial initiatives which the General Counsel has decided to pursue. Absent direction from relevant GC or OM Memos, before seeking a nontraditional remedy the Regional Office must first seek authorization from the Division of Advice. See GC Memos 00-03 and 09-09, and OM Memo 99-79.

10131.5 Decertification Petitions and Settlement Agreements

Franki v. HTH Corp., No. 10-15084, archived on August 29, 2011

In settling unfair labor practice charges, Regional Offices should follow the guidance set forth below regarding pending or potential decertification petitions:

(a) Section 8(a)(5) Settlement and Affirmative Bargaining Provision: If a charge alleges a violation of Section 8(a)(5), particularly a unilateral change, and under the circumstances the remedy should include a reasonable period to bargain, the settlement agreement should require the employer to affirmatively bargain with the union. In the absence of such a requirement, the settlement may not serve as a basis for the dismissal of any decertification petition even if filed before the parties have had a reasonable period to engage in meaningful bargaining. See OM Memo 07-24.

(b) *Pending Decertification Petition and Taint:* Following the investigation of an unfair labor practice charge alleging that a pending decertification petition was tainted by employer conduct, such as a claim that the employer instigated the filing of the petition or solicited employees' support of the petition, the Regional Office should make an administrative determination as to the taint allegations. If the Regional Office decides that employer conduct tainted the petition, the Region should:

- Involve the petitioner in the settlement process in an attempt to obtain a withdrawal of the petition and/or
- Seek an admission of liability from the employer as a condition of settlement.

Absent withdrawal, the Regional Office should dismiss the petition setting forth the taint found in the administrative investigation. Such action is appropriate whether a settlement of the related unfair labor practice charge, with or without an admission of employer

liability, is reached or the Regional Office issues a complaint. See OM Memo 07-69, Sec. 11733.2(a)(1), *Canter's Fairfax Restaurant*, 309 NLRB 883 (1992), and *Truserv Corp*., 349 NLRB 227 (2007).

(c) *Pending Decertification Petition and Causal Nexus*: In the absence of taint, if the administrative investigation nevertheless establishes a causal nexus between a meritorious unfair labor practice allegation and a decertification petition, the Regional Office should:

- Involve the petitioner in the settlement process in an attempt to obtain a withdrawal of the petition and/or
- Seek an admission of liability from the employer as a condition of settlement.

If the settlement does not address the Regional Office's determination that the unfair labor practices were causally connected to the petition, the Region may decline to approve the settlement based on a finding that it would not effectuate the purposes of the Act. In such event, a subsequent *Saint Gobain* hearing to establish whether a causal nexus exists between the allegedly unlawful conduct and the petition may be necessary to determine whether the petition should be dismissed. Where a causal nexus has been administratively determined and the Regional Office intends to approve a settlement which would result in the processing of the petition, it should consult with Division of Operations-Management before approving the settlement. See OM Memo 07-69, Secs. 11730.3(c) and 11733.2(a)(3), and *Truserv Corp*., 349 NLRB No. 23 (2007).

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10132 Notices to be Posted

10132.1 Generally

Settlement agreements should provide for posting of a notice to employees or union members that reassures employees or employees and members of their rights under Section 7 and that outlines the action taken in connection with the settlement. The posting should be for 60 consecutive days, unless prior clearance has been obtained from the Division of Advice. GC Memo 00-03.

10132.2 Preparation and Forms

The notices to be posted should be prepared by the Regional Office on approved notice forms. OM 02-44. Posting of photocopies in lieu of the Agency furnished notice is not acceptable, as such would detract from the formality of the settlement.

Informal Settlement

Forms NLRB-4722 and 4724 (Notice to Employees)

Forms NLRB-4781 and 4782 (Notice to Employees and Members)

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Formal Settlement

Forms NLRB-4727 and 4728 (Notice to Employees)

Forms NLRB-4758 and 4759 (Notice to Employees and Members)

The caption of a notice in a formal settlement should contain the following as appropriate:

> "Pursuant to a stipulation providing for a Board Order" or "Pursuant to a stipulation providing for a Board order and a consent judgment of any appropriate United States Court of Appeals"

10132.3 Notice Language

While there is considerable latitude in language to be used in the notice, Regional Offices should, in general, follow the substance of notices in Board orders in comparable cases. The notice language should be readily understandable to employees. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), and OM 02-43. Although it is proper to require the posting of a notice that declares publicly that a party will conform *in the future* to the mandates of the Act, it is improper to force a party to confess past guilt. *NLRB* v. *Express Publishing Co.*, 312 U.S. 426, 438–439 (1941). Thus, notices may not

be phrased so as to require a charged party to admit a violation of the Act, either directly (e.g., "We violated the law when we fired John Smith.") or by implication (e.g., "We will not fire anyone for union activity *again.")*.

10132.4 Posting/Dissemination of Notices

The appropriate method for traditional posting, electronic posting, mailing, and/or publication of notices depends on the type of charge and the circumstances as set forth below:

(a) *Traditional Posting:* During settlement discussions, the Board agent should obtain the charged party's commitment to post the notices at specific places consistent with posting requirements set forth in NLRB Form 4775, Settlement Agreement. The number of notices to be posted and the location of the posting will depend on various factors, including the size of the facility, the type of alleged violation and the extent to which knowledge of the alleged conduct was disseminated.

If the charged party is a union, notices should be posted by the union, both on bulletin boards located at its office and meeting halls, as well as at the facility of the employer involved, if possible. Signed copies of the notices should also be supplied for the employer to post at its facility, if willing.

Settlement agreements entered into in related CA and CB cases (where the employer and the union are jointly and severally liable) should provide for posting of both the charged union's notice and the charged employer's notice at the same places and under the same conditions.

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(b) *Electronic Notice Posting:* In certain cases, it may be appropriate to seek electronic notice posting in addition to a traditional posting where the charged party customarily communicates with its employees or members electronically and/or where the charged party utilized its e-mail or intranet system in committing an unfair labor practice. OM Memo 06-82. Under such circumstances, the electronic posting would be considered an additional site where the charged party normally posts work-related notices. The following factors should be considered in this regard:

- The existence of a charged party's intranet and the frequency and types of postings included on that site
- The existence of a charged party's e-mail system, the frequency of the use of that system to make broadcast e-mails to groups of employees and the subject matters covered
- The number and accessibility of traditional notice-posting areas at the worksite and the degree to which employees work off-site or would otherwise be unlikely to see traditional notices

Such a posting would require the charged party to disseminate the notice electronically in the same manner as it communicates with employees or members. For instance, if the charged party routinely sends broadcast e-mails to employees or members

it should notify all employees or members of the electronic posting via e-mail with the Board notice attached. If issues arise which require further analysis (e.g., the extent of an appropriate electronic posting where the charged party has multiple locations, all privy to same intranet, and the violations did not occur at all facilities), the Regional Office should contact the Division of Advice.

(c) *Mailing of Notice:* If it is apparent that a posting will not effectively reach the employees or members, consideration should be given to requiring the mailing of the notice to them at the charged party's expense.

(d) *Publication of Notice:* In unusual circumstances, the posting and/or mailing of the notice may be viewed as insufficient. Examples of such cases include an unlawful hiring hall that affected employment of persons who are widely scattered or unidentified, or where the unlawful activities involve general or widespread practices. In such cases, publication in a daily newspaper of general circulation, as opposed to publications serving only specialized groups of readers, should be required. Such publication should be at the charged party's expense and on 3 separate days within a 1-week period designated by the Regional Office. Such publication should be in addition to, not a substitute for, such other notice posting as is required by the circumstances.

10134 Parties to Informal or Formal Settlements

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10134.1 Charged Party

The charged party is a necessary signatory to any informal or formal settlement.

10134.2 Charging Party

In all cases, it is desirable to have the charging party enter into a settlement, since a bilateral settlement reflects mutual satisfaction with resolution of the dispute and avoids delay in the implementation of the settlement resulting from dismissal of the charge and possible appeal.

If the charging party is unwilling to execute the proposed settlement agreement but the Regional Office nonetheless concludes that it is appropriate to accept it, the Regional Director or the Administrative Law Judge may approve a unilateral settlement. See Secs. 10150 and 10164.7 on informal and formal settlements, respectively.

A charging party which does not wish to enter into the agreement but has no real objections to the remedial action proposed may be willing to sign a separate document in which it acknowledges the contents of the agreement and that it has no objections to the agreement or will not appeal from a dismissal based on the settlement.

10134.3 Necessary Parties to Settlement

In every case in which the contemplated settlement provides for the disestablishment of a labor organization, or for the withdrawal and/or withholding of recognition from a labor organization, or for ceasing to give effect to part or all of an existing collective-bargaining agreement, both the employer and labor organization should be a

party to the settlement. Thus, a necessary entity not charged in the case should execute the settlement as a party in interest.

Should such a party in interest decline to execute the settlement agreement, the agreement should not be approved unless:

(a) The party in interest files with the Regional Director a letter or other document stating that it has knowledge of the proceedings and of the contemplated settlement and that it waives any right to be a party to the proceedings or to contest the settlement or

(b) In the case of a dissolved labor organization, the last executive officer of that organization files with the Regional Director a statement certifying that the organization is dissolved and out of existence and that it does not claim to represent any of the employees in the unit involved.

Where, in a formal settlement, the actions set forth in either (a) or (b) has occurred, the letter, document or statement must be made part of the record. Sec. 10166.3.

10134.4 Nonparticipation of Necessary Parties

Where the participation of other necessary parties cannot be obtained, it is necessary that the counsel for the General Counsel proceed formally. The allegedly dominated organization, for example, should be served with complaint and notice of hearing. If it fails to appear, only the respondent, charging party, and the General Counsel remain as participants in the case. Under such circumstances, they may enter into a settlement stipulation reciting the facts of service on, and nonappearance of, the 8(a)(2) union.

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10134.5 Decertification Petitioner as Party in Interest

If the administrative investigation establishes either taint of a decertification petition or a causal nexus between a meritorious unfair labor practice charge and a decertification petition, the Regional Office should involve the petitioner in the settlement process in an attempt to secure a withdrawal of the petition. See Sec. 10131.5(b) and (c).

10136 Settlement Issues in Priority Cases

Certain unique issues that may arise in settlement of CC, CD, and CE cases are addressed herein as indicated below.

- Notices in CC Cases: Sec. 10204
- Settlements and Disclaimers in CD Cases: Sec. 10220
- Settlements in CE Cases: Sec. 10224
- Nonparticipation of Necessary Parties in CE Cases: Sec. 10224.2

10140 Non-Board Adjustments

In addition to Board settlements, unfair labor practice charges may be resolved through a specific agreement between the parties, including grievance settlements, or as a result of unilateral action taken by the charged party which satisfies the charging party. Non-Board adjustments result in the withdrawal of the charge or, in limited circumstances, dismissal.

10140.1 Policy

It is well-established Board policy, consistent with the preamble of the Act, to encourage voluntary resolutions of disputes between employers and unions. Accordingly, the Regional Office should encourage the parties to resolve unfair labor practice issues between themselves. However—and this is particularly important where rights of individuals are involved—the parties should be informed that any withdrawal request based upon such resolutions will be subject to the Regional Director's approval.

(a) *The Board's Established Factors:* In *Independent Stave Co.*, 287 NLRB 740 (1987), the Board reconfirmed that the Board's jurisdiction over settlement agreements requires it to enforce public interests, not private rights, and to reject private settlements that are repugnant to the Act or Board policy. Id at 741. In view of *Independent Stave*, the Regional Office should consider, among other factors, whether:

- The settlement is reasonable in light of the alleged violation, the risks of litigating the issue, and the stage of litigation
- The charging party, the charged party, and the alleged discriminatees have agreed to be bound
- Fraud, coercion, or duress were present
- The charged party has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes

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(b) *The General Counsel's Policy Considerations:* In order to permit the Regional Office to exercise proper review pursuant to the policy set forth in *Independent Stave Co.*, the Board agent should ordinarily obtain the terms of the non-Board adjustment in writing. The Board agent should also obtain the position of any alleged discriminatees and any other individuals or entities who may be adversely affected by approval of the request for withdrawal of the charge. In addition to exercising a higher level of scrutiny in cases where a merit determination has already been made, the Region should generally not approve a withdrawal request based upon a non-Board adjustment which:

- Includes a provision requiring an employee to release future rights, such as the right to file NLRB charges, with the exception that an employee may knowingly waive the right to seek employment with a named employer in the future.

- Prohibits an alleged discriminatee from providing assistance, such as testimony, to other employees.
- Absent special circumstances, prohibits an alleged discriminatee from engaging in discussions about the charged party or the terms of the settlement with other employees, except that defamatory statements may be prohibited. However, the non-Board adjustment may contain a provision limiting the disclosure of the amount of money received pursuant to the terms of the non-Board adjustment.
- Specifies unduly harsh penalties for breach of the agreement, such as repayment of backpay or a requirement that the charging party or alleged discriminatee pay attorneys' fees or costs for enforcing the agreement. A provision that seeks damages that are directly related to the breach of the agreement would not be considered an unduly harsh penalty.
- Appears to violate tax laws or regulations.

For more detailed discussion see generally OM Memo 07-27.

10140.2 Backpay

For guidance, including clearance from the Division of Operations-Management, concerning non-Board adjustments with backpay amounting to less than 80 percent or more than 100 percent of net backpay, see Sec. 11752 and Secs. 10592.1, .4, and .8 of the Compliance Manual.

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10140.3 Unrepresented Individuals

In cases involving individuals not represented by a union or an attorney, the Board agent should make known to the charging party the Regional Office's willingness to participate in any settlement discussions and its availability for consultations as to the requirements of a Board settlement, the relative strength of the case, and the impact of any proposed non-Board adjustment on further proceedings in the case.

10140.4 Not Policed by Agency

The parties should be advised that non-Board adjustments do not have the Board's approval and are not policed by the Agency.

10142 Processing of Non-Board Adjustments

Upon being notified of a charging party's desire to withdraw a case based on a non-Board adjustment, the Board agent should obtain the terms of the adjustment.

The approval of the withdrawal request should be granted or withheld in accordance with criteria set forth in Sec. 10142.4. In those situations where alleged discriminatees are not represented by counsel, caution should be exercised to ensure that

the non-Board settlement is not repugnant to the purposes of the Act or that advantage has not been taken of an individual in the private negotiations.

A Regional Director's discretion to reject a settlement reached between the parties is governed by the standards set forth in *Independent Stave Co*., 287 NLRB 740 (1987), and *Alpha Beta Co*., 273 NLRB 1546 (1985).

10142.1 Section 10(b) and Non-Board Adjustments

Generally, Board policy does not permit the reinstatement of charges, which have been withdrawn with Regional Director approval, outside the statue of limitations set forth in Section 10(b) of the Act. *Winer Motors*, 265 NLRB 1457 (1982). Accordingly, the Regional Office should take into consideration the strictures of Section 10(b) in deciding whether to approve a withdrawal request before all of the requirements contemplated by the non-Board adjustment have been carried out. Approval may be withheld or granted conditionally, pending full performance of the requirements of the parties' private adjustment.

10142.2 Approval of Withdrawal

In the normal situation, when all of the requirements of the non-Board adjustment have been carried out, the Regional Office should issue a letter approving the withdrawal request.

If approval is granted, a determination should be made as to whether the case should be closed as *adjusted*, i.e., if the terms of the resolution provide for a substantial remedy, consistent with the purposes of the Act.

If approval of a withdrawal request, proffered on the basis of a non-Board adjustment, is withheld, the parties should be so notified and the investigation should continue. Procedures for approval of a withdrawal based upon a non-Board adjustment after a hearing opens are set forth in Secs. 10154.5 and 10154.6.

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10142.3 Conditional Withdrawals

The Regional Office may also choose to approve a withdrawal conditioned upon the charged party carrying out its obligation under the non-Board adjustment. In such circumstances, the following language should be used in the letter conditionally approving the withdrawal:

> Your request to withdraw the charge you filed against [charged party] is based upon a private agreement between the parties on the matters underlying this charge. I have approved this withdrawal request, conditioned on the performance of the undertakings in the private agreement between the parties. The charge is subject to reinstatement for further processing if the charging party's request for reinstatement is supported by evidence of noncompliance with the undertakings in the private agreement.

Since the Regional Office may be called upon to determine whether there has been a breach of the private non-Board adjustment, care must be taken by the Board agent to insure that the terms of the resolution are clear and understood by all parties.

10142.4 Withdrawal or Dismissal Based on Unilateral Action

A charged party may, on occasion, take adequate remedial action without being willing to enter into a written settlement agreement or to acknowledge by a posted notice that the action is being taken pursuant to settlement of a charge. Some examples include: interrupted bargaining negotiations that resume; an alleged discriminatee who is offered reinstatement with backpay; and a union that ceases striking for an illegal objective.

In such circumstances, the case may be disposed of administratively as set forth below:

(a) *Withdrawal:* When unilateral remedial action is accompanied by a voluntary withdrawal request from the charging party, approval of the request should ordinarily be granted. The case may be closed as adjusted and the parties should be sent a letter approving the withdrawal request.

(b) *Dismissal:* When unilateral remedial action is not accompanied by a withdrawal request, the Regional Director must then determine whether effectuation of the purposes of the Act calls for further proceedings. If the action taken is a full or substantial remedy in fact, if there is no history of prior similar practices by the same charged party and if there is no likelihood of recurrence, the charge may be dismissed on the ground that effectuation of the purposes of the Act does not warrant further proceedings. The case, when closed, should be considered adjusted.

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10142.5 Representation Case Implications of Non-Board Adjustments

The Board agent should consider the impact of a non-Board adjustment on related representation cases. For example, a non-Board adjustment which encompasses the obligation to bargain and an extension of the certification year is recognized by the Board. *Straus Communications v. NLRB*, 625 F.2d 458 (2d Cir. 1980); *Gulf States Manufacturers v. NLRB*, 598 F.2d 896 (5th Cir. 1979); *Vantran Electric Corp.*, 231 NLRB 1014 (1977), enf. denied 580 F.2d 921 (7th Cir. 1978). Cf. *Deister Concentrator Co.*, 253 NLRB 358 fn. 2 (1980). Therefore, in order to avoid disputes as to the terms of the adjustment, the parties should memorialize in writing any agreement to extend the certification year. See *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962).

The non-Board settlement of unfair labor practice charges involving allegations of employer misconduct concerning the filing of a decertification petition, improper withdrawal of recognition, or repudiation of a bargaining obligation requires the dismissal of any decertification petition filed after the alleged conduct. *Liberty Fabrics, Inc.*, 327 NLRB 38 (1998); *Supershuttle of Orange County, Inc.*, 330 NLRB 1016 (2000). Sec. 11733.2.

In postelection proceedings, the impact of a non-Board adjustment of 8(a)(3) allegations on the resolution of a determinative challenged ballot or timely-filed objections relying upon an 8(a)(3) finding must be considered. For example, the parties should stipulate in the R case whether or not the employee whose discharge was resolved in the C case was eligible to vote in the election.

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10146–10154 INFORMAL SETTLEMENT AGREEMENTS

10146 Nature of Informal Settlement Agreements

10146.1 Generally

An informal settlement agreement is a Board document providing that the charged party will take certain action to remedy the unfair labor practices deemed meritorious. It requires approval of the Regional Director or, after the record opens and evidence is adduced in a C case trial, an Administrative Law Judge. Unlike a formal settlement, an informal settlement agreement, except as provided in Sec. 10146.7 regarding default language, does not provide for a Board Order or a court decree.

Informal settlement agreements are preferred over non-Board adjustments as a method of resolving meritorious unfair labor practice charges. Consideration of whether to accept an informal settlement, rather than require a formal settlement, should include, inter alia, consideration of whether there is a history of unfair labor practices by the same charged party.

10146.2 Settlement Agreement Forms

The standard Agency settlement agreement forms should be used in every case where an informal settlement is proposed. (Form NLRB-4775 is approved by a Regional Director and Form 5378 is approved by an Administrative Law Judge.) These forms are applicable regardless of whether the charged party is an employer or a labor organization. The notice is an integral part of the settlement agreement and should be attached to the settlement agreement form and initialed by the parties who execute the agreement. Any changes to the standard language of the form should be clearly identified in an attachment.

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10146.3 Scope of the Agreement/Reservation of Evidence

The standard settlement agreement forms contain language regarding the scope of the agreement which expressly provides that the settlement agreement applies only to the specific case involved. The Board held in *B & K Builders*, 325 NLRB 693 (1998), that the "Scope of the Agreement" language is sufficiently specific to avoid the "settlement bar rule" established in *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978). In *Hollywood Roosevelt*, the Board held that a settlement, if complied with, will be held to bar subsequent litigation of all prior violations, except where they were not known to the General Counsel or readily discoverable by investigation or were specifically reserved from the settlement by mutual understanding of the parties.

The standard scope of the agreement clause also permits the General Counsel to utilize the evidence obtained in the settled case in the litigation of other cases. The language of the Scope of the Agreement clause should be included in every settlement agreement.

10146.4 Special Provisions in 10(j) and (l) Cases

When a 10(j) or (l) injunction has been obtained prior to the settlement of a case, the standard provision for withdrawal of the complaint on execution of the settlement should be altered through an addendum to the settlement agreement form to provide for withdrawal of complaint upon closing of the matter in compliance. Since an interim injunction terminates by operation of law upon the Board's final disposition of a case, postponing withdrawal of the complaint allows the interim injunction to remain in effect until the Regional Office is assured that there has been compliance with the settlement. Such an arrangement ensures that the respondent remains under the legal restraint of the interim injunction, which is enforceable by contempt proceedings. In the event respondent breaches the settlement, the settlement is set aside and the complaint is litigated while the injunction remains in effect. OM 01-62.

In this connection, when settling a case in which a 10(j) or (l) injunction has been obtained, the Regional Office should strike the final sentence in the paragraph "Refusal to Issue Complaint" and substitute the following by an attachment:

> The Complaint and any Answer(s) in [the captioned administrative cases and numbers] shall be withdrawn upon closing of these matters on compliance. Respondent agrees not to move to vacate, modify, dissolve, clarify or alter the injunction decree in [caption and case number of the 10(j) or (l) decree] on the basis that this Settlement Agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the 10(j) or (l) decree]. Until these matters have been closed on compliance, the injunction in [caption and case number of the 10(j) or (l) decree] will continue in full force and effect for all purposes.

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If a 10(l) decree is obtained prior to the issuance of the ULP complaint, the first sentence should be modified to provide that the charge will remain pending until the case is closed on compliance.

If a respondent is unwilling to accept this language as part of a settlement agreement, the Regional Office should consult with the Injunction Litigation Branch.

10146.5 Settlements to be Patterned After Board Orders

In drafting language for a settlement agreement and notice, Board agents should be careful to include language readily understandable to employees that is based on provisions in both Board orders and notices in similar cases. Patterning the settlement agreement after a Board notice alone may result in the omission of important aspects of an appropriate remedy.

10146.6 Partial Settlements in a Single Case

Although partial settlements in a single case are not common, Regional Directors have discretion, in appropriate circumstances, such as consideration of the impact on the remaining allegations, to approve such settlements.

(a) *Partial Settlement and Complaint on Other Allegations:* If certain unfair labor practice allegations in the same charge are not resolved by the settlement and these remaining allegations are being, or will be, processed further, the settlement agreement should specifically exclude these allegations from the agreement. For example: "This settlement does not remedy the allegation [that John Doe was terminated by the Charged Party on or about January 2, 20_] or [that the Charged Party failed to process John Doe's January 2, 20__ grievance for reasons that are arbitrary, invidious and discriminatory]." Additionally, the settlement should provide that the evidence bearing on the settled allegations may be introduced at any hearing on the unsettled allegations. In the case of a partial unilateral settlement, the portion of the charge that is settled must be dismissed. Sec. 10150.

(b) *Partial Settlement and Dismissal of Other Allegations:* If the charged party agrees to settle all allegations of a single charge deemed meritorious and other allegations of the same charge are dismissed, the settlement should not normally be approved prior to the expiration of the appeal period for the dismissed allegations, if no appeal is filed, or the denial of the appeal on the dismissed allegations. If the appeal is sustained, the Regional Office should attempt to include in the settlement the allegations found meritorious on appeal. If such efforts fail, the charged party is still willing to be a party to the partial settlement, and the Regional Director concludes that under all the circumstances it would be appropriate to approve the partial settlement, refer to procedures set forth in paragraph (a) above. Otherwise, all meritorious allegations should be handled together.

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10146.7 Default Language in Settlement Agreements

Regions should include the following default language in informal settlement agreements where appropriate, such as when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations:

(a) *Where Complaint has Issued:*

> The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent, the Regional Director may reissue the complaint dated [insert date] in this (or these) case(s). The General Counsel may then file a motion for default judgment with the Board on the allegations of the complaint. The charged party/respondent understands and agrees that the allegations of the reissued complaint may be deemed to be true by the Board and its answer to such complaint shall be

considered withdrawn. The charged party/respondent also waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

(b) *Where Complaint has not Issued:*

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The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent, the Regional Director may issue a complaint in this [these] case(s) alleging that the following actions violate the Act:

[List all meritorious allegations of the charge(s).]

The General Counsel may then file a motion for default judgment with the Board on the above-described complaint that will issue. The charged party/respondent understands and agrees that the allegations of such complaint may be deemed to be true by the Board. The charged party/respondent also waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

10148 Bilateral Informal Settlement Agreements

Bilateral informal settlement agreements are entered into by both the charged and the charging party and approved by the Regional Director or an Administrative Law Judge.

10148.1 Conformance of Settlement Agreement and Charge

If an informal bilateral settlement agreement by its terms does not dispose of all violations alleged, but is nevertheless intended by the parties to be a full resolution, the charge should be amended to conform to the settlement. Alternatively, a sentence should be inserted in the settlement that "This settlement disposes of all unfair labor practices alleged in the charge."

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10148.2 Action on Approval of Settlement Agreement

The Regional Office should promptly inform the parties of the approval of a bilateral settlement agreement and instruct the charged party to immediately comply with it. The charged party, through an attorney or representative, should be requested immediately to take the action called for in the agreement. The charged party should be furnished with sufficient copies of the notice and be given whatever other assistance the Regional Office can render toward carrying out the agreement.

10148.3 Responsibility for Compliance

The Regional Office is responsible for ensuring compliance with the provisions of settlement agreements and has the final decision as to whether compliance has been achieved. This decision cannot be appealed.

10148.4 Closing of Case

When the Regional Office is satisfied that the provisions of the informal settlement agreement have been carried out, including the passage of the notice-posting period, the case should be closed on compliance and the parties should be so notified. The notification should specifically state that the closing is conditioned on continued observance of the terms of the settlement agreement.

10150 Unilateral Informal Settlement Agreements

Unilateral informal settlement agreements are entered into by the charged party, but not the charging party, and approved by a Regional Director or an Administrative Law Judge.

10150.1 Notification to Charging Party

If the Regional Office anticipates that the charging party may not enter into the settlement, the Regional Office should send to the charging party a copy of the settlement agreement and a letter briefly explaining why the settlement should be approved. The charging party should also be informed that any objections to the settlement, together with supporting argument, should be submitted in writing to the Regional Office within 7 days after service of the letter. This procedure is specifically set forth with respect to postcomplaint settlements in Sec. 101.9(c)(1), Statements of Procedure.

10150.2 Disposition of Charge

If the Regional Director concludes that the charging party's objections do not preclude approving the unilateral settlement agreement, it should be approved. The parties should be so apprised by letter, which should include a brief statement of the reasons for the approval, address the charging party's objections, and contain a copy of the approved agreement and the standard appeal language. The letter should also include the following paragraph:

> In view of the undertakings contained in the attached settlement agreement, it does not appear that it would effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time. I am, therefore, refusing to issue [reissue] complaint in this matter.

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10150.3 Timing for Compliance

After the expiration of the appeal period, if no appeal has been filed, the Regional Office should instruct the charged party to take the action called for in the agreement. If an appeal has been filed, the instruction is not given unless and until the Office of Appeals has upheld the Region's determination. In either case, the responsibility for compliance and the closing of the case should be in accord with the procedures described in Secs. 10148.1-4.

If the Regional Office learns that the charged party has commenced or will commence performance of the terms of the agreement prior to being so instructed by the Region, the Region should inform the charged party that a determination by the Office of Appeals may require additional remedial action. If additional remedial action is required, the charged party should generally not be required to take any action already performed in compliance with its initial settlement obligations.

10150.4 Responsibility for Compliance

The Regional Office is responsible for ensuring compliance with the provisions of settlement agreements and has the final decision as to whether compliance has been achieved. This decision cannot be appealed.

10152 Noncompliance with Settlement Agreements

If it appears that the charged party is not complying with the settlement agreement, the Regional Office should notify the charged party of this concern and provide it with an opportunity to fully comply.

10152.1 Settlement Agreements Without Default Language

With respect to settlement agreements without default language, the charged party should also be advised that failure to fully comply with the settlement agreement will result in the revocation of the approval of the agreement and the issuance or reissuance of the complaint.

Should the above efforts prove unsuccessful, the Regional Director may issue a letter informing the parties of the intention to revoke approval of the settlement agreement. Thereafter, complaint will be issued or reissued, including an Order Revoking Approval of the Settlement Agreement. At hearing, counsel for the General Counsel will have the burden of establishing noncompliance with the agreement, as well as the merits of the alleged unfair labor practices. See Sec. 10146.4 regarding 10(j) and (l) cases.

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10152.2 Settlement Agreements with Default Language

With respect to settlement agreements with default language, Regions should follow the procedures outlined in Sec. 10146.7.

10154 Postcomplaint Settlement Agreements and Non-Board Adjustments

10154.1 Settlement Agreement Executed Prior to Opening of Hearing

Regional Directors have the authority to approve informal settlement agreements executed at any time prior to the opening of the hearing and, on such approval, to withdraw the complaint. Form NLRB-4775 serves both of these purposes. After the settlement agreement is executed, the Regional Office should immediately notify the Division of Judges.

10154.2 Role of Settlement Judge

Pursuant to an agreement by the parties, the Chief Administrative Law Judge may assign a judge, other than the trial judge, to conduct settlement discussions and preside over settlement negotiations between the parties. All discussions between the parties and the settlement judge are confidential; the settlement judge does not discuss any aspect of

the case with the trial judge. (See Sec. 102.35(b)(1)–(6), Rules and Regulations, Sec. 10351, and OM Memo 95-12 for a complete discussion of the role of a settlement judge.)

10154.3 Role of Trial Judge in Settlement Efforts

Before the hearing opens, the Administrative Law Judge assigned to the trial may advise the parties of the importance to the Board of settlements; invite them to take advantage of the opportunity to further discuss settlement; assure them that reasonable good-faith requests for hearing recesses for the purpose of pursuing settlement will be granted; inform them that settlement efforts will in no way be construed as a sign that their case is weak; and recess the hearing at specific times to urge reconsideration by the parties of the advisability of settling the case.

10154.4 Approval of Settlement Agreement After Hearing Opens

Where the hearing has opened but no evidence has been introduced, the Regional Director has the authority to approve a settlement agreement. *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992). Once evidence has been introduced, but prior to the issuance of a decision, any settlement agreement must be submitted to the Administrative Law Judge for approval. Sec. 101.9(d), Statements of Procedure.

If an agreement is reached after the hearing has been adjourned or is closed, the settlement agreement should be submitted to the ALJ for approval. The ALJ's action is, thereafter, indicated by issuance of an appropriate order and notification to the parties.

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If a settlement agreement is approved by the ALJ, counsel for the General Counsel should move for an indefinite adjournment. After compliance has been effected, counsel for the General Counsel should promptly file with the ALJ a motion to withdraw the complaint and close the record.

If a respondent fails to comply with a settlement agreement approved by an ALJ, counsel for the General Counsel should move the ALJ to set aside the settlement agreement and reschedule the hearing.

10154.5 Approval of Withdrawal of the Charge After Hearing Opens

Where the hearing has opened but no evidence has been introduced, the Regional Director has the authority to approve a request to withdraw a charge. *Sheet Metal Workers Local 28 (American Elgen)*, supra.

Once evidence has been introduced but prior to the issuance of a decision, any request to withdraw the charge must be submitted to the Administrative Law Judge for approval. Sec. 101.9(d), Statements of Procedure. If the charge is being withdrawn based on a non-Board adjustment between the private parties and the Regional Office does not intend to appeal the ALJ's approval (Sec. 10154.6), the trial attorney should move for an indefinite adjournment to permit compliance with the terms of the non-Board adjustment. After compliance with the terms of the agreement, counsel for the General Counsel should file with the ALJ a Motion to Approve Withdrawal of the Charge, Dismiss the Complaint and Close the Case. Sec. 101.9(d), Statements of Procedure and Sec. 10275.3.

10154.6 Appeal from Administrative Law Judge's Approval of a Settlement Agreement or Withdrawal of the Charge

(a) *Appeal from an Administrative Law Judge's Approval of a Settlement Agreement:* If the Administrative Law Judge is presented with a settlement agreement that counsel for the General Counsel opposes, counsel should express on the record the basis for the objection. If the Regional Office determines that it is appropriate to appeal the ALJ's ruling approving the settlement agreement, the appeal should be promptly filed with the Board pursuant to Sec. 102.26, Rules and Regulations.

(b) *Appeal from an Administrative Law Judge's Approval of a Withdrawal:* If, after the record opens, the private parties reach a non-Board adjustment that the Regional Office does not believe will effectuate the purposes of the Act after considering the factors set forth in *Independent Stave Co*., 287 NLRB 740 (1987), the reasons for the Regional Office's opposition to the charging party's withdrawal of the charge should be clearly expressed on the record. If the Administrative Law Judge approves the withdrawal over the trial attorney's objection, the trial attorney should consult with the Regional Office to determine whether a request for special permission to appeal the ALJ's ruling should be made to the Board, pursuant to Sec. 102.26, Rules and Regulations. Such an appeal should be filed promptly. In the event the ALJ dismisses the complaint based upon a withdrawal of the charge, a request for review should be filed within 28 days in accordance with Sec. 102.27, Rules and Regulations.

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10154.7 Approval of a Withdrawal of the Charge or a Settlement Agreement After Administrative Law Judge Decision

Although a respondent should be encouraged to comply with an Administrative Law Judge's Order, at times the private parties reach an appropriate non-Board adjustment or an informal bilateral settlement agreement after the issuance of an ALJ's decision while the case is pending at the Board. If the Regional Office determines that such adjustment or settlement effectuates the Act, counsel for the General Counsel should file with the Board a Motion to Remand the Case to the Regional Director for the purpose of approving the adjustment or settlement. The Motion should state the terms of any agreement reached between the parties.

10154.8 Alternative Dispute Resolution of Cases Pending Before the Board

Regional Offices and the parties also have the option of participating in the Board's alternative dispute resolution (ADR).

Participation in the ADR program is voluntary, and a party who enters into settlement discussions under the program may withdraw its participation at any time. See press release dated March 24, 2009 at
http://www.nlrb.gov/shared_files/Press%20Releases/2009/R-2684.pdf

10164–10170 FORMAL SETTLEMENT STIPULATIONS

10164 Nature of Formal Settlement Stipulations

10164.1 Generally

A formal settlement is a written stipulation providing that, on approval by the Board, a Board order in conformity with its terms will issue. Ordinarily, it will also provide for the consent entry of a court judgment enforcing the order. Sec. 101.9(b)(1), Statements of Procedure.

10164.2 Parties

Normally, respondent, the charging party and the General Counsel are parties to the formal settlement stipulation. However, the Regional Office can accept an appropriate unilateral formal settlement, subject to approval by the General Counsel and the Board. The Regional Office should also include in the formal settlement stipulation all parties necessary to such agreement. Secs. 10134.3 and 10264.3–.4.

10164.3 Overview

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A formal settlement stipulation requires issuance of a complaint. If a complaint has not issued, one must issue in conjunction with the settlement. A formal settlement may be appropriate in certain circumstances, such as where there is:

- A history of prior unfair labor practices
- A likelihood of recurrence or extension of the instant unfair labor practices
- Continuing violence or a likelihood of recurring violence or
- A backpay installment schedule covering an extended period of time

The settlement should include a waiver of notice of hearing as well as a waiver of the hearing itself.

When it appears that respondent's purpose in refusing to execute a formal settlement stipulation is its belief that a Board Order can be avoided by complying with the Administrative Law Judge's decision that will issue after hearing, respondent should be apprised that, under the Act, Sec. 102.48, Rules and Regulations and Sec. 101.11, Statements of Procedure, a Board Order will issue even though respondent does not file exceptions to the ALJ's decision and agrees to comply with the ALJ's recommended Order.

In the absence of unusual circumstances, a respondent who executes a formal settlement should not be permitted to withdraw from the stipulation after approval by the Regional Director or the General Counsel, as appropriate. *George Banta Co.*, 236 NLRB

1559 (1978). In the event that respondent attempts to withdraw from the settlement while it awaits approval by the Board, the Regional Office should immediately submit the matter, with its recommendation, to the Division of Advice. GC Memo 00-03.

10164.4 Basic Record

The formal settlement provides a stipulation as a substitute for a hearing. The basic record available to the Board and the court consists of the charge, the complaint, and the stipulation. If the charge does not conform to the complaint on which the stipulation is based, an amended charge should be secured if possible. The answer, if filed, should normally be withdrawn, but may be incorporated into the record if respondent insists.

10164.5 Court Judgment Preferred

A formal settlement providing for a court judgment is preferred, since judgments serve as more effective deterrents to future violations of the Act. If respondent consents to the entry of a court judgment, it is possible to include a nonadmission clause in the stipulation. If respondent will not execute a stipulation providing for the entry of a court judgment, a request for a nonadmission clause must be rejected, since such a clause could create a question regarding the enforceability of the stipulation. Moreover, in the absence of consent to a court judgment, respondent must admit the allegations of the complaint.

Where a formal settlement provides for a court judgment, entry of such a judgment will be sought. The Board agent negotiating the formal settlement should take affirmative measures to make it clear that the stipulation contemplates the entry of a Board order and court judgment, even though the Board order may have been complied with in the interim.

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Even if a formal settlement does not provide for a court judgment, entry of such a judgment may be sought in appropriate circumstances.

10164.6 Backpay Provisions

In a formal settlement the exact amount of backpay agreed upon should be set forth rather than be left for future computation. The amount should be specified in the stipulation and may be included in the notice. In order to guard against further loss of earnings that may be incurred because of a delay in compliance, a provision that respondent will make whole the discriminatees for any additional loss of earnings, plus interest caused by a failure to offer timely reinstatement consistent with the terms of the settlement, should be included. Where such a provision is used, the stipulated order should provide also that all payroll and other records necessary to a determination of backpay due will be made available to the Regional Office. If the settlement provides for installment payments, the payment schedule should be incorporated into the settlement. Under such circumstances or if respondent's financial condition is doubtful, the Regional Office may require a security agreement as part of the settlement.

10164.7 Obtaining Approval of Formal Settlement Stipulation

Before transmittal to the parties, a formal settlement should be reviewed for conformance to Regional Office policy.

(a) *Formal Settlement Stipulation Before Hearing Opens:* When entering into a formal settlement stipulation before hearing opens:

1. The Board agent should make clear that the settlement is subject to approval by the Regional Director or the General Counsel, depending upon the circumstances, and ultimately by the Board.

2. Regional Directors have been delegated the authority to approve bilateral formal settlements on behalf of the General Counsel. They should submit such settlements directly to the Executive Secretary for approval by the Board. GC Memo 94-10.

3. Unilateral settlements must be submitted to the Division of Advice for approval by the General Counsel before they are submitted to the Board. GC Memo 00-03. The procedures for a charging party to object to the approval of a formal settlement are set forth in Secs. 101.9(c)(1) and (2), Statements of Procedure.

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(b) *Formal Settlement Stipulation After Hearing Opens:* When entering into a formal settlement agreement after hearing opens:

1. Whether the settlement is all-party or unilateral, whether the hearing is in progress and evidence introduced or has been adjourned or closed and before decision, a formal settlement stipulation must be submitted to the Administrative Law Judge for approval pursuant to Sec. 101.9(d)(1), Statements of Procedure. If the ALJ approves the settlement while the hearing is in progress, the hearing should be adjourned indefinitely pending the Board's action on the stipulation. If formal settlement is reached after the hearing has been adjourned or closed, but before issuance of a decision, the agreement should be submitted to the ALJ for approval. The ALJ may issue an appropriate order and notify the parties.
2. On approval by the ALJ, the Regional Office should assume the responsibility for transmission of the formal settlement and the required number of documents constituting the formal record to the Board for final approval. Sec. 10172.5.
3. When an ALJ refuses to approve a settlement agreement, or approves a unilateral settlement, counsel for the General Counsel or any other aggrieved party may ask for leave to appeal to the Board, as set forth in Sec. 101.9(d)(2), Statements of Procedure and Sec. 102.26, Rules and Regulations.

10164.8 Transmittal Memorandum

The Region should prepare a transmittal memorandum to assist in the review of the formal settlement agreement. The transmittal memorandum should explain the details of the agreement, emphasizing any unusual facts or deviations from standard provisions. In particular, the memorandum should specify the alleged violations the proposed order intends to remedy.

The transmittal memorandum should address the following issues:

- The extent of the remedy regarding backpay, reinstatement/instatement, and notice posting. If the settlement agreement does not provide for a complete remedy, the memorandum should explain the circumstances. For example, the memorandum should note if discriminatees have waived reinstatement and have agreed to a reduction in backpay.
- If backpay is paid through installments based upon a respondent's financial condition, the circumstances of such condition should be explained. In addition, the memorandum should reference any provisions and security arrangements regading future payments.
- Any unusual remedies.
- Any deviation from normal time limits for compliance.
- Any notice provisions which do not mirror the proposed order or do not conform to provisions normally ordered by the Board.
- If applicable, explain the lack of a provision for entry of a court judgment.
- If applicable, explain the necessity for a broad cease-and-desist order.
- If applicable, set forth the provisions of the settlement agreement that respondent has already complied with.
- In a unilateral settlement, discuss any objections that have been raised.

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In a bilateral formal settlement, the original and four copies of the transmittal memorandum, the executed stipulation and the documents constituting the record in the case should be submitted to the Office of the Executive Secretary. In a unilateral formal settlement, the same number of copies should be submitted to the Division of Advice.

The correct address for each party, as well as the facsimile number and E-mail address, should be included in the submission. The document(s) comprising the formal settlement must contain at least one original signature for each necessary party. In addition, the formal settlement should be transmitted electronically to the Executive Secretary or Advice, as appropriate.

10164.9 Nonapproval by Board

If the formal settlement is not approved by the Board, the case will resume its status as before the execution. In this connection, the Regional Office may wish to attempt to renegotiate the terms of the stipulation and resubmit it to the Board. If this is not possible, the case should be scheduled for hearing.

10166 Content of a Formal Settlement Stipulation

10166.1 Disposition of Allegations

A formal settlement provides for the disposition of all allegations of the complaint. Therefore, the complaint and settlement should conform. Thus, all allegations not covered by the formal settlement must be disposed of by amendment, withdrawal, or dismissal of those portions of the complaint. Such actions should be included in the stipulated record. Alternatively, the formal settlement itself may provide for withdrawal of appropriate allegations from the complaint. In consolidated cases, the settlement may provide for severance of cases, if the circumstances so require.

10166.2 Facts

Under Section 10(c), a Board order must be based on the preponderance of the testimony. Therefore, either in the pleadings or the formal settlement stipulation, the facts of the unfair labor practice involved must be clearly set forth. Allegations in the complaint, either undenied or expressly admitted, may satisfy this requirement; otherwise, the facts must expressly be set forth in the stipulation itself. Where there is some question as to the clarity of the material facts as they appear in the pleadings, all doubts should be resolved in favor of insisting that they be inserted in the formal settlement stipulation. If the stipulation does not provide for the entry of a court judgment, particular care should be taken to set forth all relevant facts to ensure enforcement.

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Certain facts critical to establishing the propriety of the Board's order and subsequent court enforcement should be set forth in a formal settlement stipulation, whether or not they are contained in the pleadings. Examples of such necessary facts which should be contained in the stipulation are set forth in Secs. 10166.3–10166.8

10166.3 Overall Content of Formal Settlement Stipulation

(a) *Caption/Parties/Signatures:* The stipulation caption should include the correct full name of all:

- Respondents, including the names of all partners and sole proprietorships, where appropriate
- Charging Parties
- Intervenors
- Parties in Interest

If the case involves the disestablishment, withdrawal of recognition from, or voiding of all or any part of an agreement with a labor organization, that organization should be a party to the stipulation or it should file a waiver of any right to participate or an affidavit certifying that it is dissolved and does not claim to represent the employees concerned. Such waiver or affidavit should be made part of record. Secs. 10134.3 and 10166.3(c).

The stipulation signature lines should name the correct entities.

(b) *General Recitals*: The stipulation should contain a recital of:

- The essential commerce facts necessary to establish Board jurisdiction. Sec. 10168, Pattern 60 at II. An admission that the Board has jurisdiction is not enough.
- A waiver of formal hearing and further proceedings. Sec. 10168, Pattern 60 at IV (3).
- An enumeration of the documents and pleadings that constitute the entire record. Secs. 10166.3(c) and 10168, Pattern 60 at IV (5).
- The procedural facts including filing of charges; issuance of complaints and notices of hearing; orders of severance, dismissal and withdrawal; and service on parties. Secs. 10166.3(c) and 10168, Pattern 60 at IV (1), (2) and (5).
- A statement that the union is a labor organization within the meaning of Section 2(5) of the Act. Sec. 10168, Pattern 60 at III.
- Other essential facts not apparent from the pleadings, but necessary to establish the unfair labor practices. Sec. 10166.2.
- An express consent to entry of a Board order in conformity with the stipulation without further notice. Secs. 10166.7 and 10168, Pattern 60 at VI, and, where appropriate, consent to entry of a court judgment and waiver of all defenses to entry and notice of filing of the application for enforcement. Secs. 10166.8 and 10168, Pattern 60 at VII. Entry of a court judgment is preferred, and makes unnecessary an admission that the respondent committed unfair labor practices and a recitation of facts establishing the unfair labor practices. Secs. 10164.5 and 10166.8.
- Unless court enforcement is provided for, an admission that respondent committed the unfair labor practices alleged in the complaint. Secs. 10164.5 and 10168, Pattern 60 at IV (4).
- A statement that the entire agreement between the parties is contained in the stipulation. Sec. 10168, Pattern 60 at IV (6).
- A statement that the settlement is subject to and effective upon the approval of the Board. Sec. 10168, Pattern 60 at IV (8).

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(c) *Documents Constituting the Record*: The following documents as set forth in Sec. 10168, Pattern 60 at IV (5) constitute the record in a formal settlement:

- The formal settlement stipulation
- The charge(s) and amended charge(s)
- The original/amended/consolidated complaint and notice of hearing and affidavits of service if the facts of service have not been set forth in the stipulation
- Regional Director orders withdrawing/dismissing allegations
- Affidavits of service of all necessary documents if the facts of service have not been set forth in the stipulation
- The answer, but only if the respondent insists and it has not been withdrawn. Preferably the answer should be withdrawn. Sec. 10164.4.
- The order of severance, if consolidated complaint had issued and severance occurred, and
- Any letter, document or affidavit disposing of the rights of other interested parties. Sec. 10134.3.

Hearing transcripts should not be incorporated as part of the record.

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10166.4 Other Case Specific Issues

Case specific issues common in formal settlements are addressed below.

(a) *Nonadmission Clauses:* Nonadmission clauses may not be included if the stipulation does not provide for a court judgment. Secs. 10164.5 and 10168, Pattern 60 at IV(6). Nonadmission clauses should not be included in notices. Sec. 10130.8.

(b) *Scope of the Stipulation and Reservation of Evidence:* The stipulation should contain a clause stating that the stipulation does not constitute a settlement of any other cases or matters and should also contain a reservation of evidence clause. Sec. 10168, Pattern 60 at IV (7).

(c) *Consolidated C & R Cases*: In a consolidated C and R case, the stipulation should make provision for resolution of the R case. *Aero Corp.*, 237 NLRB 455 (1978).

(d) *Joint & Several Liability*: If joint and several respondents are parties and the apportionment of backpay is not equal, the apportionment should be specified. If one respondent is willing to settle but the other is not, the stipulation should provide that the signing respondent will bear only its proportionate share of the backpay liability unless efforts to obtain payment of the remaining portion from the other respondent should fail. Secs. 10130.5 and 10130.6.

(e) *Bargaining Order Cases:* When a bargaining order is provided for, a description of the bargaining unit and a statement that the union represents a majority of

the employees therein should be set forth. Secs. 10166.3(b), 10166.5(b) and 10168, Pattern 60 at V.

10166.5 Proposed Order Provisions

Certain specific issues relative to order provisions of formal settlement stipulations are addressed below.

(a) *Organization & Language*: The proposed order provisions of the stipulation should:

- Set forth the cease and desist provisions and thereafter the affirmative provisions of the proposed order. Sec. 10168, Pattern 60 at VI (1) and (2).
- In the affirmative provisions of the proposed order, follow the time deadlines established by the Board in *Indian Hills Care Center*, 321 NLRB 144 (1996). Sec. 10168, Pattern 60 at VI (2).
- Contain a 21-day sworn certification-of-compliance provision. Secs. 10168, Pattern 60 at VI 2(j) and 10170 at VI 2(g) and also see *Indian Hills Care Center*, supra.
- Provide for either narrow or broad order language, as appropriate. Sec. 10168, Pattern 60 at VI (1)(b).
- Use the proper language for respondent employers ("officers, agents, successors and assigns") and respondent unions ("officers, agents and representatives"). Secs. 10168, Pattern 60 at VI and 10170 at VI.

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(b) *Bargaining Order*: If the stipulation intends to impose a bargaining obligation, the proposed order as set forth in Sec. 10168, Pattern 60 at VI (2)(h) should provide for:

- Affirmative bargaining obligation language
- A requirement that any agreement reached be reduced to writing
- A description of the bargaining unit, and
- An accurate statement of the union's full name.

If the unlawful refusal to bargain occurred during the certification year, the proposed order should provide for an extension of the certification year. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). Sec. 10168, Pattern 60 at VI (2)(h).

(c) *Information Cases*: If the stipulation intends to require the respondent to provide information to the union, the proposed order should specify the precise information to be provided. The proposed order should require the respondent to provide

the union with the information that it requested without the necessity of making a new request. *I & F Corp.*, 322 NLRB 1037 fn. 1 (1997).

(d) *Unilateral Changes*: If the case involves an unlawful unilateral change, the proposed order should require the respondent to rescind the change and make the employees whole for their losses. However, to the extent that the unlawful unilateral change may have benefited unit employees, the proposed order should contain language to the effect that it shall not be construed as requiring or authorizing the respondent to rescind those benefits unless requested to do so by the union. See, e.g., *Wanex Electrical Services*, 338 NLRB 111, 113–114 (2002).

(e) *Minority Union*: In cases where the employer has unlawfully entered into a collective-bargaining agreement with a minority union, the proposed order should require the employer to cease giving effect to the contract but provide that nothing in the order "shall require the withdrawal or elimination of any wage increase or other benefits or terms and conditions of employment that may have been established pursuant to the performance of the contract." *Alliant Foodservice*, 335 NLRB 695, 697 (2001).

(f) *Backpay*: The proposed order should liquidate the backpay owed. Sec. 10164.6. The exact amount of backpay owed should be set forth in the proposed order and in the notice opposite each discriminatee's name and the figure totaling the full amount of backpay owed should be set forth in the proposed order. Secs. 10164.6 and 10168, Pattern 60 at VI (2)(d).

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Where offers of reinstatement/instatement are required, the stipulation should contain a provision that the respondent will make whole the discriminatees for any additional loss of earnings plus interest caused by its failure to offer reinstatement/instatement within 14 days of entry of the Board order. Secs. 10164.6 and 10168, Pattern 60 at VI (2)(e) and *Indian Hills Care Center*, 321 NLRB 144 (1996). If such a provision is used, the proposed order should require the production of backpay records. Secs. 10164.6 and 10168, Pattern 60 at VI (2)(g).

If the respondent is to provide records for the calculation of backpay, the proposed order should contain the standard Board language for record production (*Ferguson Electric Co.*, 335 NLRB 142 (2001) ("Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order")). Sec. 10168, Pattern 60 at VI (2)(g).

If the interest owed by the respondent has not been calculated but interest is to be paid on backpay (*New Horizons for the Retarded*, 283 NLRB 1173 (1987)), or losses to benefit funds are to be paid (*Merryweather Optical Co.*, 240 NLRB 1213, 1217 fn. 7 (1979)), the method of computing those payments should be specified.

(g) *Installment Payments*: If the settlement provides for installment payments, the stipulation should state that upon approval by the Board it is effective nunc pro tunc to

the date of execution of the stipulation, or, in the alternative, it may provide for payments only after Board approval. Sec. 10168, Pattern 60 at VI (2)(e) and (f) and OM-98-67.

Security documents such as a personal guarantee, third party guarantee, assignment of contract proceeds, real property mortgage, real property deed of trust, surety bond and security agreement, when required, should be included as part of the settlement stipulation as attachments.

(h) Reinstatement/Expungement: Where offers of reinstatement/instatement are to be required, the name of each discriminatee entitled to reinstatement/instatement should be included in the proposed order and notice. Sec. 10168, Pattern 60 at VI (2)(b).

If the discriminatee is to be reinstated to a position different than his former position, that position should be specified. Sec. 10130.3.

In circumstances where the discriminatee has chosen to forgo reinstatement/instatement, the proposed order and notice should provide that the discriminatee does not desire reinstatement/instatement or that such an offer has been refused. Secs. 10130.4 and 10130.9.

The proposed order should provide for expungement of records and written confirmation of expungement in cases of unlawful discipline or discharge. Sec. 10168, Pattern 60 at VI (2)(c) and also see *Indian Hills Care Center*, 321 NLRB 144, 145 (1996) ("Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.").

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(i) *Hiring Halls*: In circumstances where there is an exclusive hiring hall, the proposed order should provide that the discriminatees be given credit in the seniority formula for the number of hours of employment discriminatorily denied them. Sec. 10130.10.

(j) *Specific Orders*: For specific order provisions in CA cases consult Sec. 10168, and in CB, CC and CD cases consult Sec. 10170.

10166.6 Proposed Notice and Related Order Provisions

Certain specific issues relative to notices proposed in formal settlement stipulations are addressed below.

(a) *Notice Content*: The notice should:

- Be directed to the appropriate group and on the appropriate notice form ("Employees" or "Employees and Members"). Sec. 10132.2.
- Mirror the provisions of the proposed order
- Conform to those normally issued by the Board in contested cases
- Be written in clear layperson's language, *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001)
- Set forth a statement of rights under Section 7 of the Act, a statement describing the function of the Board and its processes, and the contact

information for the Regional Office and the Board website, *Ishikawa Gasket America, Inc.*, supra

- Set forth the appropriate language for statutory priority cases. Secs. 10202–10222.

(b) *Notice Posting/Mailing/Publication/Reading*: The proposed order should:

- Set forth any specific details concerning the traditional posting/electronic posting/mailing/publication/reading of the notice, such as any required translation; exact posting sites; method, verification and recipients of all mailing; any required newspaper publication; and any required notice reading and by whom. Sec. 10132.4.
- Provide that if respondent goes out of business or closes the involved facility, the notice should be mailed to employees employed by it at any time since the date of the first unfair labor practice. *Excel Container, Inc.*, 325 NLRB 17 (1997).
- If the settlement involves a charge against a union, require the union to submit signed copies of the notice to the Regional Director for forwarding to the employer for posting. Secs. 10132.4 and 10170 at VI (2)(f); *Electrical Workers Local 3 (M. F. Electrical Service Co.)*, 325 NLRB 527 (1998).
- Specify the time period for the notice posting, which should be for 60 days unless prior clearance has been obtained from the Division of Advice. Secs. 10132.1, 10168, Pattern 60 at VI (2)(i) and 10170 at VI (2)(e).

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10166.7 Consent to Board Order

Within the formal settlement stipulation, the parties must consent to the entry of a Board order without further notice. The terms of the order must be specific and, since the Board must act in conformity with the formal settlement stipulation, the language should follow the substance of Board orders in comparable cases. It is permissible, when appropriate, to substitute "shall not" for "shall cease and desist from," with corresponding grammatical changes.

10166.8 Consent to Court Judgment

The standard provision for the Consent to Court Judgment set forth at Sec. 10168, Pattern 60 at VII is self-explanatory and is applicable to all other types of unfair labor practice cases.

10168 Pattern 60, Formal Settlement Stipulation in CA Case

Although the specific content of a formal settlement stipulation will vary depending upon the circumstances present in a particular case, the following is a suggested pattern for use in formal settlements in CA cases:

ABC Company

Respondent

and

XYZ Union **Case**

Charging Party

and

Mutual Benefit Society

Intervenor

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FORMAL SETTLEMENT STIPULATION

I. INTRODUCTION

Through this formal settlement stipulation, the undersigned parties to this proceeding agree that, upon approval of this stipulation by the Board, a Board Order in conformity with its terms will issue [and a court judgment enforcing the Order will be entered]. The parties also agree to the following:

II. JURISDICTION

1) ABC Company (Respondent) is a Delaware corporation with its principal office in New York, New York. It operates a plant in Columbia, Alabama (the Columbia plant), where it is engaged in the manufacture, nonretail sale and distribution of furniture.

2) In conducting its business operations at the Columbia plant during the 1-year period ending June 30, 20_, Respondent purchased and received goods valued in excess of $50,000 directly from outside the State of Alabama.

3) Respondent is now, and has been at all material times, an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

III. LABOR ORGANIZATION STATUS

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The XYZ Union (Charging Party) and the Mutual Benefit Society (Intervenor) are labor organizations within the meaning of Section 2(5) of the Act.

IV. PROCEDURE

1) FILING AND RECEIPT OF CHARGE(S). On June 1, 20_, the Charging Party filed a charge in Case _____, which was served on Respondent on June 1, 20_. On June 8, 20__, the Charging Party filed an amended charge in Case _____, which was served on Respondent on June 8, 20_. On June 15, 20__, the Charging Party filed a second amended charge in Case _____, which was served on Respondent on June 15, 20_. Respondent acknowledges receipt of the charge, amended charge and second amended charge.

2) **<u>ISSUANCE OF COMPLAINT</u>. On ____(date)_____, the Regional Director for Region ___ of the Board issued a Complaint and Notice of Hearing in Case _____, alleging that Respondent violated the National Labor Relations Act. Respondent, the Intervenor and the Charging Party each acknowledge receipt of a copy of the Complaint and Notice of Hearing, which was served by certified mail on June 18, 20_.**

[Note: Where an answer to the complaint(s) has been filed, an additional numbered paragraph with the following language should be used to withdraw the answer. Sec. 10164.4.] **By entering into this stipulation, the parties agree that the Answer to the Complaint filed by Respondent on or about _____ is withdrawn.**

3) **<u>WAIVER</u>. All parties waive the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which the parties may be entitled under the Act or the Board's Rules and Regulations.**

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4) **<u>ADMISSION</u>.** [Note: This paragraph is necessary where there is no provision for entry of a court judgment. Sec. 10164.5.] **Respondent admits the allegations contained in paragraphs __ of the complaint.**

5) **<u>THE RECORD</u>. The entire record in this matter consists of the following documents: this stipulation; the charge; amended charge; second amended charge; and Complaint and Notice of Hearing. Copies of the charge, amended charge, second amended charge and Complaint and Notice of Hearing are attached as Exhibits ___ through ___.** [Note: Affidavits of service of the charge, amended charge, second amended charge and complaint and notice of hearing should be included if the service of these documents and their receipt by the parties have not been set forth in the stipulation. The answer should be included, if respondent or intervenor insists. See Sec. 10166.3(c)].

6) **<u>ENTIRE AGREEMENT</u>. This stipulation constitutes the entire agreement between the parties and there is no agreement of any kind, verbal or otherwise, that alters or adds**

to it. [The following may be added only in stipulations providing for court judgment. Sec. 10130.8. **It is understood that the signing of this stipulation by Respondent does not constitute an admission that it has violated the Act.]**

7) **<u>SCOPE OF THE STIPULATION AND RESERVATION OF EVIDENCE</u>. This stipulation settles only the allegations in the above-captioned case(s) and does not constitute a settlement of any other cases or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this stipulation, regardless of whether those matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other cases, and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to that evidence.**

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8) **<u>EFFECTIVE DATE</u>. This stipulation is subject to the approval of the Board and it does not become effective until the Board has approved it. The Regional Director** [or General Counsel in the case of unilateral settlements] **will file with the Board this stipulation and the documents constituting the record as described above. Once the Board has approved the stipulation, Respondent will immediately comply with the provisions of the order as set forth below.**

V. <u>FACTS</u>

[When appropriate. Sec. 10166.6. If a bargaining order is required, set forth a description of the appropriate bargaining unit and the labor organization's majority status in that unit.]

VI. ORDER

Based on this stipulation and the record as described above, and without any further notice of proceedings, the Board may immediately enter an order providing as follows:

Respondent, ABC Company, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

[8(a)(1)**]**

(a) **[**NOTE: Insert language covering specific 8(a)(1) violations alleged in complaint; likewise, the notice should be patterned after the provisions of the order.**]**

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(b) In any other [or "like or related"] **manner interfering with, restraining or coercing its employees in the exercise of their right to self organization, to form labor organizations, to join or assist XYZ Union or any other labor organization, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.**

[8(a)(2)**]**

(c) Dominating or interfering with the administration of Mutual Benefit Society, or dominating or interfering with the formation or administration of any other labor organization of its employees, or from contributing financial or other support to Mutual Benefit Society or to any other labor organization of its employees.

[8(a)(2)**]**

(d) Recognizing Mutual Benefit Society as the representative of any of its employees for the purposes of dealing with Respondent concerning grievances, labor disputes, wages, rates of pay, hours of employment or other terms and conditions of employment.

[NOTE: If the case involves assistance only and not domination, the following paragraph should be substituted for subparagraph (c) above:**]**

"Contributing financial or other support to Mutual Benefit Society or to any other labor organization of its employees."

[and the following language should be added to subparagraph (d):**]**

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"unless and until that organization has been certified by the National Labor Relations Board as the exclusive representtative of those employees."]

[NOTE: If the case involves a collective-bargaining agreement between Respondent and the assisted or dominated organization, an additional provision should be added to the order, if it is appropriate, to set aside the contract. See, e.g., *Farmer's Energy Corp.*, 266 NLRB 722 (1983); *International Metal Products Co.*, 104 NLRB 1076 (1953).**]**

[8(a)(3)**]**

(e) Discharging or refusing to reinstate any of its employees or in any other manner discriminating in regard to hire or tenure of employment or any other term or condition of employment, in order to discourage membership in XYZ Union or in any other labor organization.

[8(a)(5)**]**

(f) Refusing to bargain collectively with XYZ Union as the exclusive representative of all its employees at the Columbia, Alabama plant, excluding office clerical employees, guards, professional employees and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[8(a)(2)**]**

(a) Withdraw all recognition from Mutual Benefit Society as representative of any of its employees for the purpose of dealing with the Respondent with respect to grievances, labor disputes, wages, rates of pay, hours of employment and other conditions of employment, and completely disestablish Mutual Benefit Society as such representative.

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[NOTE: If the case involves assistance only and not domination, the language "and completely disestablish Mutual Benefit Society as such representative" should be omitted and in its place should be added the language "unless and until the organization has been certified by the National Labor Relations Board as such representative."**]**

[8(a)(3)**]**

(b) Within 14 days from the date of the Board's Order, offer [names of employees**] full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.**

[If the agreement between the parties reflects a date certain for the reinstatement of employees, this paragraph should be amended accordingly.]

(c) Within 14 days of the Board's Order, remove from Respondent's files any reference to the discharge of [name of employees] **and within 3 days thereafter, notify those employees, in writing, that this was done and that the discharges will not be used against them in any way.**

(d) Make whole the following employees for any loss of pay they may have suffered by reason of the [alleged] **discrimination against them, by payment to them of the amounts set opposite their respective names:**

J. Smith	**$1,350.00**
M. Brown	**2,125.00**
S. Cohen	**1,525.00**
	$5,000.00

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(e) Make whole the above-named employees for any additional loss of pay caused by Respondent's failure, if any, to reinstate them in accordance with the provisions of this Order, within 14 days from the date of this Order, by payment to them of the respective amounts that they would have earned if properly reinstated, from the 15th day after the date of this Order to the date of a proper offer of reinstatement, less their net earnings during such period, said amounts to be computed on a quarterly basis.

[NOTE: The language in (e) need only be used where the reinstatement is to follow the issuance of the Board's Order Approving the stipulation. It should be modified accordingly if the parties' agreement contains a date certain for reinstatement.]

[NOTE: Installment payments - when a formal settlement stipulation provides for installment payments, the Regional Office should add the following sentence: "This

stipulation is subject to the approval of the Board and, immediately upon approval by the Board, it will be retroactively effective to the date of execution of the stipulation." Alternatively, the Regional Office can make the first installment payment due 30 days (or some other specific time period) after the Board's approval of the stipulation, with subsequent payments due every 30 days (or some other specific time period) thereafter. See also Sec. 10603 of the Compliance Manual and Appendices 9 and 10 regarding Security Agreements and default language.**]**

(f) Make whole the following employees for loss of pay suffered by reason of the discrimination against them, by payment to them of the amounts set forth opposite their respective names and at the times set forth in the schedule that follows. [If any installment is not paid on or before the date due, the full unpaid amount shall become immediately due and payable and the Board may, without further notice, institute proceedings against the Respondent for the collection of the full indebtedness remaining due, with additional interest due on the entire unpaid balance from the date of default until full payment is received, computed in accordance with the formula set forth in *New Horizons for the Retarded, Inc.*, 283 NLRB 1173 (1987).]

Frankl v. HTH Corp., No. 16-15984, archived on August 29, 2019

SCHEDULE

Names of Employees	**Amt. Due and Date of Payment**			**Total**
	8/1/20	**9/1/20**	**10/1/20**	
J. Smith	**$500.00**	**$500.00**	**$350.00**	**$1,350.00**
M. Brown	**900.00**	**900.00**	**325.00**	**2,125.00**
S. Cohen	**600.00**	**600.00**	**325.00**	**1,525.00**
Total	**$2,000.00**	**$2,000.00**	**$1,000.00**	**$5,000.00**

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good

cause, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

[NOTE: This provision is unnecessary if the stipulation contains an agreed-upon amount of backpay.**]**

[8(a)(5)**]**

(h) Upon request, bargain collectively with XYZ Union as the exclusive representative of all its employees at its Columbia, Alabama plant, excluding office clerical employees, guards, professional employees and supervisors, as defined in the Act, with respect to rates of pay, wages, hours of employment and other conditions of employment, and if an understanding is reached, reduce it to writing and sign it.

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[NOTE: When a refusal to bargain occurs during the certification year, the certification year should be extended to compensate for that period of time during which good-faith collective bargaining did not occur due to respondent's unlawful refusal to bargain. *Mar-Jac Poultry Co.*, 136 NLRB 785 (1962). In cases involving refusals to bargain during the certification year, the bargaining order should conform to this provision and specifically extend the certification year for the appropriate period of time. *Van Dorn Plastic Machinery Co.*, 300 NLRB 278 (1990); *General Electric Co.*, 163 NLRB 198 (1967). For example, a Board order may read as follows:

> On request, bargain with the Union as the exclusive representative of the employees in the Unit and if an understanding is reached, reduce it to writing and sign it. On resumption of bargaining, the Union's status as the exclusive collective-bargaining representative of the Unit shall be extended for ___ months thereafter, as if the initial year of the certification has not expired.**]**

[NOTE: In cases when there has been no bargaining during the certification year, the word "commencement" should be substituted for "resumption."**]**

[ALL CASES]

(i) Within 14 days of service by the Region, post at its Columbia, Alabama plant copies of the attached notice marked "Appendix A." [Attach to the stipulation a copy of the Notice to Employees and mark it "Appendix A." For guidance regarding notice language, see Sec. 10132.3.] **Copies of the notice, on forms provided by Region __, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Respondent will take reasonable steps to ensure that the notices are not altered, defaced or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since** [date of the first unfair labor practice].

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[NOTE: In all CA and CB cases, where the company and union as corespondents have entered into a joint settlement agreement, the settlement should provide for posting by respondent/company of the notice signed by the union respondent by inserting an additional paragraph after (i) as follows:

Post at the same places and under the same conditions, as set forth above, copies of the attached notice to employees marked "Appendix B" [Union - Notice to Employees and Members] **as soon as they are provided to Respondent by Region [__.]]**

(j) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

[NOTE: If the stipulation contains no provision for a consent judgment, there must be an admission of the allegations of the complaint or a stipulation of facts showing the commission of unfair labor practices (see par. IV,4). Such an admission or stipulation is essential to enforcement of the Board order in the Court of Appeals in the event of respondent's failure to comply. Sec. 10164.5.]

VII. ENFORCEMENT OF ORDER

The United States Court of Appeals for any appropriate circuit may, on application by the Board, enter its judgment enforcing the Order of the Board in the form set forth above. Respondent waives all defenses to the entry of the judgment, including compliance with the order of the Board and its right to receive notice of the filing of an application for the entry of such judgment, provided that the judgment is in the words [and figures] set forth above. However, Respondent shall be required to comply with the affirmative provisions of the Board's Order after entry of the judgment only to the extent that it has not already done so.

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ABC Company

Respondent

By

_____ _____

Joe B. Smith, President **Date**

[address]

XYZ Union

Charging Party

By

_____ _____

Sam Brown, International Representative **Date**

[address]

Mutual Benefit Society

Intervenor

By

_____ _____

President **Date**

[address]

Approval recommended:

_____ _____

Date

Attorney, Region _____

National Labor Relations Board

[address]

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Approved:

_____ _____

Office of the General Counsel **[or] Regional Director,**

Region ___

National Labor Relations Board [address]

Washington, D.C. 20570

_____

Date

[NOTE: As set forth above in Sec. 10164.7, unilateral formal settlements are approved by the General Counsel and bilateral formal settlements are approved by the Regional Director.]

10170 Pattern for Settlement Stipulation in CB, CC, CD, and CE Cases

The above pattern for settlement stipulations in CA cases is generally also applicable to CB, CC, CD, CE, CG, and CP cases. The principal differences of substance between the CA stipulation pattern and the stipulation in other cases is in the Board order set forth in paragraph "VI. Order," of Pattern 60 (Sec. 10168) and in the attached notice to employees. For this reason, the entire stipulation form is not being incorporated here. However, the following drafts of cease and desist and affirmative provisions for frequently encountered CB, CC, CD, and CE circumstances are set forth below. (Since CG and CP charges are rare, no specific examples are provided; however, Regional Offices should tailor language to fit the particular circumstances.)

[NOTE: The following patterns utilize the basic statutory language. The specific provisions of a formal settlement should conform to the allegations in the complaint.]

VI. ORDER

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Based on this stipulation and the record as described above, and without any further notice of proceedings, the Board may immediately enter an order providing as follows:

Respondent, XYZ Union, its officers, agents and representatives, shall:

1. Cease and desist from:

[8(b)(1)(A)**]**

(a) Restraining or coercing employees of ABC Company [or any other employer**] in the exercise of the rights guaranteed in Section 7 of the National Labor Relations Act, as amended, by _____.**

[8(b)(1)(B)]

(b) Restraining or coercing ABC Company [or any other employer] **in the selection of its representatives for the purposes of collective bargaining or the adjustment of grievances, by _____.**

[8(b)(2)]

(c) Causing or attempting to cause ABC Company [or any other employer] **to discriminate against any employees in regard to their hire or tenure of employment, or any term or condition of employment, in violation of Section 8(a)(3) of the Act, as amended, by _____.**

[8(b)(2) or (3)]

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(d) Giving effect to paragraph(s) _____ of its contract with ABC Company.

[8(b)(3)]

(e) Refusing to bargain collectively with ABC Company on behalf of all employees of its Columbia, Alabama plant, excluding office clerical employees and guards, professional employees and supervisors as defined in the Act.

[8(b)(4)(i) and (ii)(A)—Conduct Compelling Union Membership]

(f) Engaging in, or inducing or encouraging any individual employed by ABC Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employ-

ment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining the ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to join [Charged Union] or any other labor organization.

[8(b)(4)(i) and (ii)(A)—Conduct Compelling Membership in Employer Organization]

(g) Engaging in, or inducing or encouraging any individual employed by ABC Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services or threatening, coercing, or restraining the ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to join [Employer Organization**] or any other employer organization.**

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[8(b)(4)(i) and (ii)(A)—Conduct Seeking an 8(e) Agreement]

(h) Engaging in, or inducing or encouraging any individual employed by ABC Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to enter into, maintain, give

effect to, or enforce an agreement whereby ABC Company agrees to cease doing business with any other person.

[8(e)—Hot Cargo Agreement]

(i) Maintaining, giving effect to, or enforcing its agreement with [Union or Employer**], entered into on [**Date**], insofar as it provides: [**Set Forth Clause**]; or to any extension, renewal, modification, or supplement thereof, or to enter into any other agreement with [**Employer or Union**], or any other [**labor organization or employer as appropriate**], whereby the signatory employer cease(s) or refrain(s) or agree(s) to cease or refrain from handling, using, selling, transporting, or otherwise dealing in any of the products of any employer, or to cease doing business with any other person.**

[8(b)(4)(i) and (ii)(B)—Secondary Conduct with Cease Doing Business Objective]

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(j) Engaging in, or inducing or encouraging any individual employed by D Company, or any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining D Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is to force or require D Company, or any other person, to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with ABC Company or any other person.

[8(b)(4)(i) and (ii)(B)—Secondary Conduct with Recognitional Objective]

(k) Engaging in, or inducting or encouraging any individual employed by D Company, or any other person engaged in commerce or in an industry affecting commerce except ABC Company, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials or commodities, or threatening, coercing, or restraining D Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to recognize or bargain with XYZ Union, or any other labor organization, as representative of any of the employees of ABC Company, unless and until such labor organization has been certified by the National Labor Relations Board as the representative of such employees.

Frankl v. HTH Corp., No. 10-15968 archived on August 29, 2011

[8(b)(4)(i) and (ii)(C)—Primary Conduct With Recognitional Objective Where Another Union Certified]

(l) Engaging in, or inducing or encouraging any individual employed by ABC Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to recognize or bargain with XYZ Union, or any other labor organization, as the representative of any employees of ABC Company in a bargaining unit covered by a certification issued on [Date**], in Case [**Number**] to an organization other than XYZ Union.**

[8(b)(4)(i) and (ii)(D)—Jurisdictional Disputes]

(m) Engaging in, or inducing or encouraging any individual employed by ABC Company, or by any other person engaged in commerce or in an industry affecting commerce, to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise handle or work on any goods, articles, materials, or commodities, or to perform any services, or threatening, coercing, or restraining ABC Company, or any other person engaged in commerce or in an industry affecting commerce, where, in either case, an object thereof is forcing or requiring ABC Company to assign the work of [Describe the Work in Dispute] **to employees who are members of, or represented by XYZ Union rather than to employees who are not members of, or represented by, XYZ Union.**

[8(b)(5)—Excessive Fees]

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(n) Requiring of employees covered by an agreement authorized under Section 8(a)(3) of the Act, as modified by the Labor-Management Reporting and Disclosure Act of 1959, the payment as a condition precedent to becoming members of XYZ Union of a fee in an amount that is excessive or discriminatory.

[8(b)(6)—Featherbedding]

(o) Causing or attempting to cause ABC Company to pay or deliver, or to agree to pay or deliver, any money or other thing of value in the nature of an exaction for services that are not performed or not to be performed.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

[8(b)(2)]

(a) Notify ABC Company, in writing, that it has withdrawn its objections to the said Company's employment of Joe Doaks and now requests the Company to reinstate Joe Doaks. Notify Joe Doaks, in writing, that it has so informed ABC Company.

(b) Make whole Joe Doaks for any loss of pay suffered by reason of the [alleged] discrimination against him by payment to him of the amount of $_____.

(c) Make whole Joe Doaks for any additional loss of pay caused by the failure of the Respondent, within 14 days from the date of this Order, (1) to notify ABC Company in writing that it has withdrawn its objections to said Company's employment of the said Joe Doaks and requests the Company to reinstate him or (2) to notify Joe Doaks, in writing, that it has so informed ABC Company; by payment to the said Joe Doaks of the amount that he would have earned if reinstated by ABC Company, from the 15th day after the date of this Order to the date of the giving of the said notices by the Respondent to ABC Company and to the said Joe Doaks, less his net earnings during such period, said amounts to be computed on a quarterly basis.

Franklin v. UTH Corp., No. 10-1084, archived on August 29, 2011

[NOTE: If the Union has withdrawn its objection and/or the discriminatee has been reinstated or paid, the language should be modified accordingly. In addition, the language should also be modified to reflect the Union's continuing backpay obligation if it is anticipated the Employer will not reinstate the discriminatee upon the Union's request.]

[8(b)(3)]

(d) Bargain collectively, upon request, with ABC Company in regard to rates of pay, wages, hours of employment or other terms and conditions of employment of all employees at the Columbia, Alabama plant of said Company, excluding office clerical employees, guards, professional employees and supervisors, as defined in the Act.

[ALL CASES]

(e) Within 14 days of service by the Region, post at its business office in Columbia, Alabama copies of the attached notice marked "Appendix A." Copies of the notice, on forms provided by the Regional Director for Region ___, after being signed by Respondent's representative, shall be posted by Respondent immediately upon receipt and be maintained for 60 consecutive days in conspicuous places, including all places where notices to members are customarily posted. Reasonable steps shall be taken by Respondent to ensure that such notices are not altered, defaced or covered by any other material.

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(f) Mail to the Regional Director for Region __ signed copies of the said notice for posting, if ABC Company is willing, in the plant of ABC Company at Columbia, Alabama, in the places where notices to employees are customarily posted. Copies of said notice, on forms provided by Regional Director for Region __, after having been signed by Respondent's representative, shall be forthwith returned to the Regional Director for such posting by ABC Company.

[NOTE: In all CA and CB cases, where the company and union as co-respondents have entered into a joint settlement agreement, delete the words "if ABC Company is willing," in par. (f), above.**]**

(g) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

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10200–10248 SECTIONS 10(l) AND 10(k)—CC, CD, CE, AND CP CASES

10200 Statutory Priority

The Act accords priority to the processing of certain cases described in Section 10(l) in which injunctive relief may be appropriate. These cases are commonly referred to as "priority cases" and are designated under Agency procedures as follows:

- Section 8(b)(4)(A), (B), and (C) — CC cases
- Section 8(b)(4)(D) — CD cases
- Section 8(e) — CE cases
- Section 8(b)(7)(A), (B), and (C) — CP cases

10200.1 Timeliness Guidelines

Frankl v. HTH Corp., No. 16-15984 archived on August 29, 2011

Such cases must be handled with utmost dispatch, even though the disposition of cases having lesser priority may be somewhat delayed. The Regional Office should, at the time the charge is filed, or immediately thereafter, request the charging party to submit promptly (normally within 24 hours) evidence in support of the charge. The Regional Office should complete its investigation and make a decision within 72 hours. Submissions to the Division of Advice, if any, should be sent within 72 hours of the completion of the investigation, absent unusual circumstances. Once a charge has been determined to have merit, the Regional Office should promptly file for 10(l) injunctive relief, if appropriate. Sec. 10238–10248. Complaint—or in applicable CD cases, a Notice of 10(k) Hearing (Sec. 10214)—should issue within 5 days of the filing of any 10(l) petition. Where a 10(l) petition is appropriate, the ULP hearing should be scheduled within 28 days of issuance of complaint.

10200.2 Requests for Advice and Notification to Headquarters

The Regional Office should consult General Counsel Memoranda on Mandatory Advice Submissions to determine whether a statutory priority case must be submitted to the Division of Advice. Other cases may also warrant submission to Advice, because either the issues are novel or complex or the case is of broad interest.

Even if a case is not formally submitted to Advice, Regional Offices should notify Advice and the Division of Operations-Management of significant cases, involving, for example, defense industries, large numbers of employees, or highly publicized disputes.

Finally, Regional Offices should not hesitate to consult with Advice about questions that may arise during the processing of any statutory priority case.

10202–10204 CC CASES

10202 Conduct Proscribed by Section 8(b)(4)

Section 8(b)(4) prohibits a union from engaging in certain conduct described in subsections (i) and (ii) for the objects set forth in subsections (A), (B), (C) or (D). Generally, subsection (i) proscribes conduct that induces or encourages individuals employed by any person to engage in a strike or to cease performing other services. On the other hand, subsection (ii) proscribes conduct that threatens, coerces, or restrains any person. For a discussion of subsection (D), see Secs. 10206–10220.

If after preliminary investigation, the Regional Director has reasonable cause to believe that complaint alleging a violation of Section 8(b)(4)(A), (B), or (C) should issue, recourse to injunctive relief is provided for in Section 10(l) of the Act. Secs. 10238–10248.

10204 Settlement Notices in CC Cases

Every notice in a CC case addresses prohibited conduct, described in Section 8(b)(4)(i) or (ii) or both, and a prohibited object, described in subsections (A), (B), or (C). In cases involving more than one type of conduct, such as a case alleging violations of Section 8(b)(4)(i) and (ii)(B), a notice should contain one provision covering (i) conduct for the (B) object and a separate provision covering (ii) conduct for the (B) object. For this reason, the following language is divided into suggested "conduct" language and suggested "object" language. However, as in cases involving other sections of the Act, the Regional Office must consider all surrounding circumstances in determining the appropriate language. For instance, repeat conduct may require the use of broader language.

Franklin v. NTL Corp., No. 10-15904 archived on August 29, 2011

"Conduct" Language:

[for (i) conduct**]**

> **WE WILL NOT [**specify unlawful conduct in this case, e.g., strike, picket, etc.**] [**Construction project name or Employer name(s)**] or otherwise cause or attempt to cause any person's employees to strike or refuse to perform any work [insert appropriate object listed below].**

[for (ii) conduct**]**

WE WILL NOT [specify unlawful conduct in this case, e.g., threaten to strike, picket, etc.**] [**Construction project name or Employer name(s)**] or otherwise threaten, coerce or restrain [**Employer name(s)**] or any other person [**insert appropriate object listed below**].**

"Object" Language:

- 8(b)(4)(A) (Conduct compelling union membership)

  in order to force [Employer name(s)**] to join our Union or any other union.**

- 8(b)(4)(A) (Conduct compelling membership in Employer organization)

  in order to force or require [Employer name(s)**] to join [**Employer Organization**] or any other employer organization.**

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- 8(b)(4)(A) (Conduct seeking 8(e) agreement)

  in order to force [Employer name(s)**] to enter into, or give effect to, [**identify the clause at issue, e.g., by section, title, date, or other recognizable identifier**] or any other agreement that is prohibited by Section 8(e) of the National Labor Relations Act. Section 8(e) prohibits employers and unions from entering into agreements requiring the employer to stop doing business with another person or stop handling the products of another employer.**

- 8(b)(4)(B) (Secondary conduct with cease doing business objective)

  in order to force [Secondary Employer name(s)**] to stop doing business with [**Primary Employer name(s)**] or any other person.**

- 8(b)(4)(B) (Secondary conduct with recognitional objective)

  in order to force [Primary Employer name(s)**] to recognize or bargain with [**Union name**], which has not been certified by the National Labor Relations Board as the employees' representative.**

- 8(b)(4)(C) (Primary conduct—recognitional objective—another union certified)

  in order to force [Employer name(s)**] to recognize or bargain with [**Union name**] instead of [**name of certified Union**], which has been certified by the National Labor Relations Board as the employees' representative.**

10206–10220 CD CASES AND SECTION 10(k)

10206 Conduct Proscribed by Section 8(b)(4)(D)

Franklin v. MTL Corp., No. 10-15984 archived on August 29, 2011

Section 8(b)(4)(D) prohibits a labor organization from engaging in conduct described in subsections (i) and (ii) of Section 8(b)(4) where an object is to force an employer to make a work assignment in a jurisdictional dispute. After preliminary investigation reveals a meritorious 8(b)(4)(D) charge, the Board is empowered under Section 10(k) to hear and determine the dispute involved and, in appropriate circumstances, to seek 10(l) relief. Secs. 10238–10248. On the other hand, if the Regional Office determines that the 8(b)(4)(D) charge lacks merit, the charge should be dismissed, absent withdrawal. See Pattern at Sec. 10122.14(a).

10208 Notice of Charge Filed in CD Cases

The Regional Office should promptly serve a copy of the charge together with a copy of a Notice of Charge Filed (see Pattern in Sec. 10210) on all parties to the dispute. Such parties include not only the charged and charging parties, but also any employer which controls the assignment of the work in dispute, even if it is not a charging party, and any union(s) or group(s) to which the work has been assigned or which claim the work in dispute. These additional parties should be included in the caption of the case. The Notice of Charge Filed as well as the charge shall be made part of the record in any 10(k) proceeding.

10210 Pattern for Notice of Charge Filed in CD Cases

NOTICE TO PARTIES OF 8(b)(4)(D) CHARGE

[Case Caption]

NOTICE OF CHARGE FILED

PLEASE TAKE NOTICE that the attached charge has been filed alleging that [Insert name of the charged party(ies)] has violated Section 8(b)(4)(D) of the National Labor Relations Act. The charge will be investigated by the Regional Office. If the charge is found meritorious, the National Labor Relations Board will hear and determine the work jurisdiction dispute involved in the charge pursuant to Section 10(k) of the Act unless, within 10 days of the receipt of this notice, the parties to the dispute submit to the Regional Office satisfactory evidence that they have adjusted the dispute or have agreed to a voluntary method of adjustment.

Frankl v. HTH Corp., No. 10-15084, archived on August 18, 2011

_____

Regional Director

National Labor Relations Board

Region _____

Date _____

10212 Disclaimer in CD Cases

A claim for work cognizable under Section 10(k) may be made by a labor organization or by an unrepresented group performing the work. If one of the competing groups involved in the dispute unequivocally disclaims the work, a jurisdictional dispute may no longer exist. The Regional Office should investigate the circumstances surrounding any disclaimer to evaluate whether the claim for work has truly been renounced. If the Regional Office concludes that there are no longer competing claims for the work, the charge should be dismissed and any notice of 10(k) hearing quashed.

10214 The 10(k) Hearing

If it appears that the charge has merit, the Regional Office should issue a Notice of 10(k) Hearing, unless the parties agree on a method of voluntary adjustment of the dispute or unless they actually adjust it. Sec. 10216.

10214.1 Notice of Hearing and Service

The Notice of Hearing should include in the caption all entities as described in Sec. 10208. The Pattern for Notice of Hearing is set forth below:

[Case Caption]

NOTICE OF HEARING

PLEASE TAKE NOTICE that on [date**], 20__, at [**hour and place**] and on consecutive days thereafter until concluded, a hearing officer of the National Labor Relations Board will conduct a hearing pursuant to Section 10(k) of the National Labor Relations Act. At the hearing, the parties will have the right to appear and present testimony regarding the dispute alleged in Case No. ___-CD-___ involving the assignment of the following work:**

Franklin v. HTH Corp., No. 10-15984 archived on August 29, 2011

[Insert description of work. Where appropriate, insert "THIS CASE INVOLVES THE NATIONAL DEFENSE."]

_____

Regional Director

National Labor Relations Board

Region _____

Date _____

Once the Regional Office has determined a hearing is appropriate, service of the Notice of Hearing should issue promptly in cases involving 10(l) relief. Sec. 102.90, Rules and Regulations require that such notice normally issue within 5 days after the petition for injunctive relief is filed. The Notice should be served on all entities named in the caption.

10214.2 Scheduling

Normally, a 10(k) hearing may not be set less than 10 days after service of the charge. In all cases involving the national defense and in other cases in the Regional Director's discretion, where special circumstances indicate that an expedited hearing would be in the public interest, 10(k) hearings should be scheduled consistent with their priority as described in Sec. 10200.1.

When scheduling an expedited hearing, the Regional Office must provide adequate notice to the parties. When the Regional Office proposes to set an expedited hearing, it should obtain and consider the parties' positions on an appropriate hearing date. What period is adequate depends on the circumstances, such as the urgency of the matter, the complexity of the issues, and the time reasonably required to prepare for hearing.

10214.3 National Defense Cases

All 10(k) notices of hearing in cases involving the national defense should contain the designation "This Case involves the National Defense." See Pattern in Sec. 10214.1. In such cases, briefs may not be filed without express permission of the Board. Sec. 102.90, Rules and Regulations.

10214.4 Hearing Officers

Frankl v. HTH Corp., No. 10-15084, archived on August 29, 2011

The 10(k) hearing is conducted by someone other than the person who investigated the charge, acted as counsel for the General Counsel in a companion CC case, or may prosecute a CD unfair labor practice case arising out of the dispute. When appropriate, Regional Offices may request an Administrative Law Judge to function as a hearing officer in more complex 10(k) hearings.

The hearing is conducted in the same manner as representation hearings. See Part Two Representation Casehandling Manual, Secs. 11180–11248. The text of Form 4669, Summary of Standard Procedures in Formal Hearings Held before the National Labor Relations Board pursuant to Petitions Filed under Section 9 of the National Labor Relations Act, as Amended, should be adapted for a 10(k) hearing and put into the record.

While the parties are responsible for supporting their respective contentions, the hearing officer is responsible for developing a complete record, including reasonable cause to believe that the respondent has violated Section 8(b)(4)(D) and the relevant factors for determining the assignment of the work.

Immediately after the close of the hearing, the hearing officer should forward to the Office of the Executive Secretary an appearance sheet containing the names, addresses, and fax numbers of all interested parties and their representatives.

10214.5 Expedited Transcript

Where a case is designated as "involving the National Defense" (Sec. 10214.3), the Regional Office should order an expedited copy of the transcript of the 10(k) hearing, in order to hasten submission of the dispute to the Board for determination. The Regional

Office may also order an expedited copy of the transcript in other cases which, in its judgment, warrant more expeditious treatment by the Board.

10214.6 Hearing Officer's Report

As soon as possible after the close of the 10(k) hearing (48 hours absent unusual circumstances), the hearing officer should prepare and forward to the Office of the Executive Secretary a hearing officer's report. See Pattern in Sec. 10214.7. The report may be in the form of a memorandum from the hearing officer to the Executive Secretary. It should briefly summarize the issues and the evidence, but should make no recommendations or findings. Ordinarily, the report can and should be prepared from notes taken at the hearing, without waiting for the official transcript. This report is not served on the parties or counsel/representatives of record.

10214.7 Outline for Hearing Officer's Report

10(k) Hearing Officer's Report

1. BACKGROUND
    a. Date charge filed
    b. Date Notice of Hearing issued
    c. Dates hearing opened and closed
    d. Parties
        Charging Party
        Employer (if other than Charging Party)
        Charged Union
        Union Party in Interest
    e. Date briefs due
    f. Estimated transcript length
2. ISSUES
3. PROCEDURE

    Describe any procedural rulings made which may be challenged.
4. LABOR ORGANIZATIONS

    Describe any contested issues concerning labor organization status.
5. JURISDICTION

    Describe any contested issues concerning jurisdiction.

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6. THE DISPUTE

   Describe the competing claims for the disputed work.

7. THE ALLEGED VIOLATION(S)

   Describe the conduct which allegedly constitutes the violation(s).

8. THE WORK IN QUESTION

9. POSITIONS OF THE PARTIES ON DISPUTED ISSUES

10. POSSIBILITY OF VOLUNTARY METHOD OF SETTLING THE DISPUTE

10214.8 Posthearing Motion

All motions filed after the close of the hearing by any party should be filed directly with the Board and should conform to the format and procedural requirements set out in Sec. 102.24, Rules and Regulations.

10216 Agreed-Upon Method of Voluntary Adjustment and Actual Adjustment in 10(k) Cases

Frankl v. HTH Corp., No. 10-15984, archived on August 29, 2011

The parties may have agreed on a method of voluntary adjustment of the dispute in which all the parties (including any unrepresented group) to the dispute are bound by the same arrangement for the resolution of the dispute. Examples of such arrangements include a stipulation, a contractual agreement to submit the dispute to the same arbitral forum or an agreed-upon Board election. One of the most common methods of adjustment is the mechanism established by the Building and Construction Trades Department, AFL–CIO on behalf of its constituent National and International Unions and signatory Employer Associations. If the Regional Office is investigating a charge involving parties eligible for participation in this plan, the Regional Office should investigate whether the parties are bound by the plan. Alternatively, the parties may have actually adjusted the dispute.

In either circumstance, Section 10(k) divests the Board of its power to resolve the jurisdictional dispute. Thus, even if the parties decline to invoke their agreed-upon method of adjustment, a 10(k) hearing may not be held. See also GC Memo 73-82 concerning authorization to process 8(b)(4)(D) cases and any supplementing memoranda.

10216.1 Agreed-Upon Method of Adjustment

The sections below describe procedures Regional Offices should follow when issues arise regarding an agreed-upon method of adjustment.

(a) *Satisfactory Evidence of Method of Adjustment:* Under Sec. 102.93, Rules and Regulations, if an agreed-upon method of adjustment exists, the Regional Office should defer action on the charge and withdraw any Notice of 10(k) Hearing. Thus, if the Regional Office is presented with satisfactory evidence of an agreed-upon method of

adjustment before the hearing opens, it should not issue the notice or withdraw any notice issued. If the issue arises during the hearing and the parties demonstrate to the Regional Office's satisfaction that an agreed-upon method of adjustment exists, the hearing officer should recess the hearing and the Regional Director should withdraw the notice of hearing. In either circumstance, the charge should be held in abeyance, pending the outcome of the parties' resort to that forum.

(b) *Disputed Evidence of Method of Adjustment:* If there is a genuine dispute as to the existence of an agreed-upon method of adjustment, the Regional Office should conduct a 10(k) hearing and include evidence on this issue in the record.

(c) *Evidence of Method of Adjustment Arises after Hearing:* If, after the hearing has closed, the parties report to the Regional Office that an agreed-upon method of adjustment exists, the Regional Office should direct the party or parties raising the issue to present such information to the Board. The Regional Office should also notify the Office of the Executive Secretary of this development. If appropriate, the Board may order the hearing to be reopened to receive evidence on this issue.

(d) *Parties Decline to Invoke Agreed-Upon Method of Adjustment:* The parties' failure to invoke an agreed-upon method does not authorize the Board to conduct a 10(k) hearing. Nevertheless, dismissal of the charge is not necessarily warranted. If the jurisdictional dispute continues, the Regional Office may issue an 8(b)(4)(D) complaint. Sec. 102.93, Rules and Regulations. If further proceedings will not effectuate the purposes of the Act, the Regional Office may dismiss the charge. If a party's reasons for failing to invoke a method of adjustment raise novel issues regarding whether an agreed-upon method exists, the Regional Office may issue a Notice of 10(k) Hearing and take evidence on this issue or consult with the Division of Advice on how to proceed.

Frankl v. HTH Corp. No. 16-15984 archived on August 29, 2017

10216.2 Actual Adjustment

An actual adjustment exists when the parties in fact "settle" the dispute—for example, when all parties fully agree to a resolution or when an agreed-upon method of voluntary adjustment culminates in a decision or award that resolves the dispute, regardless of whether the charged party is complying with the resolution.

On a satisfactory showing, at any time prior to the close of a 10(k) hearing, that the parties have actually adjusted their dispute, any hearing commenced should be recessed, any notice of hearing issued should be withdrawn and the charge should be dismissed if it is not withdrawn. If the Regional Office concludes there is disagreement as to the existence of an actual adjustment, the hearing should continue and evidence on this issue should be included in the record. If the parties report an actual adjustment to the Regional Office after the 10(k) hearing has closed, the Regional Office should direct the party or parties raising the issue to present such information to the Board. The Regional Office should also notify the Office of the Executive Secretary of this development.

Whenever the Regional Office is informed that an actual adjustment has been effected, it should also investigate whether the charged party is complying with the resolution. Sec. 10218.2.

10216.3 Unsolicited Withdrawal Request

The Regional Director may approve an unsolicited withdrawal request if made prior to the close of the 10(k) hearing. If a withdrawal request is submitted after the close of the hearing, the Regional Office should direct the charging party to submit the matter by motion to the Board. The Regional Office should also notify the Office of the Executive Secretary of this development.

10218 Disposition of Charge After Jurisdictional Determination or Award

Disposition of the charge following the issuance of a determination pursuant to a 10(k) award or an agreed-upon method of adjustment will depend on the conduct of the employer and/or charged party with respect to the terms of the award.

10218.1 Work Awarded to the Charged Party

If it is determined that employees represented by a charged union are entitled to perform the work in dispute, the Regional Director should dismiss the charge, absent withdrawal, regardless of whether the employer assigned the work consistent with the determination or whether the charged union engaged in further conduct in support of its claim. Upon dismissal or withdrawal of the charge, any related 10(l) injunction expires by operation of law.

Frankl v. HHR Corp., No. 10-15984 archived on August 29, 2011

10218.2 Work Not Awarded to the Charged Party

If, as a result of the jurisdictional dispute resolution procedure, the work is not awarded to the charged party, the Regional Office should follow the procedures set forth below:

(a) *Compliance:* If the charged party is complying with a determination made pursuant to a 10(k) award or an agreed-upon method of adjustment, the Regional Office should dismiss the charge, absent withdrawal.

(b) *Noncompliance:* If, despite a determination made pursuant to a 10(k) award or an agreed-upon method of adjustment, the charged party engages in conduct proscribed by 8(b)(4)(i) or (ii)(D), the Regional Office should issue complaint. Such complaint should allege the violative conduct that gave rise to the charge, as well as any subsequent conduct within the meaning of 8(b)(4)(i) or (ii)(D) engaged in by the charged party for the object of obtaining the work covered by the 10(k) award or voluntary adjustment.

Noncompliance by the charged party with a 10(k) award that does not constitute (i) or (ii) conduct (for example, a charged party's failure to provide the Regional Director notice of whether it intends to comply with the 10(k) award where such notice is required in the award) cannot be the basis for an independent violation of the Act. If complaint is otherwise appropriate, such noncompliance should, however, be pled in the complaint and established at trial because, under Sections 8(b)(4)(D) and 10(k), some noncompliance is a predicate for issuance of complaint.

10220 Settlements in CD Cases

The unique procedures in CD cases, in which a meritorious charge results in a 10(k) hearing or other determination of the jurisdictional dispute rather than a complaint, restrict the circumstances in which Board settlement agreements concerning CD cases are appropriate. A settlement agreement should be sought after a Regional Office determines that the charged union has failed to timely comply with a 10(k) award or a determination pursuant to a method of voluntary adjustment and that complaint should issue. However, formal or informal settlement of a CD charge is not appropriate at any stage prior to a 10(k) award or determination made pursuant to an agreed-upon method of adjustment. Rather than soliciting settlement of a CD charge, the Regional Office should dismiss the charge, absent withdrawal, following an unequivocal disclaimer of the work which resolves the dispute (Sec. 10212) or compliance with a 10(k) award or voluntary adjustment determination. Sec. 10218. The charge may also be withdrawn as a result of a resolution of the dispute short of an award of the work. Sec. 10216.3.

10220.1 Notices

The following language is suggested to assist in drafting proposed notices in 8(b)(4)(D) cases. However, as in cases involving other sections of the Act, the Regional Office must consider all surrounding circumstances in determining the appropriate language. For instance, repeat conduct may require the use of broader language.

Frankl v. HHAC Corp., No. 10-15984 archived on August 29, 2011

- <u>8(b)(4)(i)(D)</u>

  WE WILL NOT [specify unlawful conduct in this case, e.g., strike, picket, etc.**]** **[**Construction project or Employer name(s)**], or otherwise cause or attempt to cause employees to strike or refuse to perform any work, in order to force [**Employer name(s)**] to assign [**describe work in dispute**] to employees who are members of, or represented by, [insert name of Charged Union] rather than to employees [who are members of, or represented by, (**insert name of Assigned Union**)] [**or who are unrepresented**].**

- <u>8(b)(4)(ii)(D)</u>

  WE WILL NOT [specify unlawful conduct in this case, e.g., threaten to strike, picket, etc.**]** **[**Construction project or Employer name(s)**] or otherwise threaten, coerce or restrain [**Employer name(s)**] or any other person in order to force [**Employer name(s)**] to assign [**describe work in dispute**] to employees who are members of, or represented by, [**insert name of Charged Union**] rather than to employees [who are members of, or**

represented by, (insert name of Assigned Union**)] [**or who are unrepresented**].**

10222–10224 CE CASES

10222 Conduct Proscribed by Section 8(e)

Section 8(e) prohibits both employers and unions from entering into agreements, express or implied, requiring the employer to cease doing business with another person or cease handling the products of another employer. An 8(e) charge may be filed against either an employer, a union or both entities.

All parties to the agreement alleged to be violative of Section 8(e) should be served with a copy of the charge, regardless of whether a party has been named as a charged party. Sec. 10040.7. If complaint issues, each noncharged party should be named in the caption of the complaint as "party to the contract." In appropriate circumstances, recourse to injunctive relief is provided for in Section 10(l) of the Act. Secs. 10238–10248.

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

10224 Settlements in 8(e) Cases

10224.1 Notices

Although Section 8(e) prohibits parties from "enter(ing) into" a prohibited contract or agreement, the language in the proposed notice for settlements involving Section 8(e) provides, in addition, that the charged employer and/or union will not "maintain, give effect to or enforce" the 8(e) contract or agreement. Such remedial language is necessary to give meaning and effect to Congressional intent to interdict "hot cargo" agreements.

The following language is suggested to assist in drafting proposed notices in Section 8(e) [Hot Cargo] cases:

> **WE WILL NOT maintain, give effect to, or enforce our agreement [**identify the clause at issue, e.g., by section, title, date, or other recognizable identifier**] with [**name of union or employer**], or any other agreement, which requires [**us or name of employer**] to stop doing business with any other person.**

10224.2 Nonparticipation of Necessary Parties

In any case in which only one party to the contract is charged, a settlement should not be approved by the Regional Director unless the noncharged party or parties to the contract:

- Is a party or signatory to the settlement agreement or
- Files with the Regional Director a statement that it knows of the proceeding and the proposed settlement and waives any right to be a party to the proceeding or to contest the settlement

A settlement agreement may be submitted to an Administrative Law Judge for approval where the noncharged party, having received proper notice, fails to appear and object.

10230–10236 CP CASES

10230 Conduct Proscribed by Section 8(b)(7)

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

Section 8(b)(7) regulates recognitional picketing. Each subparagraph prohibits a labor organization from picketing for an organizational or recognitional object in specified circumstances: subparagraph (A) prohibits organizational or recognitional picketing where the employer has lawfully recognized another labor organization and a question concerning representation cannot be raised; subparagraph (B) prohibits organizational or recognitional picketing where the Board has conducted a valid election within the preceding 12 months; and subparagraph (C) prohibits organizational or recognitional picketing which continues beyond a "reasonable period of time, not to exceed 30 days," unless a petition has been filed. Subparagraph (C) also contains two significant provisos. Under the first, when a petition has been filed within a reasonable period after the picketing began and an 8(b)(7)(C) charge has been filed, an expedited election may be directed. The second proviso exempts from the restrictions of that subparagraph picketing for the purpose of truthfully advising the public that an employer does not employ members of, or have a contract with, a labor organization, as long as such picketing does not have the effect of causing disruption of deliveries or a work stoppage.

In any 8(b)(7)(A) case in which the recognized union has been certified by the Board, an 8(b)(4)(C) charge may also be appropriate.

In appropriate circumstances, recourse to injunctive relief is provided for in Section 10(l) of the Act. Secs. 10234 and 10238–10248.

10232 Representation Petitions and 8(b)(7) Charges

In some 8(b)(7) cases, a representation petition will be filed about the same time as the charge. Processing of these cases requires the use of the unique procedures described below.

10232.1 Representation Petitions and 8(b)(7)(A) and (B) Charges

If a concurrent 8(b)(7)(A) or (B) charge and a representation petition have been filed, the petition should be held in abeyance pending the Regional Office determination of the charge. If merit is found to the charge, the petition should be dismissed, because no question concerning representation can be raised in those circumstances. The Regional Office should include any petitioner not a party to the ULP proceeding on the service sheet. The Regional Office should also advise such petitioner that it will be considered a party with an interest in the ULP proceeding limited solely to receipt of a copy of the order or other document that operates to finally dispose of the proceeding. See Pattern 74 in Sec. 10236.5.

If no merit is found to the charge, the petition should be processed in accordance with standard representation case procedures.

10232.2 Expedited Election Procedures under Section 8(b)(7)(C)

In the following circumstances, the Regional Office should invoke the expedited procedures set forth in Sec. 102.73–102.82, Rules and Regulations and, if warranted, conduct an expedited election:

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- An 8(b)(7)(C) charge is filed and
- A representation petition is filed before the picketing has exceeded a reasonable period of time

Under the expedited procedures neither a showing of interest nor a separate demand for recognition is required to support the petition. Likewise, the requirement for an Excelsior list does not apply in these elections. *Excelsior Underwear, Inc.*, 156 NLRB 1236, 1242 fn. 14 (1966); Representation Casehandling Manual, Sec. 11312.1(k). The eligibility date typically would be the payroll period ending date immediately preceding the issuance of the direction of election.

(a) *Processing Petition without Hearing:* If it is determined that an election is warranted, the Regional Director may direct an election without a hearing. Sec. 102.77, Rules and Regulations. The Direction of Election and Notice of Election should include the description of the unit, the eligibility date and the time, manner and place of conducting the election. See Pattern 72 in Sec. 10236.3. Any party may file a request for special permission to appeal the direction of election to the Board. In such circumstances, unless otherwise ordered by the Board, review by the Board will not stay the election. The Regional Office should, however, impound the ballots pending further action by the Board.

(b) *Processing Petition with Hearing:* If the Regional Director believes that certain issues must be resolved before conducting an election, a hearing may be held. See Patterns 70 and 71 in Secs. 10236.1 and .2, respectively. Issues relating to the propriety of processing the petition under the expedited procedures, as for instance whether the petition was timely filed or whether subparagraphs (A) or (B) of Section 8(b)(7) are applicable, are not appropriate for hearing. The hearing officer must be familiar with the expedited procedures set forth in Sec. 102.77(b), Rules and Regulations, which govern the conduct of such proceedings.

(c) *Disposition of the Charge:* Pending the determination of whether to direct an election under the expedited procedures, no formal action should be taken on the 8(b)(7)(C) charge. If such an election is directed, the 8(b)(7)(C) charge should be dismissed. Sec. 102.81, Rules and Regulations. The dismissal letter should advise the charging party that, pursuant to Sec. 102.81(a), Rules and Regulations, any appeal, in order to be timely, must be filed within 7 days of service of the dismissal letter. See Pattern 73 in Sec. 10236.4.

If the Regional Director dismisses the petition or determines that an expedited election is not appropriate, formal action on the 8(b)(7)(C) charge should be taken promptly. See Pattern 75 in Sec. 10236.6**,** regarding refusal to process under the expedited procedures.

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10234 Concurrent 8(b)(7) and 8(a)(2) Charges; Effect on 10(l) Proceedings

10234.1 Meritorious 8(a)(2) Charges and 8(b)(7)(A) Cases

An 8(a)(2) violation is a defense to an otherwise meritorious 8(b)(7)(A) charge since an 8(b)(7)(A) violation is premised on an existing lawful collective-bargaining relationship. Accordingly, upon finding merit to such an 8(a)(2) charge, the Regional Office should dismiss the 8(b)(7)(A) charge.

10234.2 Meritorious 8(a)(2) Charges and 8(b)(7)(C) Cases

The relationship between a meritorious 8(a)(2) and an 8(b)(7)(C) charge raises several issues. Section 8(b)(7)(C) anticipates that if a timely petition is filed, an expedited election will be ordered and the 8(b)(7)(C) charge will be dismissed. However, a meritorious 8(a)(2) charge may block the processing of the petition and prevent the Regional Office from ordering an expedited election. Accordingly, a Regional Office should proceed as set forth below.

(a) An 8(a)(2) violation is not a defense to an 8(b)(7)(C) charge. Accordingly, even if merit is found in the related 8(a)(2) case, the Regional Office should issue complaint, absent settlement, on a meritorious 8(b)(7)(C) charge, absent the filing of a timely petition.

(b) Since the second proviso to 10(l) bars 10(l) proceedings to enjoin an 8(b)(7) violation if merit is found to an 8(a)(2) charge against the picketed employer, an injunction should not be sought.

(c) A valid 8(a)(2) charge may block the processing of a representation petition. See Representation Casehandling Manual, Secs. 11730–11731, regarding the "blocking charge" policy and a Regional Director's discretion to process a petition notwithstanding a blocking charge. If a representation petition is filed within a reasonable period after commencement of the picketing, further processing of the 8(b)(7)(C) charge should be held in abeyance until the 8(a)(2) charge no longer blocks the petition, at which time the Regional Office should proceed as set forth above in Sec. 10232.2(c).

10234.3 Nonmeritorious 8(a)(2) Charges

If the Regional Office finds no merit to the 8(a)(2) charge, it should dismiss the charge and, if the circumstances so require, the Regional Director may institute 10(l) proceedings without waiting for the appeal period to expire. The appeal period for such a dismissed charge is 7 days. Sec. 102.81(c), Rules and Regulations. To ensure expedited resolution of any appeal, if the Regional Office anticipates an appeal, it should, upon dismissal of the 8(a)(2) charge, notify the Office of Appeals of the pending 8(b)(7) case. If an appeal is filed, the Regional Office should consult with the Injunction Litigation Branch regarding 10(l) considerations.

10236 Patterns for Documents Related to 8(b)(7) Cases

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Listed below are suggested patterns contained in this section for the preparation of certain documents related to 8(b)(7) cases.

- Pattern 70, Notice of Expedited Representation Hearing, Section 8(b)(7)(C). Sec. 10236.1
- Pattern 71, Order Consolidating Cases and Notice of Expedited Representation Hearing. Sec. 10236.2
- Pattern 72, Regional Director's Direction of Expedited Election. Sec 10236.3
- Pattern 73, Dismissal of 8(b)(7)(C) Charge (When Regional Office Has Directed Expedited Election). Sec. 10236.4
- Pattern 74, Dismissal of Petition—Meritorious 8(b)(7)(A) or (B) Charge. Sec. 10236.5
- Pattern 75, Refusal to Process Under Expedited Procedure. Sec. 10236.6

All patterns should be carefully reviewed and modified as appropriate to fit the circumstances of individual cases. The letter patterns in Sections 10236.3 through .6 should be addressed and served as set forth below.

(a) *Representation Letter Patterns Related to 8(b)(7):* The letter patterns for processing representation cases related to 8(b)(7) cases (see Secs. 10236.3, 10236.5, and 10236.6) should be served as follows:

- If the party(ies) to whom the letter is directed is represented by an attorney, the letter should be addressed to the attorney with a copy to the party(ies).

- If the party(ies) to whom the letter is directed is not represented by an attorney, the letter should be addressed to the party(ies) with a copy to its representative.

- Copies of the letter should also be sent to any other interested party and its representative.

(b) *Dismissal Letter Pattern for 8(b)(7)(C) Charge:* The letter pattern for dismissal of an 8(b)(7)(C) charge (see Sec. 10236.4) should be served as follows:

- If the charging party is represented by an attorney, the letter should be addressed to the attorney with a copy to the charging party.

- If the charging party is not represented by an attorney, the letter should be addressed to the charging party with a copy to its representative.

- Copies of the letter should also be sent to the charged party and its representative.

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10236.1 Pattern 70, Notice of Expedited Representation Hearing, Section 8(b)(7)(C)

For discussion about expedited representation hearings, see Sec. 10232.2(b).

UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION ____

[Name of Party**]**

and **Case [**Number**]**

[Name of Party**]**

NOTICE OF EXPEDITED REPRESENTATION HEARING

The Petitioner filed a petition pursuant to Section 9(c) of the National Labor Relations Act, and [Charging Party name**] filed a related charge under Section 8(b)(7)(C) of the Act. I have concluded that there is a question affecting commerce as to whether the employees in the unit described in the petition want to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act.**

Accordingly, YOU ARE NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, on the [date], 20__, at _____. m., (and on consecutive days thereafter) a hearing will be conducted in [location**] before a Hearing Officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise and give testimony. Because a related charge under Section 8(b)(7)(C) was filed, the hearing will be conducted in accordance with the expedited procedures of Section 102.77(b) of the Board's Rules and Regulations.**

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

_____

Regional Director

National Labor Relations Board

(Address**)**

Date

10236.2 Pattern 71, Order Consolidating Cases and Notice of Expedited Representation Hearing

For discussion about expedited representation hearings, see Sec. 10232.2(b).

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION ____

[Name of Party**]**

and **Case [**Number**]**

[Name of Party**]**

[Name of Party**]**

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

and **Case [**Number**]**

[Name of Party**]**

ORDER CONSOLIDATING REPRESENTATION CASES
AND
NOTICE OF EXPEDITED REPRESENTATION HEARING

The Petitioners filed petitions pursuant to Section 9(c) of the National Labor Relations Act and a related charge was filed under Section 8(b)(7)(C) of the Act.

I have concluded that there is a question affecting commerce as to whether the employees in the units described in the petitions want to be represented by a collective-bargaining representative as defined in Section 9(a) of the Act. In order to effectuate the purposes of the Act,

and to avoid unnecessary costs or delay, I HEREBY consolidate the petitions for hearing.

Accordingly, YOU ARE HEREBY NOTIFIED that, pursuant to Sections 3(b) and 9(c) of the Act, on the [date**], 20__, at ____ __.m., (and on consecutive days thereafter) a hearing will be conducted in [**location**] before a Hearing Officer of the National Labor Relations Board. At the hearing, the parties will have the right to appear in person or otherwise and give testimony. Because a related charge under Section 8(b)(7)(C) was filed, the hearing will be conducted in accordance with the expedited procedures of Section 102.77(b) of the Board's Rules and Regulations.**

_____

Regional Director

National Labor Relations Board

(Address**)**

Date

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

10236.3 Pattern 72, Regional Director's Direction of Expedited Election

For discussion about expedited election, see also Sec. 10232.2(a).

Petitioner [Petitioner's Attorney—otherwise,
Petitioner if not represented by an attorney]

Employer [Employer's Attorney—otherwise,
Employer if not represented by an attorney]

Union(s) [Each Union's Attorney—otherwise,
Union(s) if not represented by an attorney]

Re: [Case Name**]**

Case [Number**]**

Appropriate Salutation:

On the basis of the Region's investigation of the petition in Case __-R__-_____ and related charge in Case __-CP-_____, I have decided to conduct an expedited election by secret ballot pursuant to Sections 8(b)(7)(C) and 9(c) of the Act and Section 102.77 of the Board's Rules and Regulations. This election will determine whether the employees in the unit covered by the petition want to be represented for purposes of collective bargaining by [name of union**] [or** (name of other interested unions)**] pursuant to Section 9(c) of the National Labor Relations Act, or by no union.**

Accordingly, a secret ballot election will be conducted as described in the enclosed Notice of Election among the employees in the following appropriate unit:

[Description of Unit**]**

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

Your cooperation will be appreciated.

Very truly yours,

_____

Regional Director

Enclosure: Notice of Election

cc: Petitioner (unless addressed above because not represented by an attorney)

Employer (unless addressed above because not represented by an attorney)

Union(s) (unless addressed above because not represented by an attorney)

Non Attorney Representative of any Party

10236.4 Pattern 73, Dismissal of 8(b)(7)(C) Charge (When Regional Office Has Directed Expedited Election)

For discussion of this topic, see also Sec. 10232.2(c).

[Charging Party's Attorney—otherwise,
Charging Party if not represented by an attorney.]

Re: [Case Name**]**

Case [Number**]**

Appropriate Salutation:

The Region has carefully investigated and considered your charge against [Charged Party name**] alleging a violation of Section 8(b)(7)(C) of the National Labor Relations Act. The investigation disclosed that a timely valid representation petition has been filed in Case __-R__-_____ within a reasonable time from the commencement of the picketing involved in the charge.**

Frankl v. HTH Corp., No. 10-15284 archived on August 29, 2011

Decision to Dismiss and Conduct Election: **Section 8(b)(7)(C) of the Act permits a union to picket to obtain recognition if a representation petition is filed either before, or within a reasonable period of time of, such picketing. Therefore, I am dismissing your charge. Pursuant to the expedited election procedures of 8(b)(7)(C) and Section 102.77 of the Board's Rules and Regulations, I have separately directed an expedited election in Case __-R__-_____.**

Your Right to Appeal: **The National Labor Relations Board Rules and Regulations permit you to obtain a review of this action by filing an appeal with the GENERAL COUNSEL of the National Labor Relations Board. Use of the Appeal Form (Form NLRB-4767) will satisfy this requirement. However, you are encouraged to submit a complete statement setting forth the facts and reasons why you believe that the decision to dismiss your charge was incorrect.**

Means of Filing: **An appeal may be filed electronically, by mail, or by delivery service. Filing an appeal electronically is preferred but not required. The appeal MAY NOT be filed by fax. To file an appeal electronically, go to the Agency's website at www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. To file an appeal by mail or delivery service, address the appeal to the General Counsel at the National Labor Relations Board, Attn: Office of Appeals, 1099 14th Street, N.W., Washington, D.C. 20570-0001. Unless filed electronically, a copy of the appeal should also be mailed to me.**

Appeal Due Date and Time: **The appeal is due on [14 days from issuance]. If you file the appeal electronically, it will be considered timely filed if the transmission of the entire document through the Agency's website is accomplished no later than 11:59 p.m. Eastern time on the due date. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.**

Faanklv. HTH Corp. No. 10-15984 archived on August 29, 2014

If you mail the appeal or send it by delivery service, it must be received by the General Counsel in Washington, D.C., by the close of business at 5 p.m. Eastern time or be postmarked no later than [1 day before the due date set forth above].

Extension of Time to File Appeal: **Upon good cause shown, the General Counsel may grant you an extension of time to file the appeal. A request for an extension of time may be filed electronically, by fax, by mail, or by delivery service. To file electronically, go to www.nlrb.gov, click on E-GOV, select E-FILING, and follow the detailed instructions. The fax number is (202) 273-4283. A request for an extension of time to file an appeal must be received on or before the original appeal due date. A request for an extension of time that is mailed or given to the delivery service and is postmarked or delivered to the service before the appeal due date but received after the appeal due date will be rejected as untimely. Unless filed electronically, a copy of any request for extension of time should be sent to me.**

Confidentiality/Privilege: **Please be advised that we cannot accept any limitations on the use of any appeal statement or evidence in**

support thereof provided to the Agency. Thus, any claim of confidentiality or privilege cannot be honored, except as provided by the FOIA, 5 U.S.C. 552, and any appeal statement may be subject to discretionary disclosure to a party upon request during the processing of the appeal. In the event the appeal is sustained, any statement or material submitted may be subject to introduction as evidence at any hearing that may be held before an administrative law judge. Because we are required by the Federal Records Act to keep copies of documents used in our case handling for some period of years after a case closes, we may be required by the FOIA to disclose such records upon request, absent some applicable exemption such as those that protect confidential sources, commercial/financial information or personal privacy interests (e.g., FOIA Exemptions 4, 6, 7(C) and 7(D), 5 U.S.C. § 552(b)(4), (6), (7)(C), and 7(D)). Accordingly, we will not honor any requests to place limitations on our use of appeal statements or supporting evidence beyond those prescribed by the foregoing laws, regulations, and policies.

Notice to Other Parties of Appeal: **You should notify the other party(ies) to the case that an appeal has been filed. Therefore, at the time the appeal is sent to the General Counsel, please complete the enclosed Appeal Form (NLRB-4767) and send one copy of the form to all parties whose names and addresses are set forth in this letter.**

Hanks v. HHA Corp. No. 10-15984 Arrived on August 29, 2011

Very truly yours,

Regional Director

Enclosure

cc: Charging Party (unless addressed above because not represented by an attorney)

Non Attorney Representative of Charging Party

Charged Party and Representative

Other Parties and Representatives

General Counsel, Office of Appeals

10236.5 Pattern 74, Dismissal of Petition—Meritorious 8(b)(7)(A) or (B) Charge

For discussion of this topic, see Sec. 10232.1.

[Petitioner's Attorney—otherwise,
Petitioner if not represented by an attorney]

Re: [Case Name**]**

Case [Number**]**

Appropriate Salutation:

The Region has investigated the petition you filed in Case __-R__-_____ and a related charge in Case __-CP-_____ filed under Section 8(b)(7) of the Act.

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

[If the charge alleges a violation of 8(b)(7)(A), the following language is suggested**]**

***Decision to Issue Complaint and Dismiss Petition:* Based on that investigation, I have decided to issue an unfair labor practice complaint alleging that the picketing involved in the charge in Case __-CP-_____ is violative of Section 8(b)(7)(A) of the Act. In this regard, the investigation disclosed that [**incumbent union**] is the currently certified collective-bargaining representative and is party to a collective-bargaining agreement which acts as a bar to a petition. Accordingly, no question concerning representation can be raised at this time and I am dismissing your petition.**

[If the charge alleges a violation of 8(b)(7)(B), the following language is suggested**]**

***Decision to Issue Complaint and Dismiss Petition:* Based on that investigation, I have decided to issue an unfair labor practice complaint alleging that the picketing involved in the charge in Case ___-CP-_____**

is violative of Section 8(b)(7)(B) of the Act. In this regard, the investigation disclosed that a valid election under Section 9(c) of the Act has been conducted within the preceding twelve months. Accordingly, no question concerning representation can be raised at this time and I am dismissing your petition.

Reinstatement of the Petition: **Upon a request by the Petitioner after disposition of Case ___-CP-_____, the petition may be reinstated, if appropriate. Accordingly, a copy of the order or other document that disposes of that case will be sent to the Petitioner.**

Right to Request Review: **Pursuant to Section 102.71 of the Board's Rules and Regulations, you may obtain review of this action by filing a request with the Executive Secretary, National Labor Relations Board, 1099 14th Street, NW, Washington, D.C. 20570-0001. This request for review must contain a complete statement setting forth the facts and reasons on which it is based.**

Pratt v. HTH Corp. No. 18-15984 archived on August 29, 2019

Procedures for filing a Request for Review: **Pursuant to the Board's Rules and Regulations, Sections 102.111–102.114, concerning the Service and Filing of Papers, the request for review must be received by the Executive Secretary of the Board in Washington, D.C., by close of business on (insert date 14 calendar days from the issuance of the letter), at 5 p.m. Eastern time unless filed electronically. Consistent with the Agency's E-Government initiative, parties are encouraged to file a request for review electronically. If the request for review is filed electronically, it will be considered timely if the transmission of the <u>entire document</u> through the Agency's website is accomplished by no later than 11:59 p.m. Eastern time on the due date. Please be advised that Section 102.114 of the Board's Rules and Regulations precludes acceptance of a request for review by facsimile transmission. Upon good cause shown, the Board may grant special permission for a longer period within which to file.[1] A copy of the**

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[1] A request for extension of time, which may also be filed electronically, should be submitted to the Executive Secretary in Washington, and a copy of such request for extension of time should be submitted to the Regional Director and to each of the other parties to this proceeding. A request for an extension of time must include a statement that a copy has been served on the Regional Director and on each of the

request for review must be served on each of the other parties to the proceeding, as well as on the undersigned, in accordance with the requirements of the Board's Rules and Regulations.

Filing a request for review electronically may be accomplished by using the E-Filing system on the Agency's website at www.nlrb.gov. Once the website is accessed, select the E-GOV tab, click on E-FILING, and follow the detailed directions. The responsibility for the receipt of the request for review rests exclusively with the sender. A failure to timely file an appeal electronically will not be excused on the basis of a claim that the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason, absent a determination of technical failure of the site, with notice of such posted on the website.

Very truly yours,

_____

Regional Director

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

cc: Petitioner (unless addressed above because not represented by an attorney)

Non Attorney Representative of the Petitioner

Employer—Union and their Representatives

Interested Labor Organization(s) and Representatives

Office of Executive Secretary

National Labor Relations Board

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other parties to this proceeding in the same manner or a faster manner as that utilized in filing the request with the Board.

10236.6 Pattern 75, Refusal to Process Under Expedited Procedure

For discussion of this topic, see Sec. 10232.2(c).

[Petitioner's Attorney—otherwise,
Petitioner if not represented by an attorney.**]**

Re: [Case Name**]**
Case [Number**]**

Appropriate Salutation:

The Region has investigated the petition you filed in Case __-R__-_____ and the related charge in Case __-CP-_____ alleging a violation of Section 8(b)(7)(C) of the Act.

Franki v. HTH Corp., No. 10-15084, archived on August 29, 2011

Decision Not to Expedite Election: **Although Section 8(b)(7)(C) provides for an expedited election in certain circumstances, I have concluded that an expedited election is not warranted because the petition was not filed within a reasonable time after the picketing began. Although I will not process the petition under expedited procedures, I will process it in the normal manner, in accordance with the provisions of Section 9(c)(1) of the Act and Subpart C of the Board's Rules and Regulations.**

Submission of Evidence: **Pursuant to the requirements of Section 9(c)(1) of the Act and the Board's Rules and Regulations, if you have not already done so, please furnish evidence that [**e.g.**]**

- **[**A substantial number of employees wish to be represented by the petitioner for the purposes of collective bargaining.**]**
- **[**A substantial number of employees do not desire to be represented for collective-bargaining purposes by the labor organization currently certified (recognized).**]**

- **[**A labor organization has presented a claim to the petitioner to be recognized as the representative of the petitioner's employees as defined in Section 9(a) of the Act.**]**

Unless such evidence is submitted by close of business [date**], I will dismiss the petition.**

Very truly yours,

_____

Regional Director

cc: Petitioner (unless addressed above because not represented by an attorney)
Non Attorney Representative of the Petitioner
Employer – Union and their Representatives
Other parties and their Representatives
Office of Executive Secretary
National Labor Relations Board

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10238–-10248 INJUNCTIVE RELIEF UNDER SECTION 10(l)

10238 Section 10(l)

Section 10(l) directs that, whenever a Regional Office has found reasonable cause to believe a charged party has violated Section 8(b)(4)(A), (B), or (C), 8(b)(7) or 8(e), the Regional Office should seek injunctive relief, pending the Board's disposition of the unfair labor practice complaint. Section 10(l) further provides that such relief may be sought in 8(b)(4)(D) cases "[i]n situations where such relief is appropriate." Secs. 102.95–102.97, Rules and Regulations; Secs. 101.37–101.38, Statements of Procedure.

The Regional Office should request expedited consideration of its 10(l) petition from the district court. If the district court issues an order to show cause returnable at an unduly late date and the circumstances demonstrate a need for more immediate relief, the Regional Office may wish to consider seeking a temporary restraining order. Sec. 10244.

For detailed guidance on procedural or substantive matters regarding 10(l) litigation, Regional Offices should consult relevant GC Memoranda and material distributed by the Injunction Litigation Branch. Regional Offices may also seek assistance from the Injunction Litigation Branch through formal submissions or informal contacts.

On the other hand, if the charged union ceases the alleged unlawful conduct and the Regional Office is satisfied that the conduct will not resume, the Regional Office should defer filing a petition.

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10240 Injunctive Relief in CD Cases

Section 10(l) does not mandate injunction proceedings in CD cases. The Regional Office should institute such proceedings when it determines that there is reasonable cause to believe that the charged union has engaged in conduct proscribed by Section 8(b)(4)(D), unless the conduct has ceased and the Regional Office is satisfied that the conduct will not resume

If 10(l) proceedings are otherwise warranted, they are not precluded by the fact that the dispute is to be resolved by resort to an agreed upon method of resolution, rather than a 10(k) proceeding. If an agreed upon method exists but the parties have not invoked it (Sec. 10216.1(d)), the Regional Office should consult with the Division of Advice before instituting 10(l) proceedings. See GC Memo 73-82 concerning authorization to process 8(b)(4)(D) cases and related 10(l) petitions.

10242 Initiating 10(l) Proceedings

Neither an unfair labor practice complaint nor a Notice of 10(k) Hearing is required before filing for 10(l) relief. Accordingly, as soon as the Regional Office determines that the charge is meritorious and complaint or 10(k) notice should issue, it

should determine whether the charged union will cease the conduct and refrain from resuming it. If the union fails to provide adequate assurances, the Regional Office should immediately file a petition for 10(l) relief. Although settlement negotiations may be warranted before 10(l) proceedings are instituted, filing should not be deferred when such negotiations become protracted or are unreasonably delayed. The Board's Statements of Procedure explicitly give a Regional Director discretion to dispense with a portion of the investigative or settlement process as appears necessary in light of the nature of the proceeding and the public interest. Secs. 101.4 and .7, Statements of Procedure.

NOTE: When a Regional Office determines that an alleged violation of Section 8(b)(4)(A), (B), or (C), 8(b)(7) or 8(e) is meritorious, the Regional Office must institute a litigation hold to preserve documents, including electronically stored information, which may be related to pending or reasonably foreseeable litigation. See Sec. 11863 and in particular GC Memo 07-09 and OM Memos 07-64 and 10-48. In addition, the Regional Office should ensure that all court filings comply with the Federal rules regarding protecting personal identification information in court filings. See GC Memo 09-02.

10244 Temporary Restraining Orders in 10(l) Proceedings

Section 10(l) provides that a district court may issue a temporary restraining order (TRO) without notice, limited to 5 days, if the Board shows "substantial and irreparable injury to the charging party will be unavoidable. . . ." For guidance regarding processing applications for TROs see GC Memo 75-18.

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NOTE: In addition, the Regional Office should ensure that all court filings comply with the new federal rules regarding protecting personal identification information in court filings. See GC Memo 09-02.

10245 Post 10(l) Informal Settlements

When a 10(l) injunction has been obtained prior to the settlement of a case, the standard provision for withdrawal of the complaint on execution of the settlement should be altered through an addendum to the settlement agreement form to provide for withdrawal of complaint upon closing of the matter in compliance. Sec. 10146.4.

10246 Appeals and Contempt of District Court Orders in 10(l) Proceedings

The Injunction Litigation Branch handles all appeals from district court orders in 10(l) cases. Accordingly, whenever the requested relief is denied in whole or in part, the Regional Office should immediately notify the Injunction Litigation Branch. As soon as possible, the Regional Office should forward copies of the court's decision or order, its petition, supporting memoranda and exhibits, and the respondent's answer or opposition and supporting papers, together with the Regional Office's recommendation on whether to take an appeal.

If the respondent notifies the Regional Office it intends to appeal from the grant of an injunction or serves the Regional Office with a notice of appeal, the Regional Office should immediately notify the Injunction Litigation Branch and forward a copy of the notice of appeal.

Whenever it is claimed that an injunction is being violated, the Regional Office should notify the respondent of the claim and conduct an investigation. When the investigation reveals that the respondent was engaged in arguably contumacious conduct, the Regional Office should submit to the Injunction Litigation Branch a recommendation on whether to institute contempt proceedings, together with the district court papers described in the preceding paragraph.

10248 Processing of Underlying Unfair Labor Practices in 10(l) Cases

In every matter in which the Regional Office seeks injunctive relief from a district court, Secs. 102.95–102.97, Rules and Regulations require that every stage of the unfair labor practice case be expedited. To that end, the Regional Office should:

- Issue complaint within 5 days of filing the 10(l) petition
- Schedule the hearing within 28 days of issuance of complaint
- Notify the Administrative Law Judge that 10(l) relief has been sought or obtained and, on the record, request that the matter be expedited
- Oppose any unwarranted attempt by any party to delay the proceeding
- In any brief filed with the Board, note that 10(l) relief has been sought or obtained and request that the matter be expedited
- Notify the Office of the Executive Secretary when the case is transferred to the Board

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10250–10452 FORMAL PROCEEDINGS

10250 Further Investigation

Prior to issuance of complaint, any actions specified by the Regional Office determination should be carried out. In the absence of contrary instructions, precomplaint re-interviews of witnesses are not necessary. An exception may be made where the case depends entirely on the credibility of one or more witnesses whose testimony is contradicted by other witnesses. In such situations, re-interview of such witnesses with respect to factual conflicts may be prudent. Sec. 10064.

10252 Settlement Attempts

The Board agent assigned to make initial settlement efforts should notify the charged party and the charging party of the Regional Office determination before complaint. The Board agent should encourage voluntary agreement and should offer to assist in arriving at a satisfactory settlement that will effectuate the purposes of the Act. Even if initially unsuccessful, the Regional Office should pursue further settlement efforts consistent with the policies and procedures in Sec. 10126.2. With respect to the type of settlement to be sought, see Sec. 10124.

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10254 Cases Involving Monetary Remedy

After Regional Office determination to issue complaint, the Regional Office should ensure that the file contains a list of the names, addresses, and social security numbers of the alleged discriminatees. In preparing this list, information previously gathered during the course of the investigation will be vital.

At the time complaint issues, a copy of the complaint, along with the list of alleged discriminatees' information, should be sent to the compliance officer who is responsible for furnishing each alleged discriminatee with the following NLRB forms:

NLRB-4288 Information on Backpay for Employees

NLRB-4685 Notification of Change of Address

NLRB-5224 Claimant Expenses and Search for Work Report

NLRB-5230 Interim Earnings Report

Each alleged discriminatee should be asked to fill in Form NLRB-5224 and return it to the compliance officer. The compliance officer must make certain that such forms are received from each alleged discriminatee and placed in the case file for future use. Additionally, the compliance officer should request formally at this time that each alleged

discriminatee maintain records of interim earnings/expenses and search for work and submit that information to the compliance officer on a regular basis. The compliance officer is responsible for receiving this information from each alleged discriminatee and for placing the information in the case file for future use.

10256 Administrative Considerations

In the scheduling of unfair labor practice hearings, the Regional Office should consider a number of factors including those discussed below.

10256.1 Procurement of Hearing Date

When obtaining hearing dates from the appropriate office of the Division of Judges, the Regional Office should note the Impact Analysis category of the case, and seek an early date when special circumstances are present, such as where an alleged discriminatee is of "advanced age." Cf. *NLRB v. Solartec, Inc.*, 185 LRRM 3151 (6th Cir. 2009). The Region should also attempt to space the trial dates to allow a single judge to handle two or more trials. For additional considerations concerning administrative matters related to trials, see OM Memo 98-75.

Some Regional Offices may choose to set several cases for hearing on a "calendar call" basis, i.e., at the same place, date, and hour. This is generally feasible where the cases are ready for hearing at or about the same time, where they are to be tried in the same area and where each will probably not consume more than 4 days of hearing. The request to the Division of Judges should specify that there will be a calendar call and should give the probable duration of each case. The parties in each case should be informed that this is a calendar call.

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10256.2 Estimated Length of Hearing

Concurrent with the request for hearing date, the Regional Office must submit to the Division of Judges an estimate of the length of hearing. Estimates given to the Division of Judges should not merely be based on a cursory examination of the pleadings. Rather, Regional Offices should strive for accurate estimates, based on how many witnesses will be called and the estimated length of their testimony and cross-examination. Likewise, trial attorneys should discuss this matter with respondents' attorneys during initial pretrial conversations. Regional Offices should advise the Division of Judges of any change in the estimate as soon as possible.

If the Regional Office is unable to secure such detailed information from the respondent, in making its estimate the Regional Office's experience with a particular counsel and the number and nature of subpoenas that have been requested by respondent could help shape the Regional Office's estimate.

10256.3 Hearing Date for Summary Judgment Cases

Whenever a Motion for Summary Judgment is filed in a case scheduled for hearing before an Administrative Law Judge, the Regional Office should request the Division of Judges to withdraw the hearing date from its calendar.

10256.4 Hearing Space

Whenever possible, the Regional Office hearing room should be used. When hearings are held in the Regional Office, the hearing rooms and judge's chambers should be equipped with at least the following items:

Regional Hearing Rooms

- Judge's bench and chair
- U.S. Flag
- NLRB seal
- Container with water and paper cups

Judge's Chambers

- Desk and chair
- Coat rack or hook
- Telephone and telephone directories

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If the Regional Office does not have a designated judge's chambers, a room should, if feasible, be made available with these accouterments.

When hearings are held outside the Regional Office, they should, to the extent possible, be held in Federal, State, or municipal courtrooms. Efforts should be made to obtain the most properly equipped and maintained facilities, thereby contributing to the formality and dignity of the proceedings.

If, however, space proves inadequate or the accommodations are poor, the trial attorney should notify the official responsible for securing hearing rooms and, if possible, seek the location and availability of more suitable hearing space.

At the hearing, the conduct of the parties should be dignified, both on and off the record. All participants should treat building property with appropriate care. Special effort should be made to prevent incidents that might jeopardize future use of courtrooms or other space secured for the hearing. Thus, all building rules unique to that facility must be observed. Moreover, smoking should not be permitted while the hearing is in session.

10256.5 Division of Judges' e-Room

After securing a hearing date from the Division of Judges, a Regional Office should place the relevant case documents, including complaints, answers, underlying charge(s) and related documents, and a Litigation Participation Notification sheet into an e-Room database which is accessible by the Division of Judges, Records Management,

and Operations. See OM Memo 07-48. All such documents received in paper form must be scanned into electronic form and all documents must be named in accordance with the standardized storage and naming convention protocols. See OM Memos 05-62 and 08-33.

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10260-10283 THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT

10260 Generally

Issuance of a complaint follows a determination on behalf of the General Counsel that formal proceedings on certain matters alleged in the charge should be instituted. A complaint must be well founded in all respects since it constitutes the exercise of the General Counsel's final authority. Sec. 3(d) of the Act.

The preparation of the complaint begins, as a practical matter, after Regional Office determination to issue complaint, absent settlement. Sec. 10126.2. Ideally, the complaint should normally be ready for issuance within a few days of the decision to issue. The final draft should be carefully reviewed before being signed by the Regional Director. Generally, the likelihood of settlement, the nature of the allegations and other circumstances will determine the timing of complaint issuance. However, complaints alleging violations of Sections 8(b)(4)(A), (B), or (C), 8(b)(7), 8(e), or 8(b)(4)(D), which involve 10(1) injunctive relief, should be issued promptly, normally within 5 days of the date on which such injunctive relief is first sought. Sec. 102.96, Rules and Regulations.

The form, contents, and service of complaint and related matters are discussed in Secs. 10262–10270.

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10262 Complaint Drafter's Responsibility

The Board agent assigned to draft the complaint must carefully review the file and the Regional Office determination document to ensure that the decision is fully supported by the evidence in the file. In addition, the Board agent must carefully draft the complaint to incorporate necessary pleadings to support the Regional Office's determination, including any special affirmative remedies. The Board agent should bring to the attention of supervision any concerns about the scope of the pleadings.

10264 Content of Complaint

10264.1 Conformity of Charges and Complaints

Critical variances between the allegations of the charge and the allegations of the complaint will require appropriate amendments. Normally, the complaint should conform to all allegations of the last amended charge that have not been disposed of by other means. Although occasionally the complaint may have to be broader than the charge, the Regional Office should normally seek an amended charge to cover all complaint allegations, including discrete categories of independent 8(a)(1) violations. In any event, the charge must be broad enough, as a matter of law, to support the allegations of the complaint. Sec. 10062.5.

10264.2 Particularity of Complaint

The allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met. The complaint should be sufficiently specific to defend against a Motion for a Bill of Particulars. Sec. 10292.1. For example:

- An 8(a)(1) or 8(b)(1)(A) allegation should specify the names of offending supervisors or union agents, with the dates and locations of each incident.

- The location of each incident should be described as specifically as possible, consistent with the need to protect the identity of the witnesses.

- The names of the alleged discriminatees and dates of the underlying acts should be set forth.

- The complaint allegations should set forth a general legal description of the type of alleged violations rather than attempting to quote, for instance, exact language used in an allegedly unlawful statement.

- Complaint allegations should sufficiently set forth separate and alternative theories of a violation. See OM Memo 07-84.

Frankly, HTH Corp., No. 20-15984 archived on August 29, 2011

However, certain matters need not appear in the complaint, either because of the nature of the issue or because the Regional Office lacks specific knowledge. For example:

- Where the names of certain alleged discriminatees are unknown at the time of complaint issuance, they may be described as "others presently unknown to the undersigned." (Of course, whenever the names become known, they should be added by amendment.)

- Names of employees alleged to be the objects of 8(a)(1) or 8(b)(1)(A) conduct who are not entitled to specific individual relief should not appear in the complaint.

- Conduct relied upon as background material to which no unfair labor practice finding will be sought should not be alleged.

Careful drafting of the complaint or amendment, when such becomes necessary in the interest of accuracy or clarification, avoids many problems during trial and time-consuming briefs and arguments. The failure to properly draft or amend complaints can result in the loss of substantive rights. *McKenzie Engineering Co.*, 326 NLRB 473

(1998); *NLRB v. H. P. Townsend Mfg. Co.*, 101 F.3d 292 (2d Cir. 1996), denying enf. 317 NLRB 1169 (1995).

10264.3 Correct Respondent(s)

The legally correct name of the respondent(s) must be used in the charge and complaint. Accordingly, Regional Offices should be alert to the circumstances described below to ensure that all appropriate respondents are named.

(a) *Derivative Liability:* Whenever the Region learns that unnamed parties (such as an alter ego, successor, individual, or trustee in bankruptcy) should be alleged in the complaint as derivatively liable for remedying the alleged unfair labor practices, an amendment to the charge should be sought to reflect derivative liability and the complaint should so allege. Secs. 10054.2(c) and 10062 and Compliance Manual, Sec. 10596.

(b) *Sole Proprietorships and Partnerships:* All complaints issued against sole proprietorships or partnerships must include in the caption and in the jurisdictional pleadings all responsible individuals. (For example, in the case of a sole proprietorship, John C. Jones, d/b/a Jones Plumbing, or, in the case of a partnership, John C. Jones and Brendan L. Jones, d/b/a Jones Plumbing.) Additionally, the Regional Office should ensure that Board Orders include the correct caption, in full, and that the "order" section specify by name the individual owners who are personally liable for compliance. Where recommended orders do not fully and accurately set forth all responsible individuals, a motion should be filed with the Administrative Law Judge for the necessary corrections. Likewise, an appropriate motion should be made to the Board if its Order presents the same omission.

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(c) *Labor Organizations:* In view of the wide variety of structural relationships within labor organizations, the Regional Office should ensure that the proper labor organization is named. Thus, it may be necessary to distinguish between internationals, districts, locals, district councils, and/or joint ventures.

10264.4 Additional Parties

In drafting complaints, the Regional Office should be aware of the following circumstances in which it may be necessary to name additional parties in the caption of the complaint and serve such parties with all formal documents:

(a) *Parties in Interest:* Where the remedy sought would affect an entity not otherwise set forth in the complaint, that entity should be named as a party in interest. Examples include:

- A party to a collective-bargaining agreement
- A party to a subcontract
- A party to an allegedly unlawful bargaining relationship
- An allegedly assisted or dominated labor organization or a labor organization involved in a jurisdictional dispute

(b) *Necessary Parties in CB Cases:* In the event a remedy is sought against an employer seeking reinstatement of an employee in the context of a CB complaint where no charge is filed against the employer, the employer must be named a party in interest and a prayer for remedial relief requesting reinstatement must be set forth in the complaint. *Teamsters Local 227 (American Bakeries)*, 236 NLRB 656 (1978).

10264.5 Naming Attorneys in the Complaint

Clearance from the Division of Operations-Management must be sought before naming an attorney in a complaint as a party respondent, an agent of the respondent in general, an agent of the respondent in the commission of unfair labor practices, or for any other purpose. See Sec. 11752.

10266 Remedies and Circumstances Pled in Complaint

10266.1 Specific Remedies

When the remedy sought is in addition to that traditionally granted for the violations alleged, the complaint should contain a separate request for specific remedial relief in order to provide respondent adequate notice. See Secs. 10131, 10407.1, and 10410. Such a request should specifically reserve the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy.

Trenski v. HTH Corp., No. 16-15984 archived on August 29, 2017

10266.2 Strike Situations

In cases involving an unfair labor practice accompanied by a strike allegedly in protest thereof, the Regional Office should determine the nature of the strike. If the evidence supports a finding of an unfair labor practice strike, the Regional Office should allege such status in the complaint and seek an open-ended order requiring the reinstatement, on application, of all qualified striking employees.

Notwithstanding the above, the Regional Director has discretion not to plead and litigate the nature of the strike in a test of certification case where summary judgment is otherwise appropriate. Sec. 10282.1.

10266.3 Unlawful Fees, Dues, or Assessments

In cases where initiation fees, dues, or assessments are alleged to have been unlawfully collected, the complaint should describe the specific contract, arrangement, or practice by which the collections were made. An employer or union allegedly involved in such collection, but not named as a respondent, should be named as a party in interest in the complaint.

10266.4 Electronic Notice Posting

In certain cases, it may be appropriate to seek electronic notice posting in addition to traditional posting where the charged party customarily communicates with its employees or members electronically and/or where a charged party utilized its e-mail or intranet system in committing an unfair labor practice. OM Memo 06-82 and Sec. 10132.4(b).

10266.5 First Contract Bargaining Cases

In order to directly and effectively address the serious consequences of bad-faith bargaining and other violations during first contract negotiations and to restore the pre-violation conditions and relative positions of the parties, Regional Offices should consult GC Memo 09-09 and Sec. 10131.1 for remedies which should be sought and specifically pled where appropriate.

10266.6 Compound Interest on Board Monetary Remedies

In order to pursue the General Counsel's position that the Board should adopt a policy that incorporating quarterly compound interest on backpay and other monetary awards is necessary to fulfill the Act's remedial provisions of "make whole" relief, Regional Offices should follow the procedures set forth in GC Memo 07-07 in all future cases in which a monetary award is sought.

Frankl v. HTH Corp., No. 10-15084, archived on August 22, 2011

Thus, Regional Offices should plead a remedy of quarterly compounded interest in all such complaints and incorporate the model arguments in post-hearing briefs to the Administrative Law Judge and to the Board.

10266.7 Consolidating Compliance Issues

In appropriate circumstances, when consolidation will facilitate full resolution of a dispute, the Regional Director may consolidate compliance proceedings with underlying unfair labor practice proceedings. See Sec. 102.54(b) of the Board's Rules and Regulations and Secs. 10508.3 and 10646.3 of the Compliance Manual.

10266.8 Foreign Language Notice Posting

In certain cases, such as where a substantial number of the charged party's employees are primarily non-English speaking, Regional Offices should seek to have the notices posted in both English and in the appropriate foreign language(s).

10268 Form and Service of Complaint

10268.1 Form of Complaint

The complaint is a formal document issued for the General Counsel by the Regional Director. Bearing the case caption, it sets forth the facts underlying the assertion of jurisdiction and the facts relating to the alleged violations by the

respondent(s). The National Labor Relations Board Pleadings Manual-Complaint Forms, provides guidance in drafting complaints.

Where appropriate the complaint should contain a prayer for relief. Indeed, the complaint should set forth the requested remedy whenever any other than a routine remedy is sought. Where the Regional Office's determination of the need for a special remedy arises only after issuance of complaint, the respondent should receive prompt notification and the complaint should be amended.

10268.2 Answer Requirement and Notice of Hearing

The answer requirement and Notice of Hearing are set forth at the end of the complaint. Generally, the date of the hearing is set forth in the Notice of Hearing. After the last numbered allegation, and any prayer for a special remedy, will appear the following:

ANSWER REQUIREMENT

Frankl v. HHH Corp., No. 10-1598, archived on August 29, 2011

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the [consolidated**] complaint. The answer must be received by this office on or before [**set forth date 14 days from issuance, unless that date is a holiday**], or postmarked on or before [**set forth date of the day before the due date**]. Unless filed electronically in a PDF format, Respondent should file an original and four copies of the answer with this office.**

An answer may also be filed electronically by using the E-Filing system on the Agency's website. In order to file an answer electronically, access the Agency's website at http://www.nlrb.gov, click on the E-GOV tab, select E-FILING, and then follow the detailed instructions. The responsibility for the receipt and usability of the answer rests exclusively upon the sender. Unless notification on the Agency's website informs users that the Agency's E-Filing system is officially determined to be in technical failure because it is unable to receive documents for a continuous period of more than 2 hours after 12 noon (Eastern time) on the due date for the filing, a failure to timely file the answer will not be excused on the basis that the transmission could not be accomplished because the Agency's website was offline or unavailable for some other reason.

The Board's Rules and Regulations require that an answer be signed by counsel or nonattorney representative for represented parties or by the party if not represented. See Sec. 102.21. If the answer being

filed electronically is a PDF document containing the required signature, no paper copies of the answer need to be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a PDF file containing the required signature, then the E-FILING rules require that such answer containing the required signature be submitted to the Regional Office by traditional means within 3 business days after the date of electronic filing.

Service of the answer on each of the other parties must be accomplished in conformance with the requirements of Section 102.114 of the Board's Rules and Regulations. The answer may <u>not</u> be filed by facsimile transmission. If no answer is filed or if an answer is filed untimely, the Board may find, pursuant to a Motion for Default Judgment, that the allegations in the [consolidated**] complaint are true.**

<u>NOTICE OF HEARING</u>

Franklin v. HTH Corp., No. 1:11-cv-00984 archived on August 29, 2011

PLEASE TAKE NOTICE THAT on [date**], 20__, at [**hour and place**] and on consecutive days thereafter until concluded, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this [**consolidated**] complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.**

Following issuance of the Complaint and Notice of Hearing, any scheduling changes should be set forth in a separate Order Rescheduling Hearing.

If the Regional Office anticipates it will file a Motion for Summary Judgment, the Complaint and Notice of Hearing, should set forth that a hearing, if necessary, will be conducted at a time and date to be determined in the future.

10268.3 Attachments and Related Instructions

Copies of the charge or amended charges should not be attached to the complaint since the facts of filing and of service are recited in the complaint. One copy of Form NLRB-4668 should be attached to each copy of the Complaint and Notice of Hearing served on the parties.

Orders consolidating cases may be separately issued or, with appropriate change of title, may be incorporated into the Complaint and Notice of Hearing.

Accompanying the Complaint and original Notice of Hearing, but not as an attachment thereto, should be Form NLRB-4338, that gives (a) notice that it is still possible to settle the matter by agreement; (b) instructions for requesting postponements (Sec. 10294); and (c) names and addresses of all parties served.

10268.4 Service of Complaint

The Complaint and Notice of Hearing should be served by certified mail, as soon as possible prior to the hearing but, in any case, at least 14 days before the date set for hearing. Secs. 102.15 and 102.113(a), Rules and Regulations.

Before complaint issues, the Regional Office should prepare the Hearing and Service Sheet, Form NLRB-857, which should list the names and addresses of all persons to be served. The Regional Office is responsible for the accuracy of the list which must include the representatives or attorneys of represented parties. Sec. 10058.

The Regional Office should serve the complaint on respondent and all additional parties as set forth in Secs. 10264.3 and 10264.4. In addition, the Regional Office may serve the complaint on any other entity which may have a relationship to the dispute underlying the proceedings (e.g., persons involved in a 8(b)(4)(A) case other than the respondent and the charging party). A copy of the complaint should also be served on the attorney or nonattorney designated representatives of all parties or entities served with the complaint. See Sec. 102.113(a) and (f), Rules and Regulations and Secs. 11842.3(b) and 11842.4(b).

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10269 Postcomplaint Documents and Communications

After complaint issues, the restrictions on and requirements for service of documents and communications, including those related to compliance matters, with a party or person are governed by whether the party or person is represented and whether such representative is an attorney. See Secs. 11842–11844.

Restrictions on and requirements for service of documents and communications with a represented party or person are as follows:

- For attorneys, see Secs. 11842.3 and 11844(a)
- For designated representatives who are not attorneys, see Secs. 11842.4 and 11844(b)

On the other hand, direct service on and communications with an unrepresented party or person is appropriate.

10270 Postcomplaint Action

After issuance of complaint, the trial attorney, with appropriate supervision, will be responsible for:

- Continuation of settlement efforts
- Preparation of the General Counsel's pretrial motions and any opposition to the pretrial motions of other parties
- Preparation of the case for trial
- Trial of the case as the representative of the General Counsel
- Presenting oral argument to the Administrative Law Judge where appropriate
- Preparation and filing of a brief with the Administrative Law Judge where appropriate and
- Filing with the Board exceptions to and/or a brief in support of the Administrative Law Judge's decision, where appropriate

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The trial attorney should be aware of and call to the attention of the Regional Office any circumstances that might have an effect on the case (e.g., the unavailability of witnesses or the discovery of new evidence or of legal theories not previously considered). If new developments warrant, the trial attorney should initiate appropriate Regional Office action, through established office procedures.

10274 Amendments to Complaint

A complaint may be amended at any time prior to issuance of an order by the Board. Sec. 102.17, Rules and Regulations.

10274.1 Prehearing

Prior to the opening of the hearing, the Regional Director may amend the complaint. The new document should constitute an "amendment to" complaint, unless the amendment changes are extensive in scope, in which case an "amended complaint" should set forth all allegations. Where appropriate (e.g., where the opening of the hearing is imminent and no party will be prejudiced thereby), the parties may be served with notice that at the hearing a motion to amend the complaint will be made. The notice should contain details of the contemplated motion. In addition, the Region should promptly advise respondent of the intention to move to amend the complaint at the hearing.

With respect to continuances necessitated by prehearing amendments, see Sec. 10294.

10274.2 At Hearing

During the hearing, a complaint may be amended on motion made to and granted by the Administrative Law Judge. Unlike prehearing amended complaints, which must be in writing and signed by the Regional Director, a motion for an "amendment to" complaint may be written or stated orally on the record. Counsel for the General Counsel may move to admit the amendment to complaint at hearing either orally or in writing. In determining whether to move to amend a complaint at the hearing, one factor to consider is whether a continuance will likely be required. Secs. 10406 and 10406.2.

(a) *Strike Situations:* The nature of a strike has significance for remedial issues. Accordingly, where the Regional Office has determined that a strike was an unfair labor practice strike, counsel for the General Counsel must move to amend the complaint by the inclusion of relevant allegations. The amendment may be either during the hearing or after its close. If the Administrative Law Judge denies the motion, special permission to appeal to the Board should be considered, rather than filing an exception to the ALJ's decision. Sec. 10404.

(b) *Based on Amended Charge:* If an attempt to amend a complaint is based to any extent on an amended charge filed at a hearing, a copy of the amended charge should be served on each party, the original and one copy should be introduced into the record and, if not otherwise docketed, copies forwarded to the Regional Office for docketing.

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10274.3 After Hearing

Prior to issuance of decision by the Administrative Law Judge, any amendment should be submitted to the ALJ, in writing, as part of a motion to amend. After issuance of the ALJ's decision, any motion to amend should be submitted to the Board.

10274.4 Parties Derivatively Liable for Remedy

When events subsequent to the issuance of complaint disclose the existence of an alter ego, successor, individual, trustee in bankruptcy, or other party which should be alleged as derivatively liable for remedying the alleged unfair labor practices, the complaint (and charge where appropriate) should be amended to allege such derivative liability. See Secs. 10054.2(c), 10062, and 10264.3(a) and Compliance Manual, Sec. 10596. Where a sole proprietorship or partnership is involved, the complaint must include in the case caption and in the jurisdictional pleadings the full names of all individuals liable for compliance.

10274.5 Service

As with original complaints, copies of amendments should be served on the parties. Sec. 10268.4. Service at hearings should be personal and should be noted and acknowledged on the record.

10275 Withdrawal/Dismissal of Complaint

10275.1 Prior to Hearing

A complaint may be withdrawn before the hearing by the Regional Director, with or without any party's motion. If, after issuance of complaint, the Regional Office determines that it should not proceed further, the Regional Office should solicit withdrawal of the charge. If a request for withdrawal of the charge is approved, the complaint should be dismissed by an order that includes approval of the withdrawal request and withdrawal of the Notice of Hearing. Sec. 10276. If the charging party will not withdraw its charge, the complaint should be withdrawn by an order that includes a dismissal of the charge and instructions for appealing the action. But see Sec. 10275.2.

If an informal settlement agreement is entered into by all parties, withdrawal of the complaint is incorporated in the agreement. However, in 10(j) and (l) cases, the standard settlement agreement should be altered to reflect that the complaint is withdrawn upon closing in compliance. Sec. 10146.4. Since a *formal* settlement agreement provides for a Board Order, the complaint is neither withdrawn nor dismissed. Secs. 10164–10170.

10275.2 At Hearing, Prior to Introduction of Evidence

After a hearing has opened but before any evidence is introduced, the Regional Director has authority to withdraw part or all of a complaint, including over the objection of the charging party, as long as there is "no contention that a legal issue is ripe for adjudication on the parties' pleadings alone." *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992). The charging party has a right to appeal the dismissal of the underlying charge to the General Counsel.

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10275.3 At Hearing, After Introduction of Evidence, Prior to Transfer to the Board

Once relevant evidence is introduced at a hearing, the Regional Director no longer possesses unreviewable authority under Section 3(d) to withdraw the complaint. At that point, counsel for the General Counsel must move the Administrative Law Judge for permission to withdraw all or part of a complaint. *Sheet Metal Workers Local 28 (American Elgen)*, supra.

The following are some of the circumstances under which a request to withdraw the charge might be made:

- On discovering lack of merit once evidence has been introduced during the hearing, counsel for the General Counsel (after appropriate Regional Office clearance) should make a motion to the Administrative Law Judge to withdraw the complaint. Sec. 10388.3. However, the ALJ may *dismiss* instead of permitting withdrawal.

- If the charging party requests withdrawal of the charge once evidence has been introduced, the request is subject to the consent of the ALJ. Sec.

10276. On approval of the withdrawal, the complaint willl be dismissed by the ALJ. Sec. 102.9, Rules and Regulations.

- After full compliance with the terms of an informal settlement agreement, a motion to withdraw the complaint and to close the hearing should be made.

On the execution of a *formal* settlement agreement at this stage, the complaint is neither withdrawn nor dismissed. Secs. 10164–10170.

10275.4 After Transfer to the Board

If the Regional Office wishes to approve a request for withdrawal of a charge, counsel for the General Counsel must file a motion with the Board. The motion should describe the basis for the withdrawal request and seek to have the case remanded to the Regional Director for approval of the withdrawal. Sec. 10276. The withdrawal request itself need not be forwarded to the Board.

10275.5 Complaint Issued on Headquarters' Authorization

If a complaint was issued on authorization from any division or branch in Headquarters, clearance should be obtained from that division or branch before withdrawal or dismissal of the complaint.

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10276 Postcomplaint Attempts to Withdraw Charge; Dismissal of Complaint

A postcomplaint request by the charging party to withdraw the charge should be closely scrutinized, including the extent to which the act is voluntary. If the request is based on a private settlement, the terms should be examined; if the charging party has "lost interest," the case should be reexamined as to its strength (a) without charging party's testimony or (b) with a reluctant charging party's subpoenaed testimony. The request should be denied if, under all the circumstances, the purposes of the Act appear to require the continuation of formal action.

If the request for withdrawal is approved, the complaint will be dismissed by the Regional Director, the Administrative Law Judge or the Board, depending on the stage of the case at the time such request is filed. Sec. 10275 and Sec. 102.9, Rules and Regulations.

10280 Answer

Within 14 days from the service of the complaint, respondent must file an answer with the Regional Office, signed by respondent's attorney or representative, or by the respondent if unrepresented, specifically admitting, denying, or explaining each of the facts alleged in the complaint, unless respondent states in its answer that it is without knowledge, thereby operating as a denial. Secs. 102.20–102.22, Rules and Regulations.

An answer may be filed either as a paper document, or electronically by using the E-Filing system on the Agency's website at http://www.nlrb.gov. Instructions for E-Filing answers are set forth on the Agency's website as well as in the complaint. See also Sec. 10268.2. If the answer being filed electronically is a pdf document containing the signature required by the Board's Rules and Regulations, no paper copies of the answer need be transmitted to the Regional Office. However, if the electronic version of an answer to a complaint is not a pdf file containing the required signature, then an answer containing the required signature must be filed as a paper document with the Regional Office within 3 business days after the date of electronic filing. See Sec. 10268.2 and OM Memo 09-34.

For service requirements for answers filed by paper, see Secs. 11840 and 11846.5 and by E-Filing, see Secs. 11841 and 11846.4, and OM Memo 09-34.

With respect to answers that lack particulars, see Sec. 10292.2.

10280.1 Allegations Not Denied Deemed Admitted

Pursuant to Section 102.20, Rules and Regulations, complaint allegations shall be deemed to be admitted as true if no answer is filed. Likewise, any allegation not specifically denied or explained in an answer, unless respondent avers in its answer that it is without knowledge, shall be deemed to be admitted as true and shall be so found by the Board, absent good cause to the contrary.

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10280.2 Motion to Strike Improper or Deficient Answer

Where respondent has filed an improper or deficient answer, the Region should provide respondent sufficient notice and an opportunity to appropriately amend the answer. If respondent fails to remedy the deficiency, counsel for the General Counsel should file a motion to strike the answer, in whole or in part.

(a) *Improper or Deficient Answer:* An answer may be improper or deficient, where:

- The answer is not signed.
- The asserted denials in the answer have no legitimate basis and appear to be made solely for purposes of delay.
- Scandalous or indecent matter is included in the answer.

(b) *Notice to Attorney or Representative:* Upon receipt of an improper or deficient answer, the Regional Office should send a letter to the attorney or representative providing an explanation of the improper or deficient nature of the answer. The letter, should also assert that the answer, or a portion of the answer, appears to have been filed without good grounds to support it and for purposes of delay citing Sec. 102.21, Rules and Regulations. The letter should further inform the attorney or representative[1] that

[1] If the respondent files an answer without the assistance of an attorney or other representative, the Board has generally given such a party more latitude in reviewing the sufficiency of the answer because such a pro se party is generally unfamiliar with the Board's Rules and Regulations and procedures. See, e.g., *S&P Electric*, 340 NLRB 326 (2003); and *A.P.S. Production*, 326 NLRB 1296 (1998). In such circumstances,

unless a proper answer is filed within 1 week of the letter counsel for the General Counsel intends to file a motion with the Administrative Law Judge to strike the answer, or a portion of the answer, as sham and false and requesting that the Administrative Law Judge "proceed as though the answer had not been served." See generally OM Memo 05-55.

(c) *Filing of a Motion to Strike* If respondent does not adequately justify or appropriately amend its answer within the time allowed and persists in contesting the matter without good grounds, counsel for the General Counsel should prepare and file with the Administrative Law Judge a motion to strike the answer, or portion thereof, as sham and false. Such motion should request that the action proceed as though the answer, or that portion of the answer, had not been served.

Generally, if such motion is denied by the Administrative Law Judge, counsel for the General Counsel should request special permission of the Board to appeal. Sec. 10404. If the hearing has opened and the ALJ insists on a presentation of the evidence forthwith, counsel for the General Counsel should proceed with the case, simultaneously pressing the appeal to the Board.

If the motion is granted, counsel for the General Counsel should proceed as if only the unstricken portion of the answer has been filed.

(d) *Special Remedy:* In some cases, it may also be appropriate to contact the Division of Advice regarding the possibility of seeking as a special remedy in the underlying unfair labor practice proceeding that respondent be ordered to pay a portion of the General Counsel's attorney's fees incurred as a result of the filing of an answer without good grounds to support it.

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(e) *Referral of Alleged Misconduct:* Immediately after the conclusion of the hearing, the Regional Office should also consider whether it is appropriate to make a referral of alleged misconduct by the attorney or representative with regard to the improper or deficient answer under Sec. 102.177, Rules and Regulations. See Sec. 10058.6.

10280.3 No Answer Filed; Motion for Default Judgment

If an answer has not been filed within the time allowed, counsel for the General Counsel should communicate in writing with respondent's counsel, or with respondent if it is not represented, advising that no answer has been filed in accord with the Rules and Regulations and that if an answer is not filed within a certain period of time (normally not to exceed 1 week from date of written communication), counsel for the General Counsel will file a Motion for Default Judgment with the Board. If an answer is not filed within the applicable deadline, counsel for the General Counsel should file a Motion for Default Judgment with the Board. See *Malik Roofing Corp.*, 338 NLRB 930 (2003).

If, after the filing of a Motion for Default Judgment, an answer is later filed, the Regional Office may successfully continue to seek default judgment, where the answer was untimely with no explanation. See, e.g., *Kenco Electric & Signs*, 325 NLRB 1118

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the Regional Office should provide the pro se party with an explanation of the Board's Rules and Regulations regarding the sufficiency of the answer.

(1998). However, where respondent is proceeding pro se, the Board may be reluctant to grant a Motion for Default Judgment where respondent answers the complaint and responds to the Board's order to show cause. See, e.g., *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296 (1998).

10280.4 Answer to Amended Complaint

The above procedures also apply to an answer to an amended complaint. However, with respect to amendments made at the hearing, the nature of the amendment will determine whether the Administrative Law Judge provides 14 days for answer to the amendment. Sec. 10406.2 and Sec. 102.23, Rules and Regulations.

10281 Consolidation of Compliance Issues with Motions for Default Judgment

When filing a Motion for Default Judgment (i.e., no answer cases like those described in Section 10280.3), Regional Offices should consolidate the compliance aspect of the case with the underlying liability phase of the case as soon as feasible and, in any case, prior to seeking court enforcement, unless there are compelling reasons for not doing so. Thus, where a respondent is either likely to default, or has defaulted, with respect to an unfair labor practice complaint, Regional Offices should, prior to submitting the case for court enforcement, normally adopt one of the following approaches to expedite the casehandling process:

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- Issue a consolidated unfair labor practice complaint and compliance specification at the initiation of proceedings and, following respondent's failure to answer the consolidated complaint and specification, file a motion seeking a summary Board Order covering both the complaint and the compliance specification.
- Following respondent's failure to answer a complaint, issue the compliance specification and, following respondent's failure to answer the specification, file a motion seeking a summary Board Order covering both the complaint and the compliance specification.
- Following entry of an initial summary Board Order, issue the compliance specification, and following respondent's failure to answer the specifications, file a motion seeking a summary supplemental Board Order.

For a more detailed discussion see OM Memo 07-59.

10282 Motion for Summary Judgment in 8(a)(5) Cases

10282.1 Generally

In technical 8(a)(5) cases (i.e., where respondent is testing a Board certification and/or the proceeding on which it is based and there are no factual issues warranting a hearing), a Motion for Summary Judgment should be filed with the Board. Sec. 10025. In general, if there are factual issues involved, a Motion for Summary Judgment is not

appropriate. However, where charging party's allegations include both a technical 8(a)(5) violation and other allegations warranting a hearing, the Regional Director may exercise discretion in appropriate cases to move for summary judgment solely on the technical 8(a)(5) allegations. Under such circumstances, the Regional Office should explicitly reserve the right to litigate the other alleged violations. Such allegations suitable for future litigation include:

- Unilateral changes occurring after the bargaining obligation attaches
- Claims that the 8(a)(5) conduct affects the reinstatement rights of striking employees

See Sec. 10026 generally for a discussion of 8(a)(5) charges and Sec. 10026(b) for avoiding future litigation by entering into a stipulation that is contingent on court enforcement of a Board Order.

10282.2 Regional Procedure

A Motion for Summary Judgment should be filed within 7 days after respondent files its answer in a technical 8(a)(5) case (i.e., respondent is testing the Board certification and/or the proceeding on which it is based).

(a) *Respondent's Answer:* On receipt of respondent's answer to the complaint (or expiration of the time to file an answer), the Regional Director should determine whether to file the motion.

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(b) *Motion to Board:* Applications for summary judgment (eight copies each of the motion and attachments) in appropriate 8(a)(5) cases should be addressed directly to the Board and transmitted to the Office of the Executive Secretary. Motions may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

Since all summary judgment motions must be filed no later than 28 days before the scheduled hearing date (Sec. 102.24, Rules and Regulations), if the Regional Office intends to file such a motion it should either issue a Notice of Hearing without hearing date with the complaint or provide enough time to permit the filing of a timely motion.

In all technical 8(a)(5) cases, if the Regional Office anticipates it will file a Motion for Summary Judgment, the Complaint and Notice of Hearing should set forth that a hearing, if necessary, will be conducted at a time and date to be determined in the future. All copies of the motion to transfer case to and continue proceedings before the Board and for summary judgment must be accompanied by copies of the following documents, if any, in the formal file:

- Original charge and amended charge
- Affidavit of service of charge and amended charge
- Complaint, amended Complaint and Notice of Hearing

- Affidavit of service of complaint, amended Complaint and Notice of hearing

- Respondent's answer and amended answer to complaint

- Letter from counsel for the General Counsel to respondent advising of the consequence of not filing answer. Sec. 10280.3.

In the event that the summary judgment proceeding is an 8(a)(5) case involving test of certification, the record should also include copies of the following documents, if any, in the formal "R" case file:

- The petition

- The Regional Director's decision, consent election agreement, or stipulated election agreement

- Any Request for Review of the Regional Director's Decision and the Board's Order regarding the Request for Review

- Any Board Decision following a grant of the Request for Review

- All postelection matters, including:

  (a) Objections to election or to conduct thereof

  (b) Regional Director's or hearing officer's report and recommendations and proof of service of same

  (c) Exceptions to (b), above, and briefs

  (d) Supplemental decision, direction, or order, or certification by the Regional Director or the Board.

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10283 Other Motions for Summary Judgment

If any party files a timely Motion for Summary Judgment, the Board may deny the motion or issue a Notice to Show Cause why the motion should not be granted.

Once a Notice to Show Cause is issued by the Board, any scheduled hearing will normally be postponed indefinitely. Since Sec. 102.24(b), Rules and Regulations expressly permits any party to file an opposition prior to issuance of the Notice to Show Cause, the Regional Office should file its opposition promptly, even if respondent's motion appears deficient on its face. In any event, all such oppositions must be filed no later than 21 days before the scheduled hearing. It is also advisable for the Regional Office to notify the Office of the Executive Secretary of its intent to file such a motion.

It is not necessary to attach affidavits or other documentary evidence to an opposition or response. A short brief clearly stating the grounds for opposition will normally suffice. Sec. 102.24, Rules and Regulations.

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10284–10288 SUBMISSION OF STIPULATED RECORD TO ADMINISTRATIVE LAW JUDGE OR THE BOARD

10284 Stipulated Records

On occasion, the parties (including counsel for the General Counsel) may agree on the facts of a case in which complaint has issued but not on the applicable law, and may desire to bypass the hearing stage and submit a case by stipulation to an Administrative Law Judge or the Board. Sec. 102.35(a)(9), Rules and Regulations. Resort to such procedure is an option when all parties are in agreement and follow the procedures set forth in the above rule. Typically, in stipulated record cases, the facts are not in dispute and the parties wish expedited consideration of what they perceive to be purely legal issues. Examples of the types of cases which may be amenable to this procedure include cases involving new questions of law or policy and cases whose facts have been litigated in ancillary proceedings.

In addition to complying with the procedures set forth in Sec. 102.35(a)(9), Rules and Regulations, the following guidance should be considered:

- A submission by stipulation may go to the ALJ for decision, thereafter following the procedures of all other cases. Alternatively, it may bypass the ALJ entirely and go directly to the Board.

- The submission must include a complaint and an answer; a Notice of Hearing and any orders rescheduling or adjourning the hearing; a stipulation as to the facts; a statement of the issues presented; a short statement (no more than three pages) from each party of its position on the issues; an agreement as to the contents of the record; and an express waiver of those procedures being bypassed. The Complaint and Notice of Hearing in such a case should provide that a hearing, if necessary, will be conducted at a time and date to be determined in the future and, if Complaint and Notice of Hearing has issued with a hearing date, an Order indefinitely postponing the hearing should issue.

- The facts being stipulated must be sufficiently detailed to form the basis for findings. Since conflicting factual versions cannot be resolved in a stipulation, the facts must be agreed on and should ordinarily be set forth in a narrative form. One party may insist on the inclusion of facts that the other party contends are irrelevant. If it is agreed that they are true, they should be included if either party considers them relevant (for this may be the very legal point that the parties are seeking to resolve). The submitting document should, however, recite that the parties do not necessarily concede the relevance of each fact recited and any party urging irrelevance would do so in its brief. Documents or transcripts of other proceedings that the parties desire to be in the record should be incorporated by

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reference and attached. The agreed upon stipulation should be signed by all parties, or their representatives, as well as counsel for the General Counsel.

- Either the ALJ or the Board, depending on where the stipulation is submitted, will rule on the appropriateness of accepting the stipulation and, if approved, set the time for filing briefs. Sec. 102.35(a)(9), Rules and Regulations.

10286 Submission to Administrative Law Judge

As described in Sec. 10284, a case may be submitted directly to an Administrative Law Judge without a hearing by detailed stipulation of the parties pursuant to Sec. 102.35(a)(9), Rules and Regulations. See sample Joint Motion and Stipulation of Facts in Sec. 10288 which should be modified for submission to an Administrative Law Judge. Three copies of the stipulation should be sent to the Division of Judges and set forth the stipulation of facts, a statement of the issues presented, and each party's statement of position. Such motions may also be filed electronically at the Agency's website under "Division of Judges." See Sec. 11846.4. If the ALJ approves the stipulation, the ALJ will set a time for the filing of briefs. No further briefs shall be filed except by special leave of the ALJ. At the conclusion of the briefing schedule, the ALJ will decide the case or make other disposition of it. Sec. 102.35(a)(9), Rules and Regulations. On issuance of the ALJ's decision, the procedure outlined in Secs. 10430–10444 should be followed.

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10288 Submission to the Board

As described above in Sec. 10284, a case may be submitted directly to the Board by joint motion and stipulation of facts, pursuant to Sec. 102.35(a)(9), Rules and Regulations.

The following may be helpful as suggested language for the opening paragraphs of such motion and stipulation:

JOINT MOTION AND STIPULATION OF FACTS

This is a joint motion by the parties to this case, Respondent, Charging Party and General Counsel, to transfer this case to the Board pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The transfer of the case will effectuate the purposes of the Act and avoid unnecessary costs and delay.

If this motion is granted, the parties agree to the following:

1. The record in this case consists of the Charge, the [Consolidated**] Complaint, the Stipulation of Facts, the Statement of Issues Presented and each party's Statement of Position.**

2. This case is submitted directly to the Board for issuance of findings of fact, conclusions of law and an Order.

3. The parties waive a hearing, findings of fact, conclusions of law and order by an Administrative Law Judge.

4. The Board should set a time for the filing of briefs [and oral argument**].**

As set forth in Sec. 10284 and Sec. 102.35(a)(9), Rules and Regulations, the stipulation should set forth the agreed upon facts, a statement of the issues presented, and a short statement, not to exceed 3 pages, of each party's position in the case. Where there is a dispute as to the relevancy of certain facts that are stipulated to be true, the following may be added to the stipulation:

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> **This stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein.**

Eight copies of the stipulation with all exhibits and attachments should be submitted to the Executive Secretary of the Board. Motions may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

If the Board approves the stipulation, the Board will set a time for the filing of briefs. Answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs shall be filed except by special leave of the Board. At the conclusion of the briefing schedule, the Board will decide the case or make other disposition of it. Sec. 102.35(a)(9), Rules and Regulations. Subsequent action should accord with procedures described in Secs. 10442–10452.

10290–10294 PRETRIAL MOTIONS AND PREHEARING POSTPONEMENTS

10290 Motions

Pretrial requests (or motions) for postponement or extension of time to file answer, to intervene, or to take deposition should be filed with the Regional Director. Sec. 102.24, Rules and Regulations. All other pretrial motions, except Motions for Summary Judgment or Dismissal, are filed with the appropriate Chief or Associate Chief Administrative Law Judge. Motions for Summary Judgment or Dismissal are filed with the Board. Motions and responses thereto should be filed promptly and within such time as not to delay the proceeding.

All pretrial motions filed as a paper document with the Regional Director or an Administrative Law Judge shall include three copies. All pretrial motions filed with the Board as a paper document shall include eight copies For filing and service of paper documents, see Secs. 11840 and 11846.5.

All pretrial motions may also be filed electronically on the Agency's website. For electronic filing and service, see Secs. 11841 and 11846.4.

In all instances, a copy should be served on each of the parties, with proof of service furnished. See generally Secs. 102.24 and 102.47, Rules and Regulations. For service on represented parties of either paper filed or electronically filed documents, see Secs. 10269 and 11842.

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10290.1 Oppositions

Opposition or other answer to a pretrial motion may be filed with the same number of copies and service as above required.

10290.2 Ruled on by Regional Director

The Regional Director may, and normally should, rule on pretrial motions to extend the time in which to file an answer; to intervene in a matter; to take depositions; or to postpone the opening of the hearing under the circumstances set forth in Secs. 10294.2 and .3. Such rulings should be in writing and a copy served on each of the parties.

10290.3 Ruled on by Administrative Law Judge

A designated Administrative Law Judge shall rule on all prehearing motions, except those specified in Sec. 10290.2 and Motions for Summary Judgment or Dismissal. Sec. 102.24, Rules and Regulations. Such ALJ rulings issued prior to the opening of the hearing shall be in writing, with a copy served on each of the parties.

10290.4 Appeal from Ruling

Such rulings by the Regional Director or the Administrative Law Judge may be appealed directly to the Board only on special permission of the Board, but, if exceptions are taken to a subsequent Order, they will be considered by the Board in reviewing the record. Sec. 10404.

10290.5 Motions and Rulings Thereon Part of Record

Pretrial motions and rulings thereon will be introduced into the record as part of General Counsel's Exhibit 1, *except* for motions to revoke subpoenas and rulings thereon, which become part of the record only on request of the aggrieved party.

10292 Types of Pretrial Motions

10292.1 Bill of Particulars Addressed to Complaint

If a Motion for a Bill of Particulars (seeking specificity regarding the complaint allegations) is filed and if the complaint contains insufficient detail, the Regional Office should furnish the particulars. Sec. 10264.2. If, however, the complaint is sufficiently detailed, the motion should be opposed. In the event of an adverse ruling, the Regional Office should promptly furnish the particulars.

10292.2 Bill of Particulars Addressed to Answer

A Motion for a Bill of Particulars addressed to the answer is rare; however, where an affirmatively pleaded defense lacks sufficient details, counsel for the General Counsel should make such a motion.

10292.3 Where Answer Improper or Deficient or No Answer Filed

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Where an answer is improper or deficient or where no answer has been filed, the Regional Office should attempt to resolve the problem. If unsuccessful, a motion to strike or a Motion for Default Judgment, as appropriate, may be filed. See Secs. 10280.2 and .3. In evaluating whether to file such a motion, the Regional Office should not rely on hypertechnicalities and should balance the probability of success against the possibility of undue delay.

For a discussion of answers and related motions see generally Sec. 10280.

10292.4 Pretrial Discovery Devices

The Federal Rules of Civil Procedure providing for compulsory pretrial discovery have been held not applicable to Board proceedings. *NLRB v. Valley Mold Co.*, 530 F.2d 693 (6th Cir. 1976); *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994). Any attempt to use such discovery should be resisted. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

10294 Prehearing Postponements

10294.1 General Policy

Cases set for hearing should be heard on the day set and postponements should be granted only for good cause shown.

Form NLRB-4338, with instructions for requesting postponements and with the names and addresses of the parties appearing thereon, should accompany each notice of hearing.

10294.2 Request

Postponement of the opening date of a hearing is initiated by request (or motion) for postponement by the party seeking it. Such a request should be filed with the Regional Director under the following circumstances:

- Where all parties agree or no party objects
- Where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation
- Where settlement negotiations are in progress
- Where issues related to the complaint are pending before Advice or Appeals
- Where more than 21 days remain before the scheduled date of hearing. Sec. 102.16, Rules and Regulations.

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In all other circumstances, such motions should be filed with the Division of Judges as set forth in Sec. 102.24, Rules and Regulations.

The motion/request should be filed as promptly as practicable and in writing; three copies should be served on the Regional Director or the Division of Judges, as appropriate, with copies served simultaneously on each of the other parties. The request should contain *detailed* cause (i.e., not merely "prior commitments") and should contain suggested date(s) for resetting. The requesting party must ascertain in advance and set forth in the request the positions of all other parties to the proceedings. Where appropriate, the parties may make a joint request.

10294.3 Ruling on Request

Absent extraordinary circumstances, the Regional Director or Division of Judges should rule on the request only after opposing parties have the opportunity of making known their positions.

If the Regional Director grants the request, a new hearing date should be obtained from the Division of Judges. Sec. 10256.1. The Regional Director should then issue an Order, serving a copy on each party.

10294.4 Followup Action

Postponements normally are to a day certain, but may, if demanded by circumstances, be indefinite (sine die), e.g., in the event of a settlement. Further action

with respect to such postponements may include rescheduling by means of formal order or cancellation of the hearing.

10294.5 Request and Ruling Included in Record

Postponement requests, statements of opposition, and rulings thereon should be introduced into the record at the hearing. Sec. 10384.

10294.6 Postponement of Hearings in Emergency Situations

The Regional Director or the Division of Judges, as appropriate, may postpone hearings at the last minute due to unforeseen circumstances. In such circumstances, the Division of Judges should receive prompt notification to avoid unnecessary travel by the Administrative Law Judge assigned to the case.

10310–10320 INJUNCTIVE RELIEF UNDER SECTIONS 10(j) AND 10(e)

The following sections concern guidelines for considering 10(j) relief and for processing cases in which the 10(j) relief sought involves the substantive issues raised in a charge.

(For discussion of injunctive relief under Section 10(j) and (e) regarding respondent's sale or transference of assets, which may prejudice collection under a Board or court Order, see Compliance Manual, Sec. 10674. For 10(l) priority—CC, CD, CE, and CP—cases, see Secs. 10238–10248.)

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10310 Consideration of 10(j) Injunctive Relief

Section 10(j) of the Act authorizes the Board, in its discretion, to petition a district court for temporary relief or a restraining order, pending the Board's adjudication of an unfair labor practice complaint. The Regional Office, based on either the Director's sua sponte determination or a request from the charging party, initially considers whether 10(j) relief is warranted. In contrast to 10(l) injunctive relief, where by statute interim relief must be sought whenever certain unfair labor practices have occurred and are likely to continue, the Board decides on a case-by-case basis whether to authorize the Regional Office to seek 10(j) relief.

10310.1 Notification to Parties

Whenever the issues in a charge reveal that interim relief may be warranted, the Regional Office should notify all parties that it will examine possible 10(j) relief as part of the investigation of the charge and should invite the parties to submit evidence and argument relevant to the 10(j) consideration. Such notice should be given as soon as feasible in the investigation. Early notice allows the Region to combine the merits and 10(j) aspects of its investigation and thus complete its investigation more expeditiously; it may result in the parties' prompt cooperation in the investigation and also provides them

an opportunity to argue to the Regional Office and the General Counsel whether 10(j) injunctive relief is appropriate.

10310.2 Guidelines for the Utilization of Section 10(j)

Section 10(j) is an interim remedy used to preserve or restore the status quo during the time an unfair labor practice case is pending before the Board. Section 10(j) itself authorizes district courts to grant interim relief that is "just and proper." In general, a Regional Office's inquiry into whether 10(j) relief would be appropriate should include consideration of two elements: whether there is a sufficient showing that an unfair labor practice has occurred and whether the effects of that unfair labor practice threaten to make the Board's ultimate remedial order a nullity unless interim relief is obtained. The Regional Office should be guided in its evaluation of potential 10(j) cases by the periodically updated "Section 10(j) Manual," including its discussion of the specific standards of the circuit in which the case arises. This Manual details the types of situations that typically give rise to a need for 10(j) relief, the types of evidence that would support or negate a finding that such unfair labor practices threaten remedial failure and the case law regarding the propriety of 10(j) relief in such situations.

10310.3 Submission to the Injunction Litigation Branch

(a) *10(j) Deemed Appropriate:* When a Regional Director determines that a charge has merit and that 10(j) authorization should be sought, the Regional Office should, within 14 days of the merit determination, submit a memorandum so recommending to the Injunction Litigation Branch, together with a copy of the complaint and any 10(j) position statements submitted by the parties. (For nip-in-the-bud discharge cases, see (b) below.) If the complaint has not issued by the time the Region's 10(j) recommendation is prepared, the Region should not delay submission of its 10(j) recommendation. The complaint should be forwarded to the Injunction Litigation Branch immediately upon issuance. The Regional Office's memorandum should:

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- Indicate in the first paragraph whether the recommendation is made sua sponte or based on a charging party request
- Detail the facts and legal theories regarding the violations alleged, including responses to defenses raised by the respondent
- Discuss the impact of the violations on protected activities and the reasons injunctive relief is needed
- Include the proposed order the Regional Office would seek from the district court and
- List counsel representing the parties and include address, phone and fax information

For further information regarding the format of the memorandum, Board agents should consult the Section 10(j) Manual and other directives from the Injunction Litigation Branch. If the General Counsel concludes that 10(j) relief is appropriate, the Regional Office's memorandum, together with any supplemental memorandum of the General Counsel, will be transmitted to the Board for its consideration. The Injunction Litigation Branch will forward to the Regional Office a copy of the General Counsel's memorandum when it is transmitted to the Board.

(b) *10(j) Deemed Appropriate in Nip-in-the-Bud Discharge Cases:* In order to streamline the processing of meritorious nip-in-the-bud discharge cases, the Regional Office should, absent unusual circumstances, submit a short form memorandum to the Injunction Litigation Branch within 7 calendar days of the regional determination or close of an expedited hearing before an administrative law judge. See Sec. 10310.4(b). Such submission should also contain the parties' position statements, if any, and party representative information. See GC Memo 10-07.

(c) *Litigation Hold:* When a Regional Office determines to recommend that 10(j) injunctive relief is appropriate, a litigation hold must be instituted immediately to preserve documents, including electronically stored information, which may be related to pending or reasonably foreseeable litigation. See Sec. 11863 and in particular GC Memo 07-09 and OM Memo 10-48.

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(d) *When Merit Determination is Submitted to Division of Advice:* If a case which the Regional Office believes warrants 10(j) relief is also being submitted for advice on the merits of the charge, the Regional Office generally should include its 10(j) recommendation together with its request for advice on the merits. In some cases, it may be necessary to wait for the analysis of the Division of Advice, Regional Advice Branch on the merits before preparing a memorandum regarding the propriety of 10(j) relief. The Regional Office may wish to consult with the Regional Advice Branch or the Injunction Litigation Branch to determine the appropriate course of action in a particular case.

(e) *Special Circumstances Requiring Submission:* Regional Offices must submit a written recommendation, as described above in subsection (a), whether for or against 10(j) authorization, in all cases in which it seeks a remedial *Gissel* bargaining order. See GC Memo 99-10.

(f) *10(j) Relief Not Warranted:* Generally, if the Regional Office determines that a case does not warrant 10(j) relief, it need not submit the case to the Injunction Litigation Branch. A Region may always informally consult with the Injunction Litigation Branch regarding the propriety of 10(j) relief in a particular case.

10310.4 Settlement Efforts and Issuance of Complaint and Hearing Date Pending 10(j) Determination

The Regional Office should begin settlement efforts immediately after it has determined that the charge is meritorious and should issue complaint if such settlement efforts fail, even while the 10(j) issue is pending.

(a) *Complaint Hearing Date in 10(j) Cases:* In any case in which a Regional Office finds merit and concludes 10(j) relief is warranted, the Region should proceed to hearing before an ALJ not later than 8 weeks from the issuance of complaint. Regions should generally oppose any requests to postpone the hearing. However, Regional Directors retain discretion to grant, where appropriate, short postponements based on substantial reasons. In the rare occasion when a Regional Office believes there are compelling circumstances which warrant setting a hearing in excess of 8 weeks, clearance should be sought from the appropriate Assistant General Counsel or Deputy AGC in the Division of Operations-Management. In all cases requiring 10(j) relief, Regions should immediately prepare and submit a memorandum to the Injunction Litigation Branch seeking 10(j) authorization. See OM Memo 06-60 for a detailed discussion regarding ALJ hearings in 10(j) cases. See also GC Memo 10-07.

(b) *Expedited Administrative Law Judge Hearings:* In cases requiring consideration of the evidence at an administrative law judge hearing before determining whether to seek 10(j) injunctive relief, a Regional Office should schedule an expedited administrative law judge hearing not later than 28 days from complaint issuance. Examples of where an expedited hearing may be appropriate include nip-in-the-bud discharge cases, consideration of a substantial defense to alleged discriminatory action under *Wright Line*, an economic defense to a restoration remedy, or where there are serious issues regarding witness credibility. Immediately upon the closing of the hearing, or earlier where appropriate, a Regional Office should evaluate whether to seek 10(j) relief. An exception to such an immediate evaluation may arise in cases where the strength of a defense depends solely on critical determinations to be made by the administrative law judge. See OM Memo 06-60 for a detailed discussion regarding administrative law judge hearings in 10(j) cases. See also GC Memo 10-07.

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10310.5 Preparation of Court Papers and Expeditious Filing

Upon notice that the Regional Office's recommendation has been submitted to the Board, the Regional Office should finalize its 10(j) petition and supporting memorandum of law. If the Board authorizes 10(j) proceedings, the Injunction Litigation Branch will notify the Region. Absent settlement, the Regional Office should file the 10(j) petition with the district court within 48 hours of notification from the Injunction Litigation Branch. If the Regional Director believes a delay in filing would be productive, (e.g., a settlement is imminent and the filing of the petition may upset the prospective settlement), the Regional Office should seek telephone authorization from the Injunction Litigation Branch to file the petition outside the 48-hour deadline.

NOTE: In addition, the Regional Office should ensure that all court filings comply with the new Federal rules regarding protecting personal identification information in court filings. See GC Memo 09-02.

10310.6 Preparation for Oral Argument Before Court

To enhance the quality of oral argument before the U.S. District Court, Regional Offices should contact the Injunction Litigation Branch to arrange a moot court session prior to the hearing on the 10(j) petition. See OM Memo 08-12.

10310.7 Court Action; Expeditious Processing

The Regional Office should request from the district court expedited consideration of its 10(j) petition. If the district court issues an order to show cause returnable at an unduly late date and the circumstances demonstrate a need for more immediate relief, the Regional Office may wish to consider seeking a temporary restraining order. In such situations or in other circumstances indicating that the district court will not expeditiously hear and decide the 10(j) petition, the Regional Office should follow the procedures set out in the 10(j) Manual and consult with the Injunction Litigation Branch.

In all cases where 10(j) injunctive relief is sought or obtained, General Counsel policy requires that the underlying unfair labor practice case be expedited. See also Sec. 102.94(a), Rules and Regulations. To that end, the Regional Office should:

- Schedule the hearing for a date as early as possible (Sec. 10310.4)
- Notify the Administrative Law Judge that 10(j) relief has been sought or obtained and, on the record, request that the matter be expedited
- Oppose any unwarranted attempt by any party to delay the proceeding
- In any brief filed with the Board, note that 10(j) relief has been sought or obtained and request that the matter be expedited
- When the case is transferred to the Board, notify the Executive Secretary of the status of the 10(j)

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10310.8 Post 10(j) Informal Settlements

When a 10(j) injunction has been obtained prior to the settlement of a case, the standard provision for withdrawal of the complaint on execution of the settlement should be altered through an addendum to the settlement agreement form to provide for withdrawal of complaint upon closing of the matter in compliance. Sec. 10146.4.

10312 Appeals and Contempt of 10(j) District Court Orders

The Injunction Litigation Branch handles all appeals from district court orders in 10(j) cases. Accordingly, whenever the requested relief is denied in whole or in part, the Regional Office should immediately notify the Injunction Litigation Branch. As soon as possible, the Regional Office should forward to the Injunction Litigation Branch copies of the court's decision or order, the Regional Office's petition, supporting memoranda and exhibits and the respondent's Answer or Opposition and supporting papers, together with the Regional Office's written recommendation on whether an appeal should be taken.

If respondent notifies the Regional Office that it intends to appeal from the grant of an injunction or serves the Regional Office with a notice of appeal, the Regional Office should immediately notify the Injunction Litigation Branch and forward a copy of the notice of appeal.

Whenever it is claimed that an injunction is being violated, the Regional Office should notify respondent of the claim and conduct an investigation. If upon conclusion of the investigation, the Regional Office determines that respondent, by clear and convincing evidence, has engaged in contumacious conduct, the Regional Office should submit to the Injunction Litigation Branch a recommendation on whether to institute contempt proceedings.

10314 Effect of Board's Decision and Order on 10(j) Proceeding

In cases where the Regional Office has obtained a 10(j) Injunction or has such a request pending in a district court, if the Board issues a Decision and Order in the corresponding unfair labor practice proceeding, such Board Decision and Order renders moot the injunctive relief sought. See *Sears, Roebuck & Co. v. Carpet Layers Local 419*, 397 U.S. 655 (1970); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975). Since the Board's Decision and Order supplants the necessity for injunctive relief under 10(j) of the Act, the Regional Office, after consultation with the Injunction Litigation Branch, should inform the district court, in writing, of the issuance of the Board decision and its impact on the 10(j) decree.

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10320 Injunctive Relief Under Section 10(e)

Section 10(e) of the Act provides that while a petition for enforcement is pending, the court "shall have power to grant such temporary relief or restraining order as it deems just and proper." See *Auto Workers v. NLRB*, 449 F.2d 1046, 1050 (D.C. Cir. 1971). When a 10(j) injunction expires as the result of the issuance of a Board Order, absent immediate compliance with such order, the Regional Office should promptly recommend to the Division of Enforcement Litigation that enforcement proceedings commence and that Enforcement seek a new injunction under Section 10(e), unless changed circumstances render such action unnecessary or appropriate. In addition, the Regional Office should consider the appropriateness of seeking 10(e) injunctive relief with respect to any case pending or to be filed in a circuit court, even if 10(j) was not earlier sought or had been denied.

If such relief is necessary to effectuate the purposes and policies of the Act, the Regional Director's memorandum to Enforcement should discuss the Board's Decision and Order and set forth the reasons that interim injunctive relief is just and proper. Based on the Regional Office memorandum and the evidence submitted in support, Enforcement will determine if such injunctive relief under 10(e) should be sought.

NOTE: When a Regional Office determines to recommend that 10(e) injunction proceedings in circuit court are appropriate, a litigation hold must be instituted immediately to preserve documents, including electronically stored information, which

may be related to pending or reasonably foreseeable litigation. See Sec. 11863 and in particular GC Memo 07-09 and OM Memo 10-48.

10330–10352 TRIAL PREPARATION

10330 General Preparation

Appropriate preparation, which should ordinarily begin no later than one month prior to the trial, is critical to successful prosecution of a case. Accordingly, the period immediately preceding the hearing should be devoted to analyzing the pleadings, reviewing the evidence uncovered during the predecisional investigation, conducting further investigation of evidence relevant to the complaint, preparing the witnesses, and discussing trial strategy with supervision.

10331 Guidance for High Quality Litigation

In order to consistently maintain the highest quality and success in litigation of cases, Regional Offices and Board agents should routinely consult this manual, the Rules and Regulations, Board and court decisions, the Pleadings Manual, the Division of Judges Bench Book, and OM and GC memoranda. In particular, the Agency's quality committee periodically reviews field office performance in the various facets of litigation throughout the country and issues memoranda recommending practices for ensuring the highest quality litigation, starting with accurate and precise complaint drafting and continuing through trial preparation, presentation and briefing. See OM Memos 06-16, 06-91, 07-84, and 08-76, and subsequent memoranda. Regional Offices and Board agents should be guided by these recommendations in conjunction with their own experience and should follow the practices set forth in the memoranda.

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10332 Analysis of Pleadings

The trial attorney must carefully analyze the complaint(s) and answer(s) to determine what is admitted and what must be proved at hearing. Additionally, such review will enable the trial attorney to organize pretrial preparation and plan the introduction of evidence and arguments to be made at hearing.

10334 Pretrial Preparation and Investigation

The trial attorney has an initial obligation to become familiar with the contents of all evidence in the investigative file. Moreover, the trial attorney should also seek any additional evidence bearing upon the allegations of the complaint. When such evidence arguably supports further complaint allegations, the trial attorney should bring such evidence to the Regional Office's attention. Likewise, when such evidence arguably

undermines any complaint allegations, the trial attorney should bring such evidence to the Regional Office's attention.

In particular, in order to maintain the highest possible quality in litigation (see Sec. 10331 and OM Memos 06-16, 06-91, 07-84, and 08-76), the trial attorney in consultation with the Regional Office should focus on:

- Continuous review of a case for changes in the facts and the law
- Emerging legal issues or high profile cases likely to receive press attention which may require consultation with the Division of Advice
- Obtaining and presenting corroborative testimony or evidence

10334.1 Examination of Documents

The trial attorney should review all documents which could be introduced at trial and give consideration to the most effective manner in which the documents can assist in examining witnesses.

10334.2 Interview of Witnesses

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The trial attorney should interview each prospective witness intensively and as frequently as is necessary in order to properly prepare for trial. Such interview should avoid leading questions, should address all matters that might likely be covered by cross-examination and should thoroughly prepare the witness for credibility challenges. See OM Memo 06-16. For general principles regarding interviews of witnesses, see Secs. 10054.2 and .3; regarding credibility, see Sec. 10064.

When a witness suffers a loss of memory on an important matter, that phase of the testimony should be reviewed until the Regional Office is satisfied with the reliability of the witness' memory. Any details that will help to refresh such memory should be noted. If difficulty is experienced in directing the witness' attention to a new subject, the attorney should set forth in the trial brief the actual question, in a form that will succeed in so directing the witness' attention.

The necessity for re-interviews will be determined by the nature of the case and the ability of the witness. Repeated interviewing creates a possibility of reducing the witness' testimony to an apparently rehearsed story; such risk must be weighed against the advantages of fixing details and of obtaining additional information. Late filed pleadings are one circumstance which may militate in favor of re-interviews.

Preparing non-English-speaking witnesses often requires additional time. The trial attorney should also be sensitive to any special problems that need to be addressed during the interview.

The trial attorney should advise the Regional Office whenever significant evidence is adduced or where critical matters that affect credibility of a witness are discovered.

10334.3 Taking Affidavits from Witnesses

The trial attorney should consult with the Regional Office to determine whether to take an affidavit from a prospective witness who did not give a prior affidavit or from a witness who is providing additional testimony not included in a prior affidavit. The decision will depend upon various circumstances, including:

- Whether the witness' testimony relates to a new issue not currently in the complaint or merely corroborates an existing allegation.
- The relative significance of the testimony in relationship to the overall case.
- An evaluation of the likely reliability and cooperation of the witness at trial.

10334.4 Instructions to Witnesses

The trial attorney should instruct all witnesses that the truth is expected at all times, regardless of who may be helped or harmed. Specifically, the trial attorney should inform the witness that the obligation to answer truthfully extends to all matters, including any conversations with the trial attorney. The goal of pretrial witness interviews is to prepare the witness to testify truthfully and completely.

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In addition, the trial attorney should instruct witnesses that, at the hearing, the witness should consider each question before answering it; should ask for a rephrasing if the question is not understood; should remain calm in the face of possible argumentative or hostile cross-examination and should answer no question to which an attorney objects unless and until the Administrative Law Judge overrules the objection. Finally, the trial attorney should routinely review with each witness the standard witness instructions during pretrial preparation. See OM Memo 06-91.

10334.5 Charged Party's Ability to Comply with Remedy

At all postcomplaint stages, the trial attorney should assess respondent's current and, when possible, future ability to comply with the remedy sought by the Agency. The trial attorney should be alert to evidence from the charging party, the witnesses and respondent as appropriate. Any indication that respondent has rendered or will render itself unable to comply should be fully investigated and appropriate action taken. Consideration should again be given to the appropriateness of 10(j) protective relief (Compliance Manual, Sec. 10594.2) or amendment of the complaint to allege parties, such as an alter ego, successor, individual, trustee in bankruptcy, or other party, as derivatively liable for remedying the alleged unfair labor practices. Secs. 10054.2(c), 10264.3, 10274 and Compliance Manual, Secs. 10505.4 and 10596. The trial attorney should continue to monitor respondent's ability to comply until the case is transferred to the Compliance Officer. Sec. 10407.5.

In addition, the charging party and witnesses whose potential remedial rights may be affected should be advised to notify the trial attorney immediately of any significant change in respondent's operation, identity or financial condition, so that an assessment of ability to comply or derivative liability can be made.

10335 Interpreters for Hearing

When interpreters are required for hearing, the Regional Office should consult OM Memo 06-49 and the attached guidelines for the best practices to follow in order to:

- Seek the services of qualified interpreters
- Educate interpreters about our procedures
- Advise interpreters of their responsibilities in a formal hearing, particularly the need to avoid even the appearance of partiality and to ensure proper translation.

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10336 Trial Brief

A trial brief is necessary for proper preparation. It provides a guide and checklist to the attorney in the preparation and trial of the case and for developing opening and closing statements.

The trial attorney should begin preparation of the trial brief immediately after trial assignment is made. A trial brief is never completed, since insertions will be made even during the hearing. The trial attorney should provide a copy of the trial brief to the Regional Attorney or designee sufficiently in advance of trial to permit meaningful review.

The test of any good trial brief lies in the ability of a new attorney to take over the case and, through the trial brief, try it with a minimum of overlapping preparation. Although the contents will vary with each case, it should at least contain the following elements:

- List of formal exhibits with exhibit numbers, descriptions of exhibits to be offered and space for noting all exhibits actually offered
- Issues and outline of theory
- Abstract of pleadings to include allegations made, elements to be proved, admissions, denials and affirmative defenses

- Preliminary motions to be made, with brief statement in support thereof
- Stipulations that have been procured, are expected or should be sought
- Documents and materials expected to be offered and sought to be produced by other parties
- Order of witnesses, together with a brief statement of their expected testimony, key questions, exhibits to be introduced during their testimony and copies of their affidavits
- Order of introduction of exhibits, showing the witnesses through whom exhibits will be introduced
- Preparation for examination under Rule 611(c), Federal Rules of Evidence, or cross-examination of prospective respondent witnesses, including an outline or narrative summary for such witnesses, prior statements or affidavits, pertinent memos, letters and impeachment material
- Points on which each witness' testimony is corroborated by other witnesses and the names of such witnesses
- Legal authorities applicable to anticipated trial problems, including the admission or rejection of certain evidence
- Rebuttal witnesses with their prospective testimony
- Closing motions
- Closing argument outline

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10338 Preparation of Exhibits

Documents or records expected to be introduced in evidence should be reproduced in advance, so that sufficient copies are available for introduction into evidence and for the Administrative Law Judge and all other parties. Where only a part of a document or record will be offered and is reproduced, the whole should be kept available for inspection. No informal markings should be inserted on documents or records that are to be introduced.

10340 Service of Trial Subpoenas

Subpoenas should, where circumstances allow, normally be served at least 2 weeks prior to trial. This allows sufficient time to arrange for production of the witness or documents and for ruling on a petition to revoke prior to trial. Secs. 11778 and 11782.4. Any subpoena should be served on the party, with a copy sent to the attorney or other representative of the party or witness by mail or facsimile, depending upon the circumstances.

10350 Prehearing Conferences with Parties

Counsel for the General Counsel should, where appropriate, schedule a prehearing conference with respondent's counsel to further explore settlement and factual stipulations. Secs. 10124, 10126.3, and 10128. In each case, careful consideration should be given before evidence beyond that in the complaint is revealed to respondent in order to reach a factual stipulation. Any such stipulation should be reduced to writing and signed as soon as possible. When a settlement is reached prior to hearing, the Division of Judges should be immediately notified so that the matter can be removed from its hearing calendar.

10351 Settlement Judge

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If settlement efforts have not been fruitful subsequent to issuance of complaint, the Regional Office should consider whether a settlement judge would be beneficial. Sec. 10154.2. Sec. 102.35(b), Rules and Regulations, provides for the assignment of an Administrative Law Judge (herein a settlement judge), other than the trial judge, to conduct conferences and settlement negotiations, if all parties agree to the use of the procedure. The initiative for the settlement judge may come from any party, the judge assigned to hear the case or from the Division of Judges. Discussions between the parties and the settlement judge are confidential and not admissible in the Board proceeding, except by stipulation of the parties. Further, the settlement judge cannot discuss any aspect of the case with the trial judge and any documents disclosed in the settlement process may not be used in litigation, unless voluntarily produced or obtained pursuant to subpoena. This procedure does not affect the role of the trial judge in terms of pursuing settlement, resolving subpoena issues or working out stipulations. Sec. 10381. The settlement judge does not open the record.

Where feasible, the settlement judge may require that the parties or their representatives attend the settlement conference in person, since such a meeting provides the best opportunity to engage in a fruitful discussion. In addition, the alleged discriminatees should be encouraged to attend the conference. When only the representative of a party is present, the party, or an agent with full authority to settle, should be available by telephone. When personal attendance at a meeting is not feasible, the discussion could be conducted by conference call.

The Regional Office representative should be familiar with the facts and legal theory, as well as the settlement position of the charging party and the Regional Director.

When discussing the facts, the Regional Office's representative needs to be prepared to discuss the nature of the evidence on specific violations, but should not reveal the names of possible witnesses. Sec. 10128 and especially 10128.3. Any settlement agreed upon is still subject to the approval of the Regional Director. If the Regional Director approves a unilateral settlement, the normal appeal procedure is available to an objecting party.

10352 Depositions in Lieu of Trial Testimony

10352.1 Depositions; General

The Federal Rules of Civil Procedure providing for various types of compulsory pretrial discovery are not applicable to Board proceedings. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236–237 fn. 16 (1978). Therefore, depositions may not be used merely for purposes of pretrial discovery. They may be taken only for good cause shown after issuance of complaint. See Sec. 102.30, Rules and Regulations, for the general requirements and procedures to be followed.

10352.2 "Good Cause"

"Good cause" may arise from a variety of circumstances. It relates generally, however, to situations where the witness will not be available to testify at the hearing. The lack of availability may be due to serious illness of the witness or other extraordinary circumstances.

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However, where it is anticipated that the testimony of the witness may conflict with other evidence or testimony, the use of depositions should be discouraged. A better alternative would be, where practicable, to request an adjournment of a portion of the hearing to a time and place at which the witness can testify.

10352.3 Application for Deposition

Sec. 102.30(a), Rules and Regulations, provides any party may make application for deposition to the Regional Director before hearing or, if the hearing has opened, to the Administrative Law Judge. An order granting the application will be served on the parties if, in the discretion of the Regional Director or Administrative Law Judge, good cause has been shown.

10352.4 Order and Notice of Deposition

The order and notice of deposition should set forth the name of the witness whose deposition is to be taken, the date, hour, and place of deposition, and the "officer" before whom the "witness" will testify. Normally the "officer" will be counsel for the General Counsel, who will fully participate in the deposition. All parties should be served with the order.

10352.5 Taking of Deposition

Sec. 102.30(b), Rules and Regulations, provides that the deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of

the place of deposition, including any Board agent authorized to administer oaths. Sec. 102.30(c) provides that at the time and place specified, the officer should permit the witness to be examined and cross-examined under oath.

Sec. 102.30(c), Rules and Regulations, provides that all objections to questions or evidence shall be deemed waived unless made during the examination. The officer shall not have the power to rule on any objections, but shall note them on the record.

10352.6 Reporter and Transcript of Testimony

The party seeking the deposition must arrange and pay for the reporter. An original and two copies of the transcript of the testimony should be delivered to the Regional Director for prehearing depositions, or to the Administrative Law Judge during and subsequent to hearing. The transcript must be signed by the witness, unless counsel by stipulation waive such signature.

10352.7 Introduction into Evidence

When a party wishes to introduce a deposition into evidence, the transcript should be marked for identification and offered into evidence as an exhibit. If counsel for the General Counsel wishes to object to the introduction of all or a portion of the transcript, the attorney should present the objections with supporting legal argument. The Administrative Law Judge will rule on the admissibility of the deposition or any part thereof. Errors or irregularities in the transcript will be deemed to be waived, in the absence of a prompt motion to suppress part or all of a deposition.

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10380–10409 THE HEARING

10380 Role and Conduct of Trial Attorney

The trial attorney is an advocate who prosecutes the case as set forth in the complaint on behalf of the General Counsel. The trial attorney represents the public's interests by presenting evidence and arguments in support of the complaint with honesty and integrity. In order to maximize the potential for success, the trial attorney should be guided by the recommendations and suggested practices set forth in the memoranda of the quality committee in conjunction with the Regional Office's and trial attorney's own experience. See OM Memos 06-16, 06-91, and 07-84.

10380.1 Conduct Toward the Administrative Law Judge

The trial attorney should address the Administrative Law Judge using terms of respect, such as "the Court" and "Your Honor." The attorney must be sensitive to the role of the ALJ as an impartial decisionmaker and avoid any appearance of a special relationship with the ALJ or engage in other conduct that would suggest bias or prejudice by the judge in favor of the General Counsel's case. The trial attorney should be an example to the other parties by showing respect for the ALJ's procedural rulings, starting times and role in conducting the hearing. However, the trial attorney must exercise independent judgment in vigorously presenting and advocating the General Counsel's case as set forth in the complaint. As counsel for the General Counsel, the trial attorney must protect the record and, where appropriate, raise objections, take a special appeal to the Board or submit offers of proof.

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10380.2 Conduct Toward the Parties

The trial attorney is an officer of the court and a public servant whose dealings with others, including all parties, should be courteous and marked by integrity and common sense. The trial attorney should maintain a professional relationship with the charging party, respondent, their counsel and any representatives, and maintain an appropriate independence from the interests of any party.

10380.3 Responsibility for Prosecution of the Case

As counsel for the General Counsel the trial attorney represents the public's interests by prosecuting the complaint on behalf of the General Counsel, under the direction of Regional Office management and supervision. Although the interests of the charging party will, in most instances, be in harmony with such prosecution, counsel for the General Counsel does not represent the charging party. During preparation and the course of the hearing, the charging party or its counsel may make suggestions or give advice about the prosecution of the case. The trial attorney must be cautious in determining which suggestions to adopt or resist and be courteous but firm in maintaining control of the presentation of the case. The charging party, on its own behalf upon entering an appearance, is entitled to examine witnesses and introduce additional evidence, as well as to argue for additional remedies. However, the trial attorney should

oppose anything that will jeopardize the prosecution of the complaint or that is unnecessarily cumulative. This opposition should be pursued either informally, in consultation with the charging party, or, when necessary, by objection on the record.

10380.4 Record

Counsel for the General Counsel is responsible for proving the complaint allegations by making a persuasive record. The trial attorney should seek factual stipulations, where appropriate, and introduce relevant evidence and arguments in an efficient manner. Such techniques conserve resources and make a record that will best assist the Administrative Law Judge in reaching a sound decision.

10381 Pretrial Conferences at Hearing with Administrative Law Judge

Parties are notified of the opportunity for a pretrial conference by Form NLRB-4668, Statement of Standard Procedure in Formal Hearing Held Before the National Labor Relations Board in Unfair Labor Practice Cases, which is sent to all parties with the Complaint and Notice of Hearing.

The Administrative Law Judge may conduct, at the request of the parties or on the judge's own initiative, a pretrial conference prior to or shortly after the hearing's opening. The conference provides the opportunity to further explore settlement, work out stipulations and joint exhibits and clarify pleadings and theories set forth in the complaint and answer. Sec. 10154.3. The formal hearing will commence or be resumed immediately on completion of the conference. No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any pretrial conference.

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This opportunity for conference conducted by the ALJ on the hearing date does not preclude earlier meetings to narrow the issues or effect settlement. Secs. 10126.3, 10128.5, 10350, and 10351.

When a pretrial conference is requested by another party or the ALJ, the Regional Office should normally agree to participate and take the initiative by seeking the agreement of all parties to the conference.

10382 Opening of Hearing

The hearing will open at the place, date and hour scheduled. The record should reflect any deviation from the schedule, the reasons that they occurred and the positions of the parties.

10384 Formal Papers

The formal papers include the following:

- Each original and amended charge
- All complaints and notices of hearing, along with Form NLRB-4668 "Statement of Standard Procedure . . ." in ULP cases before the Board
- All written postponement requests, subsequent responses and orders on such requests
- All pretrial motions, responses and rulings on each motion (except, as noted below, for petitions to revoke subpoenas and related documents)
- An affidavit of service of each of the above that was served by the Regional Office

The formal documents should be assembled in advance of hearing and arranged in chronological order, starting with the earliest document on the bottom to the most recent document at top, with the very top document being the Index and Description of Formal Documents. The documents should be marked with the earliest (bottom) document being General Counsel's Exhibit 1(a), the second earliest 1(b) and so on until the Index, which will be marked as the last of the sequence of General Counsel's Exhibit 1.

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Petitions to revoke and related documents and rulings are not part of the record unless the aggrieved party or person specifically requests. Sec. 11782.5.

The trial attorney should show the parties the formal papers prior to the opening of the hearing and give them a copy of the index. (The parties should already have the rest of the documents in GC Exh. 1.) Extra copies of Form NLRB-4668 ("Statement of Standard Procedure . . .") should be made available on request.

Following the opening of the hearing by the Administrative Law Judge, counsel for the General Counsel should introduce the formal papers with substantially the following statement:

> **I offer into evidence the formal papers. They have been marked for identification as General Counsel's Exhibits l(a) through 1( ), inclusive, Exhibit 1( ) being an index and description of the entire exhibit. This exhibit has already been shown to all parties.**

Extended arguments in support of the receipt of the formal papers into the record will not normally be necessary. If objection is raised, counsel for the General Counsel should note that these papers are pleadings, normally part of any judicial or administrative record.

10386 Opening Statements

The trial attorney should prepare an opening statement in each case. Such a statement should be presented if likely to be helpful for the Administrative Law Judge's understanding of the case or if requested by the judge. An opening statement is useful to set the context of the case, help explain why certain elements and evidence are relevant and may assist the ALJ in making later evidentiary rulings. In such a statement, the trial attorney may also express on the record separate and alternative theories of a violation encompassed by the complaint. See OM Memo 07-84.

10388 Trial Motions

Motions at hearing may be either written and served on all parties or made orally on the record. Rulings by the Administrative Law Judge, and any subsequent orders may be in writing and served on all parties or stated orally on the record. Where practical, motions calling for a detailed ruling may be served on all parties with a proposed order for the ALJ. Depending on the nature of the motion the ALJ may reserve ruling, but should eventually rule on all motions made.

Special permission of the Board is necessary to directly appeal an ALJ's ruling made at the hearing. Sec. 102.26, Rules and Regulations and Sec. 10404. Absent the Board's grant of special permission to appeal, the ruling of the ALJ will be considered by the Board only if timely and specific exceptions are filed with the Board to the ALJ's recommended decision.

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10388.1 Motion to Intervene

The Administrative Law Judge rules on all motions to intervene made after the opening of the hearing. Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding. Sec. 102.29, Rules and Regulations and *Camay Drilling Co.*, 239 NLRB 997 (1978). Otherwise, counsel for the General Counsel should oppose such intervention.

10388.2 Motion to Dismiss

Counsel for the General Counsel should oppose any motion to dismiss unless the motion is well founded. Sec. 10388.3. If the Administrative Law Judge grants the motion and dismisses the complaint, counsel for the General Counsel should appeal the decision, absent a total failure of evidence as discussed below. The appeal should be in the form of a request for review filed with the Board within 28 days and served on all parties. Sec. 102.27, Rules and Regulations and Sec. 10436.

10388.3 Failure of Proof

Counsel for the General Counsel, after consultation with the Regional Office, should move to withdraw an allegation from the complaint where there is an unquestionable failure of proof on that allegation. Otherwise, no such motion should be made. If the Administrative Law Judge treats the motion to withdraw an allegation as one to dismiss and does dismiss the allegation, no appeal should be taken.

10388.4 Other Common Motions

Other common motions are more fully discussed in the following sections:

- Motions involving the answer to the complaint, Secs. 10280 and 10290–10292.3
- Motions to amend the complaint, Sec. 10274
- Petitions to revoke, Sec. 11782
- Motions to sequester witnesses, Sec. 10394.1
- Motions for continuance, Sec. 10406

10390 Rules of Evidence

Section 10(b) of the Act provides that Board hearings shall, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . . ." Trial attorneys should be thoroughly familiar with the Federal Rules of Evidence and Board decisions interpreting and applying these rules. They should also be familiar with any rules of evidence peculiar to the states or territories within their Region which may also be followed in the local Federal district courts.

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10392 Stipulations

Wherever possible, evidence should be introduced into the record in the form of stipulations. Time is well spent in seeking stipulations that help reduce the size of a record. Additionally, sometimes a stipulation will secure evidence for the record which might otherwise be difficult to prove through General Counsel's witnesses. Sec. 10350.

Stipulations should contain detailed, factual assertions and should not be conclusionary. For example, a stipulation that the Board has commerce jurisdiction is inadequate, without a recital of supporting facts.

Stipulations may be in writing or orally introduced, with each party attesting to the accuracy of the stipulated facts and the admissibility of the stipulation. Nevertheless, any party to a stipulation retains all rights to argue about the relevance and relative weight of any such stipulated evidence.

The charged party(ies) and the General Counsel must be parties to all stipulations, unless the stipulation is entered into the record without objection. *NLRB v. Haddock-Engineers, Ltd.*, 215 F.2d 734 (9th Cir. 1954); *U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines*, 504 F.2d 1288 (7th Cir. 1974). However, a stipulation need not include the charging party if given adequate opportunity to adduce evidence to contradict

or to explain parts of the stipulation. See *Auto Workers (BorgWarner) v. NLRB*, 231 F.2d 237, 242 (7th Cir. 1956).

10394 Witnesses

10394.1 Sequestration of Witnesses

Board procedures permit any party to move to sequester witnesses. In *Greyhound Lines*, 319 NLRB 554 (1995), the Board set forth a model sequestration order with which trial attorneys should be familiar. Discretion should be used in determining whether to initiate or oppose the sequestration of witnesses. Sequestration orders by an Administrative Law Judge at trial should be carefully followed. See, e.g., *Sargent Karch*, 314 NLRB 482 (1994).

10394.2 Examination of Witnesses

The trial attorney should call and examine witnesses as planned in the trial brief (Sec. 10336), unless changed circumstances favor altering the order or direction of the examination. In order to enhance the credibility and reliability of the witness, direct, nonleading questions should generally be used. Some leading, however, is permitted to advance the witness to a particular subject matter and for refreshing recollection. For adverse witnesses, examination by leading questions is appropriate. See Sec. 10394.3.

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10394.3 Rule 611(c) Federal Rules of Evidence

This Rule in pertinent part provides:

> When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Examination of respondent's decisionmakers and agents by leading questions has proven to be a useful tool that should be seriously considered in each case. The advantages of this examination, used early in the General Counsel's case, include:

- Fixing respondent's defenses on critical issues, such as the cause for discharge in an 8(a)(3) or 8(b)(2) case
- Securing admissions early in the proceeding for efficient and effective presentation of the case
- Securing admissions on matters particularly within the knowledge of respondent's witnesses

In the event it is decided to use Rule 611(c) examination, the trial attorney should carefully prepare the examination prior to trial and, when appropriate, use it in tandem with a subpoena duces tecum.

10394.4 Cross-Examination of Witnesses

Cross-examination of a witness called by another party is not mandatory and may be unnecessary. The goals of cross-examination include impeaching the witness' testimony and gaining admissions of fact favorable to the General Counsel's case. With respect to impeachment, the relative reliability of a witness' direct testimony may be revealed by questioning as to, for example, the timing and specific circumstances of the events or conduct in issue. In preparation for cross-examination, the trial attorney should carefully review the defenses proffered during the investigation and also those that may be reasonably anticipated. Thus, the trial brief should set forth in detail possible lines of cross-examination. Finally, cross-examination should proceed with firmness, direction and cordiality.

10394.5 Objections

Counsel for the General Counsel should be well versed in the Federal Rules of Evidence, so that objections can be raised at suitable times and argued with authority. Objections should be used to keep improper evidence from being considered and to make a record for Board and appellate review. Counsel for the General Counsel should show restraint in raising technical objections, avoiding those that serve little useful purpose. On the other hand, objections should be raised when the testimony or proffered exhibits are incompetent. Failure to object on grounds of incompetence, such as hearsay, may be found to be a waiver of the defect and could allow as probative what would otherwise be incompetent testimony. Rule 103(a)(1) of the Federal Rules of Evidence; 1 *Wigmore on Evidence* § 18 (3d ed. 1940). Sec. 5033 Federal Practice and Procedure, *Wright & Miller* (1977); *U.S. v. Fuentes*, 432 F.2d 405 (5th Cir. 1970); and *Diaz v. U.S.*, 223 U.S. 442, 450 (1912).

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Objections should be made in a timely manner. They should be addressed to the ALJ and stated crisply with a specific ground, e.g., "I object, hearsay." Questions by the Administrative Law Judge are as subject to objection as questions by other parties.

If the ALJ overrules an objection to a question that is one of a series, counsel for the General Counsel may ask to note objection to the entire line. This approach can be suggested to opposing counsel in similar circumstances.

Voir dire is an examination into the authenticity of an exhibit proffered by an opposing party and the competence of the witness to authenticate such exhibit or to be an expert witness. Voir dire is used to explore whether an objection should be made and may be conducted by leading questions. Voir dire must be conducted at the time an exhibit is offered into evidence and is untimely after the exhibit is accepted into the record. Moreover, voir dire must not expand into general cross-examination; it must be limited to the specific purposes noted above.

10394.6 Use of Statements or Affidavits

Counsel for the General Counsel should use affidavits and other statements from the investigation to prepare witnesses for trial. At trial, statements may be used to refresh recollection, to impeach a witness' testimony and, in certain circumstances, may be introduced as substantive evidence in the form of an admission or in the absence of the witness. See generally Federal Rules of Evidence 612, 613, 801, and 803(5) as well as *Alvin J. Bart & Co.*, 236 NLRB 242 (1978).

Secs. 102.117 and 102.118(a), Rules and Regulations govern access to statements and other materials from the case file. Express consent must be obtained under Sec. 102.118(a) for a party's access to file materials and statements under the General Counsel's control not otherwise required to be produced. When opposing a party's request for material not required to be produced, counsel for the General Counsel should not solely rely upon the fact that consent was not obtained pursuant to Sec. 102.118. Counsel for the General Counsel should also set forth the reasons that nonproduction is appropriate. See Secs. 11820–11828 for subpoenas seeking Board agent testimony and documents in the Board's or General Counsel's possession.

10394.7 Production of Witness Statements

(a) *Witness Statements Defined:* Sec. 102.118, Rules and Regulations provides for the production of witness statements under certain circumstances. See Sec. 10394.8 below. Under the rule, a statement is defined as:

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> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

Such statements whether in the form of affidavits, e-mails, or other recordings are commonly referred to as "*Jencks* Statements." See *Jencks v. U.S.*, 353 U.S. 657, 672 (1957).

(b) *Circumstances Requiring Production:* Sec. 102.118(b)(1), Rules and Regulations provides for the production of witness statements to opposing parties when all the following circumstances have occurred:

- The witness was called by the General Counsel or the charging party for testimony at a Board hearing and
- After completion of the direct testimony, the opposing counsel requests the witness' statement for cross-examination and

- The statement is in the possession of the General Counsel and
- The statement relates to the subject matter of the witness' testimony on direct

The General Counsel will request of another Federal agency producible statements by the witness in such agency's possession for use in the Board proceeding, if notified by the requesting party of the existence of such statements. Cf. *Trailways, Inc.*, 237 NLRB 654, 656 (1978). Counsel for the General Counsel should also turn over any certified English translation of a producible affidavit taken in another language. Sec. 10060.8.

The charging party also may be entitled, upon request and for the purpose of cross-examination, to a producible statement, in the possession of the General Counsel, of an agent who testifies on behalf of a respondent. See *Senftner Volkswagen Corp.*, 257 NLRB 178, 186–187 (1981), and *Louisiana Dock Co.*, 293 NLRB 233, 250–251 (1989).

10394.8 Opposition to Production of All or Certain Portions of Statement; In Camera Inspections

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If any of the requirements for production under Sec. 102.118(b), Rules and Regulations are not met, counsel for the General Counsel should oppose production of a statement obtained during an investigation, including a statement that is not in the exclusive possession of the General Counsel.[2] For example, if the alleged statement of the General Counsel's witness was not signed, adopted or otherwise approved by the witness, the trial attorney should oppose its production. The Administrative Law Judge may require that the statement be turned over for the ALJ's review of the document alone, i.e., an *in camera* inspection. The ALJ may also allow counsel seeking the statement to question the witness about whether any such statement was reduced to writing and either signed or adopted, or whether the written statement is a substantially verbatim recitation of an oral statement.

Counsel for the General Counsel during pretrial preparation should fully explore with each prospective witness to determine whether any producible statements are in the General Counsel's possession, whether in the pending matter or in any other case, and the exact number of such statements. This may prevent the witness at hearing from becoming confused and contradicting the trial attorney's assertion that no statement exists. If, however, the witness does provide incorrect information at the hearing, the trial attorney should request permission to question the witness about the existence or number of producible statements. Such questioning may reveal that a previous oral statement to a Board agent was not, at the time, reduced to writing; that the written statement the witness is referring to is in the possession of another federal agency, which should prompt the trial attorney to request the statement from that agency; or that the witness never read or otherwise adopted the written statement in question.

[2] See *H. B. Zachary Co.*, 310 NLRB 1037 (1993).

Counsel for the General Counsel may contend that certain portions of an otherwise producible statement should be excised before delivery to the cross-examiner. If so, the trial attorney should submit the statement to the ALJ for an *in camera* inspection designating to the judge those portions that should be excised. The ALJ should remove those portions that do not relate to the subject matter of the witness' direct testimony. However, this is a discretionary matter and the ALJ may find that some or all of the proposed deletions relate to other matters raised by the pleadings.

10394.9 Copies of Statements for Counsel

Counsel for the General Counsel will provide, upon request and when producible, as set forth in Secs. 10394.7(b) and 10394.8, a copy of each witness' statement to the counsel or other representative for each respondent. Where the original affidavit is handwritten and a typed copy has been made of the affidavit, copies of both should be produced. The handwritten version will be controlling and the unsigned typewritten copy should be supplied as a matter of convenience. Where the Administrative Law Judge has excised portions of a statement, only the copy with the excision should be produced to respondent's counsel. The ALJ decides the amount of time afforded counsel for review of the affidavits for cross-examination. Counsel for the General Counsel should not oppose a reasonable period of time for such review. If counsel for the respondent desires, respondent may be permitted to retain the affidavits until the hearing is closed provided that they are retained for legitimate trial purposes. Unless, of course, the affidavits have been offered in evidence, affidavits may not be retained by respondent after the close of the hearing for purposes of drafting a posthearing brief, inasmuch as the discussion in the brief must be based on record evidence.

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Since Sec. 102.118(b), Rules and Regulations limits the production of witness statements for the purpose of cross-examination, any other use is not permitted. Examples of prohibited practices include:

- Copying statements without permission
- Retaining statements after the close of hearing
- Disclosing statements to anyone not directly involved in respondent's cross-examination

The Division of Operations-Management should also be advised if the Regional Office becomes aware of any use of witness statements for other than cross-examination.

10394.10 Statements Produced and Entered in Record

Counsel for the General Counsel may introduce all relevant portions of a statement if respondent attempts to impeach the witness by examination on only a portion of the statement. See, e.g., *J. P. Stevens & Co.*, 239 NLRB 738, 750 fn. 29 (1978). A novel or unusual situation involving the production of statements should be submitted to the Division of Advice.

10396 Offers of Proof

Evidence excluded by the Administrative Law Judge that counsel for the General Counsel considers competent, relevant and necessary to the proof of the case should be preserved by an offer of proof. The offer may cause the ALJ to reconsider or reverse the adverse ruling. Moreover, the offer of proof is a necessary prerequisite to take exceptions to a ruling excluding the evidence and preserves the opportunity for a remand to accept the evidence if necessary.

The offer, in essence, is a detailed recitation of facts to which the witness would testify if permitted. Offers that set forth the evidence in summary fashion or that merely recite conclusions are insufficient.

An offer of proof may take the form of specific questions to and answers by the witness, if permitted by the ALJ, or may be an oral statement by counsel on the record or a written statement to be included in the record. "Questions and answers" effectively present an offer of proof while preserving the witness' credibility. (See Rule 103(b) of the Federal Rules of Evidence and also Chapter 13, Sec. 13-112 of the ALJ's Bench Book.) If the ALJ refuses to hear the offer by question and answer, counsel for the General Counsel may excuse the witness and present the evidence through an oral statement on the record. Recitation of the offer of proof outside the witness' hearing helps avoid claims that the credibility of the witness has been compromised. The oral statement would commence with "I offer to prove by this witness that Foreman Jones said to him . . ." and would contain exact or paraphrased words that the witness would use. Alternatively, a written offer of proof may be used where an extended line of examination is necessary, permitting full consideration of details and saving hearing time.

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Counsel for the General Counsel should ensure the record clearly reflects when the offer is concluded. Upon completion of an opponent's offer, counsel for the General Counsel should renew appropriate objections. If the offer is rejected, the proffered evidence is not received into the record. However, if the ALJ reverses the ruling and receives an opponent's evidence, counsel for the General Counsel should demand the right of cross-examination and/or rebuttal.

10398 Exhibits

Documents and records, if relevant to the issues, are introduced into the record as exhibits. To the extent possible, exhibits should be prepared in advance. Sec. 10338. However, confidential documents such as internal deliberative memoranda intended for intragency use should never be introduced in evidence without prior clearance from the Division of Operations-Management. Sec. 11820.

10398.1 Identification

Counsel for the General Counsel should ask the reporter to mark a document for identification and hand a copy to opposing counsel before approaching the witness. The document is then handed to the witness through whom it is being offered and, through questions and answers, is identified and authenticated. It is then offered in evidence. At

this point, an objection may be made and the relevance and authenticity of the document argued.

10398.2 Introduction

Two copies of all exhibits must be furnished to the reporter by the party offering the exhibit. A copy of each exhibit should also be available for the Administrative Law Judge and copies distributed to all other parties. The ALJ may permit voir dire to explore the authenticity of an exhibit and the competence of the witness to testify about the exhibit. Sec. 10394.5.

10398.3 Rejected

A party offering an exhibit may request its inclusion in the "Rejected Exhibits" if the exhibit has been refused admission.

10398.4 Record of Exhibits

The trial attorney should keep a running record—a good place is in the trial brief—of identification numbers of all exhibits marked, a short description of each, whether they were offered, whether they were received and, under "Remarks," anything else that might be of value.

10398.5 Submitted After Close of Hearing

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The Administrative Law Judge may allow parties to submit exhibits after the close of the hearing pursuant to the following procedures:

(a) All parties should stipulate on the record that certain evidence may be received after the close of the hearing and shall become part of the record upon receipt.

(b) A description of the document(s) that a party proposes to offer should appear as part of the stipulation in the record and an appropriate exhibit number should be reserved.

(c) Ordinarily, the trial attorney should reserve the right to inspect the documents when they are offered and to file objections; this right may be reserved by all parties.

10398.6 Custody of Exhibits

The official reporter retains custody of exhibits received into the record (or placed among the rejected exhibits). The reporter is responsible for their safekeeping during and between hearing sessions. The reporter will not turn exhibits over to any party except upon direction by the Administrative Law Judge, in which case the reporter will be furnished a receipt. After the hearing is closed or indefinitely adjourned, the reporter will forward one copy of the exhibits to the Regional Office and one copy to the ALJ. The reporter shall retain custody of all exhibits in the case when the hearing is adjourned to a specified date. If the hearing is subsequently adjourned indefinitely, the exhibits will be forwarded to the Regional Office as above.

10400 Requests to Produce by Opposing Counsel

Demands by opposing counsel for the production of documents other than statements or affidavits in possession of the Agency should be rejected except in the following circumstances:

- Where a witness has been given or is about to be given the document to refresh memory or to impeach testimony.
- Where the General Counsel has granted advance permission to turn over the document. But see Sec. 10398.

See Secs. 11820–11828 if the demand is followed by service of a subpoena and Secs. 10394.6–10 if the demand is for statements and affidavits. See Sec. 11782.6 if a subpoena duces tecum is served on alleged discriminatees and/or counsel for the General Counsel's witnesses.

Counsel for the General Counsel should consult with the Regional Office for consideration of a possible special appeal or other action if the Administrative Law Judge upholds the demand for production over the objection of counsel for the General Counsel.

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10402 Evidence of Settlement Negotiations

Settlement offers and discussions are normally inadmissible. Rule 408 of the Federal Rules of Evidence. Counsel for the General Counsel should not introduce such evidence and should resist attempts of others to introduce it. But see *Miami Systems Corp.*, 320 NLRB 71 (1995), which held that threats during the course of grievance settlement discussions are admissible.

10403 Background Evidence and Use of Presettlement Conduct

In cases involving postsettlement unfair labor practice allegations, unfair labor practices or other statements and conduct prior to the settlement agreement may be considered in establishing the motive or object of respondent in its postsettlement activities. *Coastal Electric Cooperative*, 311 NLRB 1126, 1132 (1993).

10404 Appeals to Board

Sec. 102.26, Rules and Regulations requires special permission of the Board before a party may file a direct appeal to rulings and orders of the Administrative Law Judge. Requests for such permission should be made promptly in writing, with a copy served on each other party and on the ALJ. Requests for Special Permission to Appeal rulings and orders of the ALJ may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4. The request for

special permission to appeal should succinctly state the ruling, the surrounding circumstances and the grounds urged for reversal.

Counsel for the General Counsel should consult with the Regional Office before filing a request with the Board for special permission to appeal. Factors to be weighed before deciding to specially appeal include the importance of the issue to the overall prosecution of the case and the likelihood that the Board will grant such special permission.

Ordinarily, the hearing should not be delayed because a party seeks special permission to appeal a ruling or order. Counsel for the General Counsel should exercise discretion in deciding whether to submit to the Board an opposition to the request.

10406 Postponements

The Administrative Law Judge has the authority to grant postponement requests once the hearing is open. Unless all parties agree, the ALJ will ordinarily grant the postponement only on a showing of good cause, in view of the costs of hearing and the schedules of the parties and witnesses.

Counsel for the General Counsel is expected to be ready to proceed with the case at the scheduled time and, absent compelling circumstances, should not request a postponement. Sec. 10294.

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10406.1 Requested Because of Lack of or Newly Acquired Counsel

Normally, the Regional Office will oppose a respondent's postponement request for lack of or newly acquired counsel, unless respondent can demonstrate good cause.

10406.2 Requested Because of Amendment to Complaint

Respondent may request a postponement, asserting the need to investigate matters alleged in an amendment to the complaint granted by the Administrative Law Judge at hearing. Sec. 10274.2. Counsel for the General Counsel should oppose the requested delay if the amendment is an extension of matters already in issue or if it is reasonable that respondent can investigate the matters while proceeding with the rest of the case. Counsel for the General Counsel must, however, appreciate and support the Agency's responsibility to ensure adequate notice and due process to all parties. The ALJ will normally consider the amount of advance notice as well as the nature and extent of the amendment in determining whether to grant a continuance in the hearing and in setting the time allowed for answering the new allegations.

Answers to allegations newly added to a complaint during hearing may take the form of prehearing answers or may take another form with the ALJ's permission, such as interlineations on the face of the original answer or oral statements on the record. Sec. 102.23, Rules and Regulations.

10406.3 Requested to Prepare Defense

Another common type of postponement request is the request for an adjournment between the closing of the General Counsel's case and the opening of the defense. Counsel for the General Counsel should absent unusual circumstances resist any continuances, arguing, for example, that the pleadings, settlement discussions and underlying investigation should have placed respondent on notice of the issues to be tried.

10406.4 Necessitated by Other Matters

To the extent that litigation needs require appeals to the Board or other ancillary proceedings which may result in a continuance of the hearing, counsel for the General Counsel should expedite such proceedings to minimize any delay.

10407 Remedy Sought

10407.1 Statement on Record

The complaint should set forth any specific remedies that are in addition to those traditionally granted for the violations alleged. See Secs. 10131, 10266.1, and 10410. Counsel for the General Counsel, with the Administrative Law Judge's permission, may reiterate and expand upon the reasons for such remedies at hearing, in addition to arguing for such remedies in the brief.

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10407.2 New Developments Requiring Reconsideration

From time to time, new developments at a hearing may require reconsideration of the remedy proposed. In such situations, counsel for the General Counsel should discuss the matter with the Regional Office, which will decide the appropriate course of action.

10407.3 Proposed Remedy Not a Limitation

Counsel for the General Counsel should explain to the Administrative Law Judge and the parties that the recommended special remedy is not a limitation as to normal Board remedies, but needs to be granted in addition to such remedies. Counsel for the General Counsel should always request the ALJ and Board to provide "any further relief as may be appropriate." Sec. 10266.1.

10407.4 Charging Party Seeks Different Remedy

Differences between counsel for the General Counsel's and the charging party's view of the appropriate remedy can be presented to the Regional Office and normally resolved prior to hearing. However, absent such an accord, counsel for the General Counsel will advance only the Regional Office's views. The charging party will have opportunity to present its views to the Administrative Law Judge and the Board, if it so chooses.

10407.5 Possible Change in Circumstances After Hearing

Circumstances affecting respondent's operations may change significantly after the close of hearing. Such changes may include altered operating methods, relocation,

merger, acquisition, and other major events. Therefore, counsel for the General Counsel should request remedies at hearing and in the brief in broad terms to ensure they are applicable in the face of potential change. Further, absent an approved settlement, counsel for the General Counsel should not assume that a full remedy has been obtained by respondent's posthearing actions. For example, even where an alleged discriminatee has been put back to work, counsel for the General Counsel should not assume there has been a complete reinstatement. Instead, in the absence of a Regional Office determination that a full remedy has been obtained, counsel for the General Counsel should pursue an appropriate remedy for each complaint allegation.

Counsel for the General Counsel and the compliance officer should encourage the charging party and employees who have remedial rights to inform the Regional Office of any changed circumstances, such as the dissipation or transfer of assets, the starting of new businesses and the identification of potential entities with possible derivative liability. Secs. 10054.2(c), 10264.3, 10274.4, and 10334.5 and Compliance Manual, Sec. 10596.

10407.6 Litigation of Proposed Remedy

Counsel for the General Counsel should introduce relevant evidence establishing the appropriateness of any requested remedies pled in the complaint. See Sec. 10266. Moreover, counsel for the General Counsel should not oppose respondent's attempt to introduce relevant testimony or evidence concerning any remedy sought subject of course to cross-examination, rebuttal and further appropriate evidence by counsel for the General Counsel as allowed by the Administrative Law Judge. On the other hand, the trial attorney should oppose irrelevant, inappropriate or extended debate concerning the remedy.

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(a) *Suitability of Reinstatement Remedy*: Of particular concern in this area are issues regarding the suitability of certain alleged discriminatees for reinstatement and the desire to avoid contingent orders which may prove problematic at the enforcement stage and may impede the Agency's ability to obtain meaningful remedies in an efficient manner. In this regard, Regional Offices should consult OM Memo 07-57 and follow the guidelines set forth below:

- The Regional Office should investigate claims of suitability for reinstatement.
- After consulting Regional management, the trial attorney should agree to litigate at the unfair labor practice hearing evidence which, as a matter of law, constitutes a defense to the complaint allegations or could alter the reinstatement remedy.
- The trial attorney should, however, oppose the proffer of evidence legally insufficient on its face as well as proffers related to whether the alleged discriminatees are legally in the country. See also GC Memos 02-06 and 98-15.
- If the hearing record has closed but the Administrative Law Judge's decision has not issued, the trial attorney should, after consulting Regional

management and where otherwise appropriate, join in the request to reopen the record. However, the trial attorney should oppose attempts to raise such matters when material evidence was deliberately withheld at the earlier hearing.

- Generally, attempts to raise such matters after the issuance of an Administrative Law Judge decision has issued should be opposed.

(b) *Other Remedial Issues:* Regional Offices may follow the approach outlined above in appropriate circumstances regarding other remedial issues and especially where such actions will:

- Enhance the likelihood of obtaining meaningful compliance results more promptly
- Assure availability of more current evidence
- Generally enhance the quality and efficiency of casehandling

10408 Bench Decisions and Oral Argument

The Board's Rules and Regulations give Administrative Law Judges the discretion to dispense with posthearing briefs and hear oral argument in lieu of briefs and to issue bench decisions. Sec. 102.42, Rules and Regulations provides that in any case the ALJ believes written briefs may not be necessary, the ALJ shall notify the parties at the opening of hearing or as soon thereafter as practicable of the judge's wish to hear oral argument in lieu of briefs. Additionally, the ALJ, under Sec. 102.35(a)(10), Rules and Regulations has the authority to make and file decisions, including bench decisions, within 72 hours after conclusion of oral argument. While the Board has not set forth in its Rules the circumstances under which these procedures should be utilized, it has suggested cases in which it may be appropriate to dispense with briefs and/or to issue bench decisions. Such cases include:

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- Cases that turn on straightforward credibility issues
- Cases involving 1-day hearings
- Cases involving a well-settled legal issue where there is no dispute as to the facts
- Short record, single-issue cases
- Cases in which a party defaults by not appearing at the hearing

In any case that might result in a bench decision, counsel for the General Counsel must prepare an oral argument in advance of trial.

Upon issuance of a bench decision, the ALJ must certify the accuracy of the transcript pages containing the decision; file with the Board a certified copy of those

pages, together with any supplementary matter the judge may deem necessary to complete the decision; and serve a copy on each of the parties. Upon the filing of the decision, the Board will issue an order transferring the case to the Board and serve a copy on the parties. Accordingly, the period for filing exceptions to an ALJ's bench decision does not commence until the date of service of the order transferring the case to the Board.

In addition, oral argument may be appropriate in hearings which do not involve a bench decision. Thus, when appropriate, unless the ALJ has indicated that oral argument will not be permitted, counsel for the General Counsel should be prepared to argue orally. Accordingly, in preparation for the hearing, counsel for the General Counsel should prepare a detailed outline of the facts and legal argument with case citations, as appropriate. During the hearing, counsel for the General Counsel should be particularly sensitive to the ALJ's understanding of the General Counsel's theory. If it appears that further elucidation is needed, an oral argument should be made as to the issues warranting clarification, including any complex or novel legal principles in issue.

Since bench decisions and oral argument each will expedite issuance of ALJ decisions, Regional Offices should carefully assess the opportunity to recommend their use. In appropriate circumstances, counsel for the General Counsel should urge use of oral argument and bench decisions.

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10409 Close of Hearing

Counsel for the General Counsel should check the trial brief to make sure all matters have been handled before the close of hearing. Regarding exhibits, counsel for the General Counsel should make sure:

- All exhibits intended to be offered in the General Counsel's case were offered and received or otherwise ruled upon
- All copies of exhibits were supplied
- The reporter has two copies of all General Counsel, joint and other exhibits the trial attorney is relying on
- All parties understand the arrangements, if any, for submission of exhibits after the close of hearing

Counsel for the General Counsel should also ensure that the complaint was amended, if necessary, to specifically allege violations of the Act supported by evidence adduced at trial. In circumstances involving failure of proof, see Sec. 10388.3.

Immediately after close of hearing, counsel for the General Counsel should complete the Report and Obligated Cost of Hearing form, Form NLRB-4237.

10410–10444 POSTHEARING

10410 Briefs to Administrative Law Judge

Briefs should normally be filed in the absence of oral argument and especially where involved credibility issues are present, the record is long, the issues varied or where legal argument may be helpful. The trial attorney should allow adequate time for drafting the brief and for supervisory review. Additionally, the discussion on persuasive brief writing in OM Memos 07-84 and 08-76 as well as the following briefing guidelines may be useful.

The brief should be succinct yet comprehensive and address:

- All alleged violations and the testimony and exhibits in support with specific record citations
- All points specifically raised by the Administrative Law Judge or that otherwise appear to be of concern to the judge
- Issues of credibility, highlighting undisputed facts and evidence and inconsistencies in testimony, inherent probabilities of witness' testimony, whether the testimony was specific and detailed and whether it was adduced by leading questions
- Argument and case law for the substantive allegations and for any specifically pled remedies the General Counsel is seeking
- Adverse evidence and case authority

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Additionally, the brief should be respectful, scrupulously accurate, and comprehensive in discussing the case-in-chief and dealing with adverse evidence.

If the brief is filed as a paper document, three copies shall be filed with the ALJ. For filing and service of paper documents, see Secs. 11840 and 11846.5.

Briefs my also be filed electronically at the Agency's website. For electronic filing and service, see Secs. 11841 and 11846.4.

In all instances, a copy should be served on each of the parties, with proof of service furnished. See generally Secs. 102.24 and 102.42, Rules and Regulations. For service on represented parties of either paper filed or electronically filed documents, see Secs. 10269 and 11842. Dates for filing set by the ALJ and any subsequent rulings by the Division of Judges must be met. Sec. 102.42, Rules and Regulations.

Copies of the brief should be retained in electronic form for use in possible exceptions or for briefs in support of the ALJ's decision. Sec. 10438.

The trial attorney, supervisor, and Regional Attorney should carefully review Respondent's brief to uncover and address potential problems. If the entire case or a particular allegation appears to have a fatal flaw, reconsideration may be warranted.

Regions should also be alert to changes in the law and take appropriate action. Additionally, in *Reliant Energy*, 339 NLRB 66 (2003), the Board adopted a procedure, modeled after Rule 28(j) of the Federal Rules of Appellate Procedure, which permits parties in unfair labor practice cases and in representation cases to call to the Board's attention pertinent and significant authorities that come to a party's attention after the party's brief has been filed.

10412 Correcting the Transcript

Counsel for the General Counsel should ensure that the testimony of witnesses and the statements of counsel and the Administrative Law Judge are accurately set forth in the transcript, since all further proceedings will be based on the record. Counsel for the General Counsel should carefully read the hearing transcript upon delivery, especially in breaks during the course of hearing. Such review permits the opportunity to supplement an incomplete record with additional testimony. Further, counsel for the General Counsel should note all material inaccuracies and take necessary steps to correct the record. Corrections may be made by stipulation or by motion to the ALJ or the Board after transfer.

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If the stipulation or motion to correct transcript is filed with the ALJ as a paper document, three copies must be submitted. If filed with the Board as a paper document, eight copies are required of such stipulation or motion to correct. For filing and service of paper documents, see Secs. 11840 and 11846.5.

The stipulation or motion to correct transcript may also be filed electronically with the ALJ or the Board at the Agency's website. For electronic filing and service, see Secs. 11841 and 11846.4.

In all instances, a copy should be served on each of the parties, with proof of service furnished. See generally Secs. 102.24 and 102.47, Rules and Regulations. For service on represented parties of either paper filed or electronically filed documents, see Secs. 10269 and 11842.

10430 Administrative Law Judge's Decision

The Administrative Law Judge's ultimate decision on the merits is based on full consideration of the record. After the close of the hearing and submission of briefs (except with a bench decision), the ALJ issues a decision that sets forth findings of fact, legal conclusions and recommended remedial action. If the ALJ delivers a bench decision, the judge shall certify the accuracy of the transcript containing the decision. In either case, upon the filing of the decision with the Board, the Board issues an order transferring the case to the Board, thereby divesting the ALJ of all jurisdiction. Sec. 102.45, Rules and Regulations.

Electronic Service (E-Service) of Administrative Law Judges' decisions is also available to parties and their representatives. Registration for notice and a link to such decisions and orders is set forth at the Agency's website. See also Sec. 11846.6. However, parties or party representatives who register for E-Service will not receive service of such decisions or orders by any other means.

Counsel for the General Counsel should review the ALJ's decision, including the factual findings, conclusions of law, and any remedy, to enable the Regional Office to determine whether any exceptions, cross-exceptions or an answering brief should be filed.

The trial attorney or other designated agent should continue to monitor respondent's ability to comply with the remedial provisions of the ALJ's decision and any changed circumstances with respect to the respondent's operation, identity or financial condition. Sec. 10407.5 and Compliance Manual, Secs. 10505 and 10596.

10430.1 Analysis of Significant Losses in Administrative Law Judge's Decision

Within 10 days following the issuance of an Administrative Law Judge's decision containing a significant loss to the General Counsel, an analysis should be submitted to the Division of Operations-Management. Such analysis should emphasize not only the result, but also the adequacy of the ALJ's proposed remedy.

10430.2 Novel or Complex Policy Questions Arising in Administrative Law Judge Decision

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If the Administrative Law Judge's decision embodies novel or complex policy questions, the Regional Office should notify the Division of Advice as to whether it intends to file exceptions. Further action should await direction from Advice.

10434 Compliance with Administrative Law Judge's Decision

If no exceptions are filed, compliance efforts should be promptly initiated.

10436 Request for Review of Order Granting Dismissal

Where a motion to dismiss the entire complaint is granted by the Administrative Law Judge, any appeal should be in the form of a request for review filed with the Board within 28 days of the order of dismissal. Sec. 102.27, Rules and Regulations and Sec. 10388.2.

10438 Exceptions, Cross-Exceptions, Briefs Supporting the Administrative Law Judge's Decision and Requests for Oral Argument

Sec. 102.46, Rules and Regulations sets forth the time limits and format of exceptions, cross-exceptions and briefs in support, as well as any answering briefs and reply briefs. The time limits, format and strictures of Sec. 102.46 must be read with care

and followed. The various filings described below may be filed by paper document or electronically at the Agency's website under "Board/Office of the Executive Secretary."

10438.1 Filing of Exceptions and Cross-Exceptions

Any party, including the General Counsel, may file written exceptions and a brief in support of those exceptions contending that a material part(s) of the Administrative Law Judge's decision and recommended order is erroneous and should not be adopted by the Board. Cross-exceptions may be filed in response to another party's exceptions by any party who has not previously filed exceptions; they are governed by the same rules and format applicable to exceptions. Sec. 102.46(e), Rules and Regulations.

If filed as a paper document, eight copies of the exceptions or cross-exceptions and any brief in support must be filed with the Board. For filing and service of paper documents, see Secs. 11840 and 11846.5.

Exceptions and cross-exceptions and any brief in support may also be filed electronically at the Agency's website. For electronic filing and service, see Secs. 11841 and 11846.4.

In all instances, a copy should be served on each of the parties, with proof of service furnished. See generally Secs. 102.24 and 102.46, Rules and Regulations. For service on represented parties of either paper filed or electronically filed documents, see Secs. 102.69 and 11842.

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10438.2 Time for Filing Exceptions and Cross-Exceptions

Exceptions must be filed within 28 days of service of the order transferring the case to the Board, unless an extension of time is granted. Sec. 102.46(a), Rules and Regulations.

Cross-exceptions must be filed within 14 days from the last date on which exceptions and any supporting brief may be filed, unless an extension of time is granted. Sec. 102.46(e), Rules and Regulations.

Secs. 102.111–102.114, Rules and Regulations govern time computations and other service and filing requirements for paper documents. Exceptions, cross-exceptions, briefs in support, and other briefs in this topic area filed as paper documents are accepted as timely filed by the Board if they are "postmarked on the day before (or earlier than) the due date" or hand delivered to the Board on or before the closing time of the receiving office on the due date. See particularly Sec. 102.111(b).

Secs. 102.111–102.114, Rules and Regulations also govern time computations and other service and filing requirements for electronically filed documents. The requirements for the timely receipt of documents filed electronically with the Agency are set forth at Sec. 102.111(b), as modified by Sec. 102.114(i) and the instructions for E-Filing on the Agency's website. Exceptions, cross-exceptions, briefs in support, and other briefs in this topic area filed electronically must be transmitted through the Agency's website at http://www.nlrb.gov with receipt of the entire document before midnight (i.e., 11:59 p.m. Eastern time) on the due date. See Secs. 11841 and 11846.4.

10438.3 Responsibility for Determination and Preparation of Exceptions and Cross-Exceptions

Ordinarily, the Regional Office determines whether to file exceptions or cross-exceptions. However, where a complaint was authorized by the Office of the General Counsel, normally the Division of Advice or the Office of Appeals, the Regional Office should make a timely recommendation to the branch or division involved as to filing exceptions or cross-exceptions and whether the original theory or another should be pursued.

Generally, exceptions should be filed when there is a reasonable possibility of success and the matter involved is of sufficient importance to the overall case. See OM Memo 07-84 for a detailed discussion. The standard for cross-exceptions should be substantially similar. Credibility findings are often difficult to successfully overturn and should normally be attacked only when other factors besides "demeanor" are the basis of the resolution.

Exceptions to *favorable* Administrative Law Judge findings and conclusions should be filed only where there are obvious errors, the rationale of the ALJ needs bolstering or the recommended remedy is inappropriate or inadequate.

10438.4 Preparation of Exceptions and Cross-Exceptions

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Sec. 102.46(b), Rules and Regulations sets forth the format and requirements of each exception filed and Sec. 102.46(c) addresses the format and substance of the brief in support. The format and requirements for cross-exceptions and any brief in support thereof are governed by the same considerations applicable to exceptions. Sec. 102.46(e), Rules and Regulations. These documents frame the issues presented to the Board for its consideration. The supporting brief, if filed, contains the argument and citation of authority and the exceptions shall not contain such argument and citations, unless no supporting brief is filed. Together, both documents should, at a minimum, make clear:

- Specifically, the questions of procedure, fact, law or policy to which exception is taken
- Where in the Administrative Law Judge's decision each excepted to item is found or discussed
- What transcript pages and/or exhibits support the argument being made
- Where a disputed ruling may be found in the Administrative Law Judge's decision or the transcript
- The reasons and citations of authority the party asserts to support its position

Broad general exceptions, which do not clearly identify the issues, are not acceptable. See *Howe K. Sipes Co.*, 319 NLRB 30 (1995). For example, an exception

claiming the ALJ failed to find a violation of Section 8(a)(1) or 8(b)(1)(A), without more, is insufficient. On the other hand, such an exception is sufficient if it identifies a specific complaint allegation the ALJ found without merit, or did not address, and, in tandem with the brief in support, contains the specificity described above. If no brief is filed, the supporting argument must be included in the exceptions.

10438.5 Answering Briefs and Reply Briefs

Sec. 102.46(d) and (f), Rules and Regulations provide for the content, circumstances and time to file answering briefs to exceptions. Reply briefs to answering briefs are addressed in Sec. 102.46(h).

10438.6 Requests for Oral Argument – Division of Advice Notification

A request for oral argument before the Board should be filed, if at all, along with the exceptions. The Regional Office should not request argument without clearance from the Division of Advice.

10438.7 Briefs in Support of Administrative Law Judge's Decision

Any party may file a brief in support of the Administrative Law Judge's decision. Sec. 102.46(a), Rules and Regulations. The number of copies and service are the same as exceptions.

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10442 Oral Argument Before Board

The Regional Office should notify the Division of Advice if oral argument is ordered by the Board and consult regarding who will argue, the nature of the argument and related details.

10444 Posthearing Motions

Motions filed by any party after the close of the hearing but before transfer to the Board should be filed with the Administrative Law Judge. Sec. 102.24(a), Rules and Regulations. If the posthearing motion is filed with the ALJ as a paper document, three copies must be submitted. For filing and service of paper documents, see Secs. 11840 and 11846.5. Posthearing motions to the ALJ may also be filed electronically at the Agency's website. For electronic filing and service, see Secs. 11841 and 11846.4.

After transfer to the Board, motions should be filed with the Board. If the posthearing motion is filed with the Board as a paper document, eight copies must be submitted. For filing and service of paper documents, see Secs. 11840 and 11846.5. Posthearing motions to the Board may also be filed electronically at the Agency's website. For electronic filing and service, see Secs. 11841 and 11846.4.

In all instances, a copy should be served on each of the parties, with proof of service furnished. See generally Secs. 102.24 and 102.47, Rules and Regulations. For service on represented parties of either paper filed or electronically filed documents, see Secs. 10269 and 11842.

10450–10452 BOARD ORDER

10450 Issuance

In the event no exceptions have been filed, the Board will issue an order adopting the Administrative Law Judge's findings, conclusions, and recommendations. Sec. 102.48(a), Rules and Regulations.

Sec. 102.48(b) provides that upon the filing of exceptions, cross-exceptions, or answering briefs the Board may decide the matter on the record made before the ALJ. The Board may also decide the matter after oral argument or after reopening the record to receive further evidence or may make other appropriate disposition of the case.

Decisions and Orders of the Board are served on all parties and persons and their attorneys or representatives. Sec. 102.113(a) and (f), Rules and Regulations. See also Secs. 11842.3(b) and .4(b).

Electronic Service (E-Service) of Board Decisions and Orders is also available to parties and their representatives. Registration for notice and a link to such decisions and orders is set forth at the Agency's website. See also Sec. 11846.6. However, parties or party representatives who register for E-Service will not receive service of such decisions or orders by any other means.

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10452 Motions for Reconsideration Under Sec. 102.48

The Regional Office should not file a motion for reconsideration under Sec. 102.48, Rules and Regulations, without prior clearance from the Division of Advice. The recommending memo should set forth the legal and evidentiary reasons for the recommended action and the substance of the proposed motion. The Regional Office, should, where appropriate, oppose other parties' motions for reconsideration. However, where new or novel legal problems are raised by such motions, prior clearance should be requested from Advice. Should a respondent file a motion for reconsideration with the Board, after the Regional Office has recommended enforcement, the Regional Office should notify the Division of Enforcement Litigation promptly.

11700–11886 COMMON TO ALL CASES

11700–11711 JURISDICTION

11700 Jurisdictional Standards

The Board's jurisdictional standards existing on August 1, 1959, provide the extent to which the Board might, in its discretion, decline to exercise its legal jurisdiction. Pursuant to Section 14(c)(1) of the Act, these standards may be modified, provided that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.

Although the Board has statutory authority to assert jurisdiction over all enterprises, not specifically exempted by Section 2(2) of the Act, whose operations affect interstate commerce, the Board has exercised its discretion to assert jurisdiction only over enterprises that meet monetary standards which are based on the character of the business. The standards which have the broadest application are those for retail and non-retail operations and are set forth in *Siemons Mailing Service,* 122 NLRB 81 (1959). Jurisdiction will be asserted over any retail operations with a gross volume of business in excess of $500,000 annually and which has some business, greater than de minimis, across State lines. The nonretail standard requires $50,000 of direct or indirect inflow or outflow of goods or services across State lines.

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In addition, the Board has established separate individual standards to address certain industries and types of enterprises, including health care organizations, newspapers, and educational institutions. The Agency's publication "An Outline of Law and Procedure in Representation Cases," Chapter 1, Jurisdiction, contains a more complete discussion of the Board's jurisdictional standards and their application.

Even where an employer fails to meet the appropriate Board discretionary monetary standard, the Board will assert its jurisdiction to the extent necessary to address alleged violations of Section 8(a)(4) of the Act if it can be established that the Board has statutory jurisdiction, i.e., a greater than de minimis flow of goods or services across State lines. *Pickle Bill's, Inc.,* 224 NLRB 413 (1976).

11702 Investigation

Among the earliest determinations to be made is whether the employer is an "employer" under Section 2(2) of the Act and whether the employer meets the appropriate Board jurisdictional standard. If Board jurisdiction cannot be asserted, the Regional Office should dismiss the charge or petition, absent withdrawal.

11702.1 Obtaining Commerce Information from Employer

Normally, commerce information is furnished by the employer involved. Where appropriate, a Questionnaire on Commerce Information, NLRB Form-5081, is sent to the

employer with the initial letter serving the charge or petition. If the completed questionnaire is not conclusive, further investigation must be undertaken. As an alternative to the Commerce Questionnaire, the Regional Office may, where appropriate, accept a written stipulation of facts establishing Board jurisdiction.

11702.2 Examination of Employer Records

If an employer fails or refuses to stipulate to commerce facts, or to return a properly completed questionnaire on commerce, or if the Regional Office has reason to question the accuracy of a stipulation or questionnaire, an examination of the relevant records of the employer should be undertaken.

11702.3 Commerce Affidavit

The Regional Director may wish to procure an affidavit from an official of an employer certifying the completeness and accuracy of the employer's records examined by the Regional Office relative to the question of jurisdiction. The Regional Office should obtain such an affidavit where the investigation reveals that an employer's revenues fall just short of the Board's jurisdictional standards or where the Regional Director finds compelling circumstances. As with other witnesses in appropriate circumstances, the Board agent should inform the affiant of the criminal penalties under the United States Code applicable to any one giving false information to the U.S. Government. The affidavit could contain the following statement, which appears on petitions and charges:

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> Willful false statements herein can be punished by fine and imprisonment. (U.S. Code, Title 18, Section 101)

If an employer refuses to provide such an affidavit in an R case and there exists a reasonable question as to the issue of the Board's jurisdiction, the matter should be set for hearing. However, in an unfair labor practice investigation, see Sec. 11704.2.

11702.4 Action on Basis of Commerce Investigation

All determinations on jurisdiction should be based on admissible evidence or stipulated facts, rather than bare admissions.

11704 Subpoenas for Commerce Information

11704.1 Representation Cases

In representation cases, if reasonable and practical efforts fail to develop sufficient evidence to dispose of the question of jurisdiction, production of the relevant material should be demanded by subpoena returnable either at the hearing or, in appropriate circumstances, before issuance of the notice of hearing.

The hearing officer should be prepared to establish facts concerning statutory jurisdiction and otherwise make a record appropriate for a jurisdictional determination under the rule set forth in *Tropicana Products,* 122 NLRB 121 (1958), in the event of noncooperation or noncompliance with the subpoena.

Under the Board's *Tropicana* rule, in a case where an employer refuses, on reasonable request by a Board agent, to provide information relevant to the Board's jurisdictional determination, jurisdiction will be asserted without regard to whether any specific monetary jurisdictional standard is shown to be satisfied, if the record at a hearing establishes that the Board has statutory jurisdiction.

11704.2 Unfair Labor Practice Cases

If the utilization of reasonable and practical means fails to develop sufficient evidence to dispose of the question of jurisdiction in an unfair labor practice case, a subpoena—normally a duces tecum—should be served on the employer. It should be returnable *before* issuance of complaint unless it is otherwise clear by way of prior cases, widespread repute, etc., that the Board has jurisdiction. In the latter case, the subpoena should be returnable at the C case hearing. The *Tropicana* rule described above may also be applied in similar circumstances in C case hearings. *Strand Theatre, K.I.M.V.B.A. Corp.,* 235 NLRB 1500 (1989).

11704.3 Failure to Comply with Subpoena

Where a person has failed to comply with a subpoena relating to commerce, it should be enforced (Secs. 11770 and 11799) unless the Board's *Tropicana* rule is relied on or the need for the subpoenaed material is otherwise obviated.

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11705 Other Sources for Obtaining Commerce Information

Other sources may be used as a supplement to, a check on or substitutes for information supplied directly by the employer. For example:

- Prior cases
- Employees, such as receiving/shipping department employees
- Suppliers or customers of employer
- Transportation services
- State and Federal agencies
- Commercial and financial reporting services and trade journals

11705.1 Contacts with Other Agencies

Regional Offices may directly contact field offices of other agencies for commerce information. Contact with the headquarters of other agencies should be made through Operations.

11706 Jurisdictional Standards Not Met

Where it is clear that an employer does not meet the Board's discretionary monetary standards, the case should be dismissed, absent withdrawal.

11707 Jurisdictional Policy Question

Wherever a C case involves a policy question regarding jurisdiction, it may be submitted to Advice (Sec. 11750), whether or not any party objects to the assertion of jurisdiction.

11708 Proof in Formal Proceedings

In any formal proceeding, commerce facts sufficient to determine whether the Board has jurisdiction over the dispute must be established either through factual stipulation or by record evidence.

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11709 Advisory Opinions

As set forth fully in Secs. 102.98 through 102.104, Rules and Regulations and Secs. 101.39 through 101.40, Statements of Procedure, under certain limited circumstances the Board will, at the request of a court or agency of a State or Territory, issue an advisory opinion as to whether it would assert jurisdiction over the parties to a particular controversy. (By Final Rule of January 10, 1997, Federal Register, Volume 61, Number 239, private parties may not petition for such advisory opinion.)

Whenever an agency or court of any State or Territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current monetary standards or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Unlike most other Agency matters that are initiated through the filing of documents with a Regional Office, petitions for advisory opinions must be filed directly with the Board. Although a copy of the petition should be served on the Regional Director, such does not satisfy the petitioner's obligation to serve the original on the Board.

11709.1 Regional Office Action

Upon the filing of a petition for an advisory opinion, a review of the petition and the Regional Office case files should be undertaken. If the Regional Director is in possession of facts bearing on the jurisdictional issues before the Board secured during the investigation of a prior or current C or R case and believes such facts would assist the Board in rendering its advisory opinion, the Regional Director should move to intervene in the advisory opinion proceeding. After conducting any additional investigation into jurisdiction, the Regional Director should submit to the Board the jurisdictional facts contained in the investigatory files with such motion. If the case is closed, however, no further investigation should be conducted unless the Board so requests.

In this regard, the Regional Director should:

- In accord with Sec. 102.113, Rules and Regulations, serve copies of the Regional Director's motion to intervene and a statement of jurisdictional facts on the State court or agency and the parties to the State proceedings
- Advise the parties so served that pursuant to Sec. 102.101, Rules and Regulations, they have 14 days after service thereof within which to make a response.

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11710 Declaratory Orders

The procedures for the filing of a petition for a declaratory order on a question of Board jurisdiction by the General Counsel are set forth fully in Secs. 102.105 through 102.110, Rules and Regulations and Secs. 101.42 through 101.43, Statements of Procedure. Such a petition may be filed when both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office; there is doubt whether the Board would assert jurisdiction over the employer involved; and there is no dispute as to the facts concerning commerce. See, e.g., *Latin Business Assn.,* 322 NLRB 1026 (1997).

If the Regional Director determines that a declaratory order should be sought, a proposed petition containing the facts and pleadings required by Sec. 102.106, Rules and Regulations should be submitted to the Division of Operations-Management with a transmittal memorandum setting forth the Regional Office's recommendations. Eight copies of the petition, plus additional copies for service on all parties, and an affidavit of service, original and two copies, containing the names and addresses of all parties involved in the unfair labor practice and representation cases, should also be submitted.

If the petition is deemed appropriate, the General Counsel will sign it, file it with the Executive Secretary of the Board, serve a copy of the petition on each of the parties involved, complete the affidavit of service and notify the Regional Office by means of a conformed copy of the affidavit of service.

11711 National Mediation Board Jurisdiction

At times, questions may arise as to whether a particular employer involved in an NLRB proceeding is under the jurisdiction of the Railway Labor Act (RLA), administered by the National Mediation Board (NMB). See 45 U.S.C. §§ 151 (railroads) and 181 (air carriers). Section 2(2) of the National Labor Relations Act excludes from the definition of employer "any person subject to the Railway Labor Act."

11711.1 Jurisdiction Clear

If it is clear that the NLRB has jurisdiction over the employer, the Regional Office should proceed with the processing of the case. See *United Parcel Service,* 318 NLRB 778 (1995), for circumstances in which referral to NMB is not appropriate.

Conversely, if it is clear that the employer falls under the jurisdiction of the RLA, the parties should be referred to the NMB and the charge or petition should be dismissed, absent withdrawal.

11711.2 Arguable RLA Jurisdiction

The Board's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue. *Federal Express Corp.,* 317 NLRB 1155 (1995). Thus, in such circumstances, the Regional Office should submit the case for referral either to the Executive Secretary or the Division of Operations-Management as specified below. In such cases, the written submission should contain the relevant facts as outlined in OM 90-83, concerning referrals to the NMB and should include the names, addresses, telephone numbers, fax numbers, and e-mail addresses of all parties to the proceedings and their representatives.

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(a) *C Case:* In a C case, the Regional Office should initially contact the Division of Operations-Management to informally discuss the matter. If a formal submission is required, the Regional Office should draft a letter to the Chief of Staff of the NMB for the signature of the Associate General Counsel, Division of Operations-Management. The letter should be entitled "Request for Opinion on National Mediation Board Jurisdiction under the Railway Labor Act" and should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the Parties

The letter should conclude with a statement that the question of jurisdiction is being submitted for NMB consideration. The Regional Office should also submit its case file.

(b) *R Case:* Generally, in an R case, the Regional Office should conduct a hearing to develop a record on the jurisdictional issue. If, after review of the record, the

RLA jurisdictional issue remains doubtful, the Region should prepare a memorandum directed to the Office of the Executive Secretary which should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the parties

The memorandum should not contain a legal analysis by the Regional Office but should conclude with the recommendation that the Board consider whether the issue should be submitted to the NMB. If a hearing is held, the Regional Office should forward the transcript, exhibits and all briefs on the issue with the memorandum. If the Regional Office investigates the matter without a hearing, the Regional Office should submit all evidence and position statements relating to the jurisdictional issue. The Regional Office must also issue an Order Transferring the Case to the Board, NLRB Form-4481.

11712–11720 TRANSFER, CONSOLIDATION, AND SEVERANCE

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11712 Generally

The transfer, consolidation and severance of cases are addressed at Sec. 102.33, Rules and Regulations as to charges and Sec. 102.72 as to petitions. Transfer, consolidation, and/or severance may be appropriate in order to effectuate the purposes of the Act and for cost and time considerations.

11714 Interregional Transfers

Generally, there are two categories of interregional case transfers.

11714.1 Individual Case(s) Transfer

Individual cases may be transferred from one Regional Office to another for the purposes set forth above at the time of filing or as soon thereafter as the necessity becomes apparent. In such circumstances, the Regional Offices involved in the transfer will confer about the proposed action and the reasons therefor. The sending Regional Office will then request that the Division of Operations-Management issue an order transferring the case. See Clerical Procedures, Sec. 12420. The request will contain the case name, petitioner or charging party, the present case number, and the case number to be assigned by the assisting Regional Office; a brief statement of the reasons for transfer; and an indication of whether the assisting Regional Office concurs in the proposed action.

A copy of the request will be sent to the assisting Regional Office. On receipt of the General Counsel's order of transfer, the sending Regional Office will send the file to the assisting Regional Office after notifying all parties to the case of the transfer and that future correspondence in the case should be directed to that office. The assisting Regional Office should notify the parties of the name of the agent to whom the case has been assigned.

11714.2 Interregional Assistance Program

Due to staffing considerations and/or backlogs of overage cases, cases may be transferred between Regional Offices pursuant to an interregional assistance program by which a set number of cases and/or specified counties will be transferred over a specified period of time. See OM 98-5 and OM 96-26. Under the interregional assistance program, the General Counsel may issue a blanket order setting forth the terms of the anticipated transfers.

(a) *ULP Cases:* Unfair labor practice cases susceptible to telephonic investigation are appropriate for transfer under this program. Both the sending Regional Office and the assisting Regional Office will assign case numbers to the transferred cases. Typically, the blanket transfer order will direct the assisting Regional Office to process the case through: dismissal; approval of withdrawal; issuance of a deferral letter; approval of and compliance with a settlement agreement; or a determination to issue complaint. Thereafter, the case will be returned to the sending Regional Office which will be responsible for any further processing required.

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(b) *Representation Cases:* Representation cases may be assigned to an assisting Regional Office for the limited purpose of drafting and issuing a decision after a preelection hearing. The resulting decision will issue under the originating Regional Office's case number. Generally, the assisting Regional Office's Director will sign the decision as Acting Regional Director for the originating Regional Office and will include a footnote stating that the case was transferred pursuant to the interregional assistance program for decision writing only. In some situations, the originating Regional Office's Director will sign the decision and in that event such a footnote should not be included. In either circumstance, the originating Regional Office will document that the assisting Regional Office provided decision writing assistance, along with the dates the assistance was provided, by making an entry in Case Notes in the Case Activity Tracking System (CATS). Thus, the case will remain under a single case number throughout the entire process, eliminating unnecessary paperwork and confusion. See OM 03-77.

Assisting Regional Offices may also be requested to supply hearing officers to other Regional Offices for preelection or postelection hearings. In such circumstances, the case need not be transferred between Regional Offices.

(c) *Temporary Changes to Regional Office Boundaries:* Due to staffing considerations and/or backlog of overage cases, unfair labor practice cases, and representation petitions may also be transferred pursuant to temporary changes to Regional Office boundaries. Thus, the General Counsel may issue a blanket transfer order requiring that all cases arising in specified counties of one Regional Office be filed in another designated, usually contiguous, Regional Office.

Under these circumstances, both the sending Regional Office and assisting Regional Office will assign case numbers to the transferred cases. The assisting Regional Office will retain responsibility for the processing of the cases, including litigation, if necessary, until they are closed and will then forward the case files to the sending Regional Office.

For further instruction with respect to the latter two methods of transfer, consult OM 98-5 and OM 96-26.

11716 Consolidation

Pursuant to Secs. 102.33(c) and 102.72(c), Rules and Regulations, the Regional Director has the authority to consolidate unfair labor practice and representation cases, respectively, which are pending in the same Regional Office. A consolidation normally does not take place while the cases involved are in the investigative stages, but occurs upon the institution of formal proceedings or thereafter.

The following are examples of circumstances where cases may be consolidated:

- C cases where the respondent is the same in each case, where multiple respondents are sufficiently related or where the fact situations are sufficiently related
- R cases where the employer is the same in each case or multiple employers are sufficiently related
- A postelection R case with a C case, where the two cases involve sufficient issues in common

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The authority for the consolidation of cases pending in more than one Regional Office rests with the General Counsel; the Division of Operations-Management should be consulted on such issues.

11718 Severance

Pursuant to Secs. 102.33(c) and 102.72(c), Rules and Regulations, the Regional Director has the authority to sever unfair labor practice charges and representation cases, respectively, which have been previously consolidated by the Regional Office. Where the General Counsel has authorized consolidation, clearance should be obtained from the Division of Operations-Management before severing cases.

11720 Motions to Consolidate or Sever

11720.1 Unfair Labor Practice Cases

Pursuant to Secs. 102.33(d) and 102.24, Rules and Regulations, motions by parties to consolidate or sever unfair labor practice cases after the issuance of complaint should be filed with the Chief Administrative Law Judge, if prior to hearing, or with the ALJ, if during hearing.

11720.2 Representation Cases

Motions by the parties to consolidate or sever representation cases should be filed in accordance with Sec. 102.65, Rules and Regulations.

11730–11734 CONCURRENT R (REPRESENTATION) AND C (ULP) CASES

To the extent relevant, the principles of these Sections should also be applied to situations involving UD petitions.

These sections apply to preelection situations. They generally do not deal with those postelection situations in which challenges and/or objections and related unfair labor practice charges are being processed. Such situations are discussed in Secs. 11407 and 11420.1.

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For special procedures where there are concurrent 8(b)(7) cases, see Secs. 10240–10248.

11730–11731 BLOCKING UNFAIR LABOR PRACTICE CHARGES; EXCEPTIONS

11730 Blocking Charge Policy—Generally

The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted. However, there are significant exceptions to the general policy of having a charge "block" a petition. Accordingly, the filing of a charge does not automatically cause a petition to be held in abeyance.

The exceptions to the blocking charge policy are set forth in detail in Sec. 11731. Where the Regional Director is giving consideration to these exceptions while implementing the blocking charge policy, it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question

concerning representation raised by a petition. Rather, the blocking charge policy is premised solely on the Agency's intention to protect the free choice of employees in the election process.

11730.1 Types of Blocking Charges

Blocking charges fall into two broad categories. The first, called Type I charges, encompasses charges which allege conduct that only interferes with employee free choice. The second, called Type II charges, encompasses charges which allege conduct that not only interferes with employee free choice but also is inherently inconsistent with the petition itself. After investigation of the latter charges and a determination as to their merit, such charges may also cause a petition to be dismissed.

11730.2 Type I Charges: Charges That Allege Conduct That Only Interferes With Employee Free Choice (Request to Proceed May be Honored)

When the charging party in a pending unfair labor practice case is also a party to a petition, and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted, and no exception (Sec. 11731) is applicable, the charge should be investigated and either dismissed or remedied before the petition is processed. Unless Type II conduct is involved, a request to proceed by the charging party (Sec. 11731.1) may be honored in these cases. *Columbia Pictures Corp.,* 81 NLRB 1313, 1314 (1949); *Carson Pirie Scott & Co.,* 69 NLRB 935, 938–939 (1946); *United States Coal & Coke Co.,* 3 NLRB 398, 399 (1937); see also *Holt Bros.,* 146 NLRB 383, 384 (1964).

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11730.3 Type II Charges: Charges that Affect the Petition or Showing of Interest, that Condition or Preclude a Question Concerning Representation, or that Taint an Incumbent Union's Subsequent Loss of Majority Support (Request to Proceed May Not be Honored)

Some unfair labor practice charges allege conduct which, if proven, would not only have a tendency to interfere with the free choice of employees in an election, but also would be inherently inconsistent with the petition itself. Regardless of whether such charges are filed by a party to the petition or by a nonparty, and regardless of whether a request to proceed (Sec. 11731.1) is filed, such charges block a related petition during the investigation of the charges, because a determination of the merit of the charges may also result in dismissal of the petition. Inherently inconsistent charges include, but are not limited to, the situations described below in Secs. 11730.3(a) through (c).

11730.3(a) Charges that Affect the Petition or Showing of Interest

These are Section 8(a)(1) and (2) or 8(b)(1)(A) charges that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition. If meritorious, such a charge may invalidate the petition or some or all of the showing of interest. As a consequence, the petition may be dismissed. Sec. 11733.2(a)(1).

Examples:

- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the initiation of a RD or UD petition.
- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the support of a RD or UD petition, if the showing is reduced below 30 percent after the tainted showing is subtracted.
- A finding of merit to an 8(a)(2) charge that alleges employer representatives assisted in the showing of interest obtained by a labor organization, if the showing is reduced below 30 percent after the tainted showing is subtracted.
- A finding of merit to an 8(b)(1)(A) charge that alleges a labor organization's showing of interest was obtained through threats or force, if the showing is reduced below 30 percent after the coerced showing is subtracted.
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NOTE: See Sec. 11028.2 for the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

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11730.3(b) Charges that Condition or Preclude a Question Concerning Representation

These are Section 8(a)(2) and (5), 8(b)(3), or other charges which allege violations that involve recognition issues. These charges include allegations of 8(a)(5) or 8(b)(3) failure to recognize or bargain, or 8(a)(1) and/or (3) violations requiring a remedial bargaining order, or 8(a)(2) unlawful recognition. A determination of merit in such a charge may impose conditions upon or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries,* 201 NLRB 197 (1973)). Sec. 11733.2(a)(2).

Examples:

- An 8(a)(5) or 8(b)(3) charge, which seeks to establish, to continue or to reestablish a bargaining relationship and for which the remedy is an affirmative bargaining order, may require dismissal of a related petition upon a finding of merit to the charge.
- An 8(a)(1) and/or (3) charge, in which a remedial bargaining order is being sought, seeks to establish a bargaining relationship, and would require dismissal of a related petition upon a finding of merit to the charge. *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).
- An 8(a)(2) charge that seeks to disestablish a bargaining relationship imposes a condition upon the question concerning representation that the

petition seeks to raise and must be resolved prior to processing the petition. In this situation, a determination of no merit, permitting the challenged bargaining relationship to continue, may, because of contract or recognition bar principles, require dismissal of a related petition which seeks to establish a new bargaining relationship. A determination of merit to the 8(a)(2) charge may cause the petition to continue to be blocked, until resolution of the charge by the Board, since the bargaining relationship must be disestablished before the petition can be processed. EXCEPTION: Sec. 11731.1(c)(1).

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NOTE: Not all merit determinations in charges alleging 8(a)(2) and (5) or 8(b)(3) violations would require dismissal of the petition. If the remedy for the 8(a)(2) and (5) or 8(b)(3) conduct would not have an effect on the bargaining relationship and thus does not condition or preclude the existence of the question concerning representation sought to be raised by the petition, and if other Type II charges are not involved (Secs. 11730.3(a) and (c)), the petition would not be subject to dismissal.

Examples:

- Remedying a meritorious 8(a)(2) allegation of limited assistance by a low-level supervisor does not necessarily require disestablishment of a bargaining relationship.
- Remedying meritorious allegations of 8(a)(5) or 8(b)(3) unilateral change or failure to furnish information does not necessarily require an affirmative bargaining order.
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Accordingly, these kinds of charges should be viewed as type I charges that allege only interference (Sec. 11730.1(a)), notwithstanding their allegations of 8(a)(2) and (5) or 8(b)(3) conduct.

FURTHER NOTE: An 8(a)(2) and (5) or 8(b)(3) charge involving recognition conduct that postdates the filing of the petition does not warrant dismissal of the petition, since the petition was already on file when the later allegedly unlawful conduct occurred. Similarly, such conduct that postdates the obtaining of the showing of interest and did not affect the filing of the petition does not warrant dismissal of the petition. Hence, these kinds of charges should be viewed as Type I charges that allege only interference (Sec. 11730.1(a)). *Empresas Inabon, Inc.,* 309 NLRB 291 (1992) (also *Union de la Construccion v. NLRB,* 10 F.3d 14, 16 (1st Cir. 1993)); *Celebrity, Inc.,* 284 NLRB 688 (1987).

11730.3(c) Charges that Taint an Incumbent Union's Subsequent Loss of Majority Support

These charges can be of any kind, other than a charge that affects the circumstances surrounding the petition or the showing of interest or a charge that

involves a general refusal to recognize and bargain with the union. These charges raise the issue of a causal relationship between the violations alleged and the subsequent expression of employee disaffection with an incumbent union. A finding of merit to such a charge and of a causal connection between the violations alleged and the employee disaffection would warrant dismissal of a petition that was filed based upon that disaffection. Sec. 11733.2(a)(3).

Example:

An 8(a)(1) statement to a group of represented employees that the employer intends to operate in the future as a nonunion employer may require the dismissal of a petition that follows, if upon a finding of merit to the charge a causal relationship is established between the statement and the subsequent expression of employee disaffection with the incumbent union which is used to support the petition. *Williams Enterprises,* 312 NLRB 937, 939 (1993).

In *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Board concluded that a hearing should be held to resolve genuine factual issues as to whether there was a causal nexus between alleged unfair labor practices and the filing of a decertification petition before the dismissal of such a petition.

Accordingly, in such circumstances the Regional Office should conduct a preliminary administrative investigation and proceed as follows:

(a) If no evidence of causal nexus exists, e.g., the showing of interest was obtained prior to the alleged unlawful conduct or the disputed conduct was de minimus or isolated:

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- No further consideration should be given to dismissal of the petition
- The decision to treat the charge as blocking the processing of the petition should be reconsidered

(b) If evidence may support a finding of a causal nexus:

- Contact the Division of Operations-Management as to the appropriate action including a possible hearing on the causal nexus issue
- Advise the Office of Representation Appeals of the issue
- Continue to treat the charge as blocking the processing of the petition

11730.4 Decision Whether to Hold Petition in Abeyance

Regardless of whether the charge is already pending at the time of the filing of the petition or is filed after investigation of the petition has already begun, the Regional Director should decide whether the general policy of holding the petition in abeyance should be applied (Sec. 11730) or if one of the exceptions in Sec. 11731 applies. In implementing the blocking charge policy, the Regional Director should assess, throughout the steps of processing the charge and the petition, whether the charge blocks the petition.

If at any time during or after investigation the Regional Director establishes that there was no causal relationship between the unfair labor practice allegations and the decertification petition, the Regional Director should not give further consideration to dismissing the petition and should reconsider whether the charge should continue "blocking" the processing of the petition.

11730.5 AC and UC Cases

Although the blocking charge policy applies to AC and UC petitions, in most situations the charge and the petition raise significant common issues which may better be resolved by processing the UC or AC petition. Secs. 11490.3 and 11731.4.

11730.6 Period of Pendency of Charge

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A charge is pending at all stages up to and including an administrative decision to dismiss or a withdrawal, on the one hand, or, on the other, up to and including a court judgment with which there has not been full compliance. However, also see Sec. 11732 regarding the impact of charges that are to be or have been dismissed.

11730.7 Informing Parties

The Board agent handling the matter should inform the parties of any determinations made with regard to concurrent charges and petitions and the reasons therefor. If any party requests the reasons in writing, the Regional Director should promptly provide them. If the determination is to hold the petition in abeyance, the letter should also inform the parties of their right to obtain review by the Board of this determination under Sec. 102.71 of the Rules and Regulations.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

11730.8 Notification to Board

If a blocking charge is filed at a time when a petition is pending before the Board in Washington, the Executive Secretary should be notified of the filing, as well as of any request to proceed that may be received. All subsequent relevant developments or dispositions of the unfair labor practice charge should also be reported to the Executive Secretary.

11731 Exceptions to Blocking Charge Policy

Exceptions to the Agency's general policy to block petitions are described below in Secs. 11731.1 through .6 as Exceptions 1 through 6. As noted in Sec. 11730.4, their applicability may be invoked or reconsidered at any time during the pendency of the petition.

NOTE: Exceptions 2 through 6 apply to Type II as well as Type I charges. The fact that a Type II charge may ultimately involve dismissal of the petition should be an element in the Regional Director's consideration as to whether an exception applies.

11731.1 Exception 1: Request to Proceed

11731.1(a) Receipt of Request to Proceed (Type I Charge)

A petition may be processed notwithstanding the pendency of a Type I charge (Sec. 11730.2) in a related C case, subject to the limitations set forth below, if the party filing the charge requests that the petition proceed. Form NLRB-4551 may be used for this purpose. On receipt of a request to proceed and if otherwise appropriate, the Regional Director may proceed with action on the petition. If the matter is before the Board for any reason, the Executive Secretary should be so advised.

11731.1(b) Rescission of Request to Proceed

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Should a party seek to rescind a request to proceed and once again suspend action on the petition, the reasons for the change should be ascertained. The Regional Director should rule on the request to rescind, applying the same considerations outlined in Sec. 11730 regarding the Agency's blocking charge policy. The charging party's prior willingness to attempt to continue with processing the petition should not, in and of itself, be viewed as a reason not to honor the charging party's subsequent attempt to rescind its request to proceed. It may contend, for example, that with the passage of time the unfair labor practices have had a tendency to interfere with the free choice of employees in an election. On the other hand, if the Regional Director determines, upon consideration of all the relevant factors, not to grant approval of the rescission, processing of the petition should continue.

The parties should be appropriately informed. Sec. 11730.7.

11731.1(c) Where Type II Charges are Involved

A request to proceed should not be approved in the face of a Type II charge. Sec. 11730.3. Where such allegations are involved, they should be disposed of before a concurrent petition is processed, unless other exceptions apply (Secs. 11731.2 through .6).

11731.1(c)(1) Section 8(a)(2) *Carlson* Waiver

In cases in which the Board has entered an order requiring the respondent employer to withdraw and withhold recognition from the assisted union unless and until it has been certified, the Regional Director may honor a waiver whereby the petitioner affirmatively indicates a willingness to withdraw an 8(a)(2) assistance charge in the event

the allegedly assisted union is certified. *Carlson Furniture Industries,* 157 NLRB 851 (1966). In the event all parties reach an agreement that accomplishes the same purpose as a Board order disestablishing a bargaining relationship, thus removing recognition or contract bar as an issue from the processing of the petition, the Regional Director may honor a waiver from the petitioner modeled on *Carlson Furniture*.

11731.1(c)(2) Withdrawal and Attempted Reinstatement of Charge

A party which requests withdrawal of a refusal-to-bargain charge or of a domination of or assistance to union charge, in order to unblock a R case (in other words, which attempts to accomplish by withdrawal what it cannot accomplish by a request to proceed), should be advised that reinstatement of the charge might not be permitted after an election. *Fernandes Supermarkets,* 203 NLRB 568 (1973).

11731.2 Exception 2: Free Choice Possible Notwithstanding Charge

There may be situations where, in the absence of a request to proceed (Secs. 11731.1(a) and .1(c)(1)), the Regional Director is of the opinion that the employees could, under the circumstances, exercise their free choice in an election and that the R case should proceed notwithstanding the existence of a concurrent Type I or Type II unfair labor practice case and the absence of a request to proceed or a waiver.

Factors: The following are among the factors to be considered under this section.

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(a) The character, scope, and timing of the conduct alleged in the charge, and the conduct's tendency to impair the employees' free choice

(b) The size of the work force relative to the number of employees involved in the events or affected by the conduct alleged in the charge

(c) Whether the employees were bystanders to or the actual targets of the conduct alleged in the charge

(d) The entitlement and interest of the employees in an expeditious expression of their preference regarding representation

(e) The relationship of the charging parties to labor organizations involved in the representation case

(f) The showing of interest, if any, presented in the R case by the charging party

(g) The timing of the charge.

Also see Sec. 11731.6 for the considerations that apply when a charge is filed before a scheduled election.

11731.3 Exception 3: Charges Otherwise Appropriate for Deferral Under *Collyer* Or *Dubo*

In situations where the processing of a representation petition is, or may be blocked by unfair labor practice charges that are otherwise appropriate for deferral under *Collyer* or *Dubo*, Regional Offices should conduct a complete investigation of the charges and reach a determination on the merits. If the charges are without merit, Regions should dismiss them, absent withdrawal, and unblock the representation case. If

the investigation discloses sufficient merit to proceed to a complaint, the parties should be so advised, and given an opportunity to enter into an informal settlement agreement resolving the allegations. In settling the case, the Region must consider the implications for the representation case. See OM Memo 07-69, Sec. 11733.2. Absent settlement, and prior to the issuance of complaint, the matter should be forwarded to the Division of Advice for consideration of whether deferral is appropriate, and whether *Saint Gobain Abrasives, Inc.,* 312 NLRB 937 (1993), is implicated. See OM Memo 08-74.

11731.4 Exception 4: Petition and Charge Raise Significant Common Issues; UC and AC Petitions

There are situations where the Type I or Type II alleged unfair labor practices are so related, at least in part, to the unresolved question concerning representation sought to be raised by the petition that the processing of the petition will resolve significant common issues. *Panda Terminals,* 161 NLRB 1215, 1223–1224 (1966); *Krist Gradis,* 121 NLRB 601, 615–616 (1958). Thus, it may be appropriate to conduct a hearing and issue a decision to resolve an issue, such as supervisory status, that is relevant to both the petition and the unfair labor practice case. Sec. 11228. Where appropriate, the conditions of Exception 2 (Sec. 11731.2) should also be taken into account, especially with respect to proceeding to an election.

UC and AC Petitions: When a UC or AC petition and an 8(a)(2) or (5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Sec. 11490.3. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, unless the potential for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case.

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11731.5 Exception 5: Scheduled Hearing

In situations where a R case hearing has already been scheduled when a Type I or Type II unfair labor practice charge is filed and time does not permit determination of possible merit of the charge, the Regional Director may proceed with the hearing in the R case. A separate determination should then be made by the Regional Director pursuant to Exceptions 2, 3, and 4 above (Secs. 11731.2, .3, and .4) with regard to issuing a decision and/or conducting an election.

11731.6 Exception 6: Scheduled Election

When an election has already been scheduled and thereafter a Type I or Type II unfair labor practice charge is filed too late to permit adequate investigation before the scheduled election, the Regional Director may, in his/her discretion:

(a) Postpone the election pending disposition of the charge; or

(b) Hold the election as scheduled and impound the ballots until after disposition of the charge; or

(c) Conduct the election, issue the tally of ballots and, in the absence of objections, issue a certification; and then proceed to investigate the charge.

Factors: The following are among the factors to be considered under this exception:

(1) The extent to which substantial evidence in support of the allegations is submitted by the charging party with its charge

(2) The passage of time between the alleged conduct and the filing date of the charge

(3) The seriousness of the allegations and the evidence submitted with the charge as to its dissemination.

Relevant factors recited in Exception 2 (Sec. 11730.2) may also be considered.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

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11732–11733 FINDING AS TO MERIT OF UNFAIR LABOR PRACTICE CHARGE

11732 Charge Found Not to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge lacks merit and is to be dismissed, absent withdrawal, the Regional Director should proceed with the processing of the petition.

Where the situation involves a Type I charge (Sec. 11730.2), the Regional Director should proceed with the petition as if there were no concurrent charge, even though the dismissal of the charge is either pending or on appeal, unless, in his/her discretion, he/she concludes that further processing of the petition should await the results of the appeal.

Where the situation involves a Type II charge (Sec. 11730.3) and the dismissed charge is either pending or on appeal, the Regional Director may await the results of an appeal before processing or dismissing the petition, as appropriate, or he/she may proceed immediately.

If an appeal of the dismissal of the charge is filed with the Office of Appeals, that office should be immediately notified of the pending concurrent petition and its current status. If subsequent to this notification an election is scheduled in the petition, separate notification of such should be sent to the Office of Appeals. If an election is to be conducted before the Office of Appeals has ruled on the appeal of a Type II charge, the ballots ordinarily should be impounded pending a ruling from the Office of Appeals.

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11733 Charge Found to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge has merit and that a complaint should issue, absent settlement, the Regional Director should determine whether further processing of the petition should be blocked by the charge or the petition should be dismissed. The parties should be informed accordingly. Sec. 11730.7. For the purposes of that determination, the Regional Director shall accept the allegations to be set forth in the complaint as true.

11733.1 Blocking of Petition Warranted

If the Regional Director determines that the petition should be blocked by a Type I charge, because the impact of the meritorious unfair labor practices would have a tendency to interfere with employee free choice in an election, were one to be conducted, he/she should hold the petition in abeyance until disposition of the charge, whereupon the processing of the petition may be resumed. Absent unusual circumstances, Exceptions 1 through 6 to the foregoing, set forth in Secs. 11731.1 through .6, are equally applicable after a merit determination has been made in the charge.

11733.2 Dismissal of Petition Warranted

11733.2(a) Types of Violations Found

11733.2(a)(1) Violations that Affect the Petition or Showing of Interest

If the Regional Director finds merit to an 8(a)(1) and (2) or 8(b)(1)(A) charge that challenges the circumstances surrounding a petition or the showing of interest submitted in support of a petition (Sec. 11730.3(a)) and the alleged conduct, if proven, directly affects a petition or its showing of interest to an extent that the showing is insufficient, then the petition should be dismissed with a dismissal letter setting forth the specific connections between the alleged unfair labor practice allegations and the petition, subject to a request for reinstatement by the petitioner after final disposition of the C case. See Sec. 11733.2(b), OM Memo 07-69, *Williams Enterprises*, 312 NLRB 937, 939 (1993), and *Canters Fairfax Restaurant, Inc.*, 309 NLRB 883, 884 (1972). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB 227 (2007), and OM Memo 07-69.

NOTE: Sec. 11028.2 discusses the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

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11733.2(a)(2) Violations That Condition or Preclude a Question Concerning Representation

If the Regional Director finds merit to charges involving violations of Sections 8(a)(1), (2), (3), (5) or 8(b)(3), and the nature of the alleged violations, if proven, would condition or preclude the existence of a question concerning representation, as described in Section 11730.3(b), the petition should be dismissed with a dismissal letter setting forth the specific connections between the alleged unfair labor practice allegations and the petition, subject to a request for reinstatement by the petitioner after final disposition of the charge. Sec. 11733.2(b) and *Williams Enterprises*, 312 NLRB 937, 939 (1993). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB 227 (2007), and OM Memo 07-69.

11733.2(a)(3) Violations That May Affect an Incumbent Union's Subsequent Loss of Majority Support

This section applies to an unfair labor practice charge of any kind other than one that directly challenges the circumstances surrounding the petition or the showing of interest or one that involves a general refusal to recognize and bargain with the union. If the Regional Director finds merit to an unfair labor practice charge of another kind than described in the preceding sentence, and there is specific proof of a causal relationship between the unfair labor practice allegations and ensuing events indicating that alleged unfair labor practices caused a subsequent expression of employee disaffection with an

incumbent union, then the Regional Director should dismiss a petition that was filed based upon that disaffection**.** Prior to making such a decision, the Regional Office may be required to conduct a hearing on the causal nexus between the allegedly unlawful conduct and the filing of the petition. See Sec. 11730.3(c). The petition is subject to a request for reinstatement by the petitioner after final disposition of the C case. Sec. 11733.2(b). *Williams Enterprises,* 312 NLRB 937, 939 (1993). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB No. 23 (2007), and OM 07-69.

11733.2(b) Dismissal of Petition

The dismissal letter (Sec. 11102) or order dismissing the petition should set forth the basis for the action, including the reasons that the unfair labor practice findings would affect further processing of the petition. The specific connection between the conduct alleged as unfair labor practices and the petition should be clearly articulated. If more than one basis for dismissal is arguably present, all such bases ordinarily should be stated. For example, conduct, such as direct dealing, which the investigation revealed was causally related to the employee disaffection upon which the petition was based (Sec. 11730.3(c)), may also be conduct the remedy for which—bargaining—precludes a question concerning representation (Sec. 11730.3(b)); the petition should be dismissed for both reasons. The parties should be informed of the right to obtain review by filing a request for such with the Board. Sec. 102.71, Rules and Regulations. Where there is provision for reinstatement of the dismissed petition on application of the petitioner after final disposition of the unfair labor practice case, the dismissal letter or order dismissing the petition should so advise the petitioner. A petition is subject to reinstatement only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit. An application for reinstatement under any other circumstances should be denied.

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In order to assure notification to the petitioner of the disposition of the unfair labor practice proceeding, the petitioner should be made a party in interest in the unfair labor practice proceeding, with an interest limited solely to receipt of a copy of the order or other document that operates to finally dispose of the proceeding and the dismissal letter or order dismissing the petition should so advise.

11734 RESUMPTION OF PROCESSING OF PETITION

11734 Resumption of Processing of Petition Upon Disposition of Charge

Processing of a petition held in abeyance during the pendency of an unfair labor practice charge may be resumed upon the disposition of the charge. Where the charged party or respondent in the unfair labor practice proceeding has taken all action required by a settlement agreement, administrative law judge's decision, Board Order, or court judgment, except that the full period for posting any required notice has not passed, certain preelection action with respect to the R case may be taken, whether or not the charging party requests that the R case proceed. Thus:

(a) A hearing may be held

(b) An election agreement may be approved

(c) An order dismissing petition or a decision and direction of election may be issued.

As noted, these preelection actions may be taken in the absence of a request to proceed.

ELECTION: In the event the charging party wishes to proceed to an election during the posting period, a written waiver must be obtained from the charging party, stating that the unremedied unfair labor practices referred to in the posted notice may not constitute grounds on which the Board may set aside the election.

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Absent such a waiver, an election should not be held until the posting period has expired.

EXCEPTION: When the remedy requires that recognition of an unlawfully assisted union be withdrawn and withheld unless and until that union has been certified by the Board, neither a RC petition filed by that union nor a RM petition should be entertained until after the expiration of the posting period. The showing of interest submitted in support of a petition filed by that union must be dated after expiration of the posting period.

11740 PRIORITY OF CASE PROCESSING

11740 Priority of Cases—Impact Analysis

Recognizing that limited resources prevent the processing of all cases on a first in, first out basis, the Agency has developed an Impact Analysis system. Impact Analysis assesses representation, unfair labor practice and compliance cases in terms of their relative impact on the public and their significance in effective achievement of the Agency's mission. Under Impact Analysis, cases are categorized as Category III, exceptional impact; Category II, significant impact; or Category I, important impact.

Since cases in a higher category should receive greater resources and have shorter time goals than cases in a lower category, categorization should be made as soon as possible, not later than 1 week from filing, and should be revised as warranted.

The General Counsel determines the type of cases which belong in each Impact Analysis category and establishes different time goals for the disposition of ULP cases within each category. These goals are most stringent for Category III cases and least stringent for Category I cases. The specific types of cases which belong in each category and the time goals are reviewed periodically and may be modified, depending upon a variety of factors, such as case intake, staffing, and budget. GC Memo 02-02.

The following guidelines are intended only to assist Regional Offices in exercising discretion as to the appropriate differentiation of cases; unusual situations undoubtedly will arise which will warrant placement in a category different from that which would ordinarily appear appropriate. As a guiding principle, Regional Offices should resolve any doubts about the appropriate category by selecting the higher category.

11740.1 Category III Cases: Exceptional Impact

Category III (Exceptional) cases involve the allegations most central to achievement of the Agency's mission.

Illustrations include:

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- 10(j) and (l) cases
- All representation cases involving the resolution of a question concerning representation, i.e., RC, RD, and RM petitions, as well as any postelection cases
- All blocking charge cases
- All cases in which the establishment or continuation of a union's status as a 9(a) representative is at stake. This would include: cases involving *Gissel* bargaining orders; the relocation, transfer or elimination of a bargaining unit; test of certification summary judgment; and alleged misconduct designed to frustrate a union's ability to obtain an initial contract after certification
- Cases involving the resolution of whether a strike or lockout is based on economic or unfair labor practice considerations
- Any case involving the issue of whether a strike is unprotected or the status of strikers or the employment status of significant numbers of employees
- 8(g) cases
- 8(a)(1), (3), (4), or (5) permanent or indefinite loss of employment cases

- 8(b)(2) cases where individuals have been denied work opportunities because of the union's alleged discrimination, including hiring hall refusal to refer allegations
- National cases or cases of unusually high visibility.

11740.2 Category II Cases: Significant Impact

Category II (Significant) cases are all other cases, except for those included in Categories III and I. They typically involve conduct which affects core rights under the Act and for which there is no alternative remedy. In addition, this category includes those cases involving 8(d) duties where the conduct does not imperil the bargaining relationship itself.

Illustrations include:

- 8(a)(1), (3), and (4) discrimination cases which do not involve a permanent or indefinite loss of employment
- Refusal to hire cases
- Nonsection 10(j) picket line violence or misconduct cases
- All Representation cases which do not involve the resolution of a question concerning representation, i.e., UC, UD, AC, and WH cases
- 8(a)(5)/8(b)(3) refusal to provide information cases
- 8(a)(5) unilateral change allegations
- 8(b)(1)(A) duty of fair representation cases
- Independent 8(a)(1) allegations

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11740.3 Category I Cases: Important Impact

Category I (Important) cases make up the remainder of the Agency's work. They either are deferrable or involve conduct for which alternative means of redress are available to the charging party.

Illustrations include:

- *Collyer/Dubo* and other deferral cases
- 8(a)(5) pension and welfare contribution collection cases. See GC Memo 02-05

11740.4 Priority of Cases Within Each Category

In determining which of several cases should be given priority within the particular Impact Analysis category, consideration should be given to the particular facts of each case, the nature of the alleged violation, its impact on the parties or the public, the type of relief indicated, and any other factors that would affect the policies of the Act. Generally, cases in which injunctive relief is being considered will take precedence over other matters, even in the same category.

11750–11754 SUBMISSIONS TO HEADQUARTERS

This section sets forth the general procedures regarding the submission of unfair labor practice and representation case issues to the appropriate office in headquarters. There are also other sections of the Manual regarding specific matters, including Section 10(j), 10(k), and compliance issues, in which advice, clearance or authorization should or must be sought.

11750 Unfair Labor Practice Cases

11750.1 Submissions to Division of Advice

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Although the Regional Director generally has the responsibility to determine whether an issue warrants submission to the Division of Advice, the General Counsel periodically issues guidelines which establish that certain issues should be submitted to Advice. GC Memo 07-11 sets forth in detail such issues, which fall under the following categories:

- Cases requiring a decision by the General Counsel because of the absence of precedent or because they involve identified policy priorities
- Cases requiring development of a litigation strategy in light of adverse circuit court law or new Board precedent
- Cases presenting various difficult legal issues
- Matters traditionally requiring Advice clearance

In addition, certain other matters, as set forth in Secs. 11753.1(a) and 11753.2(a), should also be submitted to the Division of Advice. Credibility issues should not normally be submitted, but rather should be resolved by the Regional Director.

The Regional Office should notify the parties that the case is being submitted to the Division of Advice and the specific issue(s) involved. If the parties have not submitted a position on the advice issues, they should be invited to do so promptly. However, the Regional Office must not communicate its recommendation to the parties.

With regard to cases interregional in scope, the Regional Office should consult with the Division of Operations-Management prior to submitting the case to the Division of Advice.

In all cases pending in the Division of Advice, any subsequent developments (such as withdrawals, settlements and private adjustments) should be promptly reported by the Regional Office.

If any skip counsel issues arise during an investigation, the Regional Office's submission to the Division of Advice should note the information listed in Sec. 10058.

11750.2 Format and Content of Request for Advice

All issues submitted should be clearly posed in a memorandum captioned: Request for Advice. Although the Request for Advice should be transmitted to the Divisions of Advice and Operations-Management electronically, the entire file should be forwarded to the Division of Advice promptly thereafter. The Request for Advice should be arranged in the following order:

- Charge
- Issues: The Regional Office should clearly note the specific issues on which advice is sought.
- Facts: The Regional Office should set forth a concise statement of relevant facts including credibility resolutions. If a Regional Agenda Minute is sufficiently detailed, it can be submitted as an attachment to the Advice memo rather than repeating the facts in the Request for Advice.
- Regional Office's Position: The Regional Office should set forth its position on each issue, noting any dissents.
- Analysis: The Regional Office should set forth its analysis of the strengths and weaknesses of the arguments on either side.
- Related Cases.

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11750.3 Requests by Division of Advice for Further Investigation

All cases in which the Division of Advice requests further investigation should receive priority treatment consistent with their categorization under Impact Analysis. The information requested should be transmitted by the most expeditious means. Advice should be notified of any undue delay and the reasons therefor, with an estimate of the additional time required.

11750.4 Confessions of Judgment

Regional Offices should confer with the Contempt Litigation and Compliance Branch when use of a Confession of Judgment is contemplated. See OM Memo 09-58.

11751 Suits Against the Agency and Requests for Intervention

The Regional Office should promptly inform the Special Litigation Branch whenever the Agency or its agent has been sued or upon a request that the Agency intervene in private litigation. Pleadings and papers, as received, should be forwarded as expeditiously as appropriate to the Special Litigation Branch with a copy to the Division of Operations-Management.

11752 Precomplaint Submissions to Division of Operations-Management

- Clearance must be sought before naming an attorney in a complaint as a party respondent, an agent of the respondent in general, an agent of the respondent in the commission of unfair labor practices, or for any other purpose. See Sec. 10264.5.
- In cases in which the alleged unfair labor practices also arguably violate the Occupational Safety and Health Act, the Regional Office should refer to GC Memo 75-29 and GC Memo 79-4 for instructions regarding submission to the Division of Operations-Management
- In cases in which the alleged unfair labor practices also arguably violate the Federal Mine Safety and Health Act of 1977, the Regional Office should refer to GC Memo 80-10 for instructions regarding submission to the Division of Operations-Management
- In cases in which the alleged unfair labor practice charge also involves the Americans with Disabilities Act (ADA), the Regional Office should consult with the Division of Operations-Management
- Misconduct by attorneys or other representatives should, where appropriate, be referred to the Division of Operations-Management. Sec. 102.177(e), Rules and Regulations and OM Memos 97-2 and 01-80
- Certain settlements amounting to less than 80 percent or more than 100 percent of net backpay require clearance from the Division of Operations-Management as follows:
    - All formal and informal Board settlements, Sec. 10592.4 and .8 of the Compliance Manual
    - Non-Board settlements in cases where the Regional Office has decided to issue complaint, Sec. 10592.4 and .8 of the Compliance Manual.

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11753 Postcomplaint, Posthearing, and Compliance Submissions

11753.1 Postcomplaint Submissions

(a) *Division of Advice*

Authorization from the Division of Advice should be obtained before:

- Issuing postcomplaint investigative subpoenas in certain situations. See Sec. 11770.4 for more detailed guidance.
- Issuing trial subpoenas if there are foreseeable impediments to enforceability, such as where the witness may assert a recognized privilege
- Seeking subpoena enforcement where previously unforeseen impediments arise. Sec. 11790
- Denying a private party's request for subpoena enforcement. Sec. 11790.1

(b) *Division of Operations-Management*

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Authorization from the Division of Operations-Management should be obtained before introducing or agreeing to the introduction of confidential Agency documents. Sec. 10398.

Misconduct by attorneys or other representatives should, where appropriate, be referred to the Associate General Counsel, Division of Operations-Management. Sec. 102.177(e), Rules and Regulations and OM 97-2 and OM 01-80.

11753.2 Posthearing Submissions

(a) *Division of Advice*

Authorization from the Division of Advice should be sought in the following matters:

- Before deciding whether or not to file exceptions where the Administrative Law Judge's decision raises previously unforeseen novel or complex policy issues. Sec. 10430.1
- Where complaint was authorized by the Division of Advice, the Regional Office should make a timely recommendation to Advice regarding exceptions
- Before requesting oral argument before the Board. Sec. 10438.6
- Where oral argument is ordered by the Board, to determine who will argue and the nature of the argument. Sec. 10442.

- Before filing a motion for reconsideration of a Board order. Sec. 10452
- Before filing an opposition to another party's motion for reconsideration where new or novel issues are involved. Sec. 10452

(b) *Office of Appeals*

Where complaint was authorized by the Office of Appeals, the Regional Office should make a timely recommendation to Appeals regarding exceptions.

11753.3 Compliance

For any issues regarding whether clearance is necessary from the Division of Operations-Management with respect to compliance with a settlement agreement, administrative law judge's decision, Board order or court judgment, the appropriate section in the Compliance Manual should be consulted.

11753.4 Equal Access to Justice Act (EAJA)

When a Region is uncertain regarding Agency policy with respect to an EAJA issue, the matter should be submitted to the Division of Advice.

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11754 Representation Cases

11754.1 Generally

All requests for advice in representation cases except as set forth in Sec. 11754.2 should be directed to the Board through the Office of the Executive Secretary. Normally, requests for advice with respect to substantive law will not be submitted to the Board as the Regional Director is expected to apply Board precedent and to decide questions of statutory interpretation. Sec. 11273. In unusual cases presenting novel issues, the Regional Director may exercise discretion and transfer such matters to the Board for decision.

Advice, clearance, or authorization should be sought from or notification given to the Board, the Executive Secretary or the Director of Representation Appeals in the following circumstances:

(a) Where no-raiding procedures are involved. Secs. 11018.1 and .2 and 11019

(b) Prior to any relaxation of the rule requiring a 30-percent showing of interest of petitioner. Sec. 11023.1

(c) If an officer or responsible agent of the petitioner was responsible for or had knowledge of and condoned submission of a forged showing and the remaining valid showing satisfies the interest requirement. Sec. 11029.3(b)

(d) Before treating exceptions or a request for review as a motion for reconsideration. Secs. 11100.3, 11274, 11364.8, and 11394.8

(e) Where a petitioner wishes to withdraw a petition after a valid election. Sec. 11116.1

(f) Where the validity of the showing of interest has been raised in a request for review. Sec. 11274

(g) Where the date of an election has been set and a request for review is filed with the Board. Secs. 11274 and 11302.1

(h) Where the date of an election has been set and a motion for reconsideration has been or is to be filed with the Board. Sec. 11282

(i) Before updating the eligibility list used in a runoff. Sec. 11350.5

11754.2 Authorization From Headquarters

Submission for clearance is not required before referring to other Federal or State agencies possible violations of other statutes, except there is a requirement of clearance when the potential violation concerns possible criminal conduct related to Agency proceedings. Examples are forgery of authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings. Similarly, there is a clearance requirement prior to referral if alleged unethical conduct of attorneys is involved.

(a) *Authorization from Advice and Special Litigation is required before:*

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- Issuing investigative subpoenas in the limited circumstances set forth in Sec. 11770.4. But see Sec. 11770.2.
- Issuing hearing subpoenas if there are new or doubtful legal problems of enforceability. Secs. 11770.4 and 11772
- Denying request of private party for enforcement of subpoenas. Sec. 11790
- Seeking enforcement of subpoena, where, between the necessity to issue and necessity of enforcement, intervening circumstances created enforcement problems. Sec. 11770.6

(b) *Authorization from Advice is required before:*

- Filing a motion for reconsideration of a Board decision or an answer to such a motion filed by any other party that raises new or novel legal problems. Sec. 10452

(c) *Authorization from Operation-Managements is required before:*

- Preparing and conducting last-offer elections. Sec. 11520

- Notifying voters of an election by newspapers, radio, or television. Sec. 11314.7(b)
- Obtaining non-Board personnel to participate in the conduct of an election
- Requesting an Administrative Law Judge to handle a complex hearing on objections/challenges. Sec. 11424.1
- Consolidation of interregional cases. Sec. 11716
- Severance of interregional cases. Sec. 11718
- Payment of special fees for expert testimony

11770–11784 SUBPOENAS

Section 11(1) of the Act provides that the Board or any Member may issue subpoenas calling for attendance and testimony of witnesses or the production of evidence in any investigation or proceeding. Sec. 102.31(a) (for C cases) and Sec. 102.66(c) (for R cases), Rules and Regulations set forth the procedure for issuance of such subpoenas and provide that the Executive Secretary of the Board has the authority to sign and issue subpoenas on behalf of the Board.

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

11770 Investigative Subpoenas

During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.

Investigative subpoenas, however, are no substitute for a promptly initiated, dogged, and thorough pursuit of relevant evidence from cooperative sources. Investigative subpoenas should be utilized responsibly to make available to the Regional Director evidence necessary for:

- Deciding whether a complaint or compliance specification should issue, absent settlement
- Determining whether there has been compliance with remedial obligations
- Determining the possible derivative liability of additional parties
- Determining the need to initiate proceedings to obtain a protective order or other *pendente lite* relief, or
- Making appropriate determinations in processing R cases

11770.1 Application for Investigative Subpoena

Upon Regional determination that it is necessary to issue an investigative subpoena, the Board agent assigned to the case should request such subpoena from the Regional Director. The application must be in writing and should contain a statement of the scope of the information or documents sought and of their relevance. There is no right to an investigative subpoena available to parties other than the General Counsel.

11770.2 Scope of Regional Director's Discretion

The Regional Director has full discretion to issue precomplaint investigative subpoenas ad testificandum and duces tecum seeking evidence from parties and third party witnesses whenever the evidence sought would materially aid in the determinations described above in Sec. 11770 and whenever such evidence cannot be obtained by reasonable voluntary means.[1] The Regional Director's discretion is subject only to limited clearance and recordkeeping requirements. See Sec. 11770.4.

Subpoenas ad testificandum may compel testimony by affidavit, by oral testimony under oath before a court reporter or by response to written interrogatories.[2] Where the Regional Office reasonably anticipates that a subpoenaed witness may be uncooperative, an interview of such witness should normally be conducted under oath before a court reporter.

11770.3 Notification to Attorney or Representative

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When serving a subpoena on a witness represented by an attorney, restrictions against skipping counsel mandate that the attorney receive notification of the subpoena. See Sec. 10058. However, there is no requirement that an attorney representative of a party be notified of a subpoena to a witness who is not a supervisor or agent of the party.[3]

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[1] *NLRB v. North Bay Plumbing, Inc.,* 102 F.3d 1005, 1008 (9th Cir. 1996). Accord: *Carolina Food Processors v. NLRB,* 81 F.3d 507, 511–512 (4th Cir. 1996). The courts have, in fact, interpreted Sec. 11 to permit the Board "to obtain everything it [could seek] from an order compelling discovery" under the Federal Rules of Civil Procedure. *NLRB v. Interstate Material Corp.,* 930 F.2d 4, 6 (7th Cir. 1991).

[2] See Compliance Manual, Sec. 10590.2. The Board's investigative authority under Sec. 11 includes the power to require responses to written questions (see *EEOC v. Bay Shipbuilding Corp.,* 668 F.2d 304, 306, 313 (7th Cir. 1981)*; EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 478–479 (4th Cir.), cert. denied 479 U.S. 815 (1986)); to compel the production of documents (see, e.g., *NLRB v. G.H.R. Energy Corp.,* 707 F.2d 110, 113–114 (5th Cir. 1982); *EEOC v. Maryland Cup,* supra at 476–478); and to require oral testimony before the investigator concerning the matters in question (e.g.*, NLRB v. North Bay Plumbing,* supra at 1008; *Link v. NLRB*, 330 F.2d 437, 438 (4th Cir. 1964*)*; cf. *FTC* v. *Standard American, Inc.,* 306 F.2d 231, 233–236 (3d Cir. 1962); *FTC v. Scientific Living, Inc.,* 150 F.Supp. 495, 497–499 (M.D. Pa. 1957), affd. 254 F.2d 598 (3d Cir. 1958), cert. denied 358 U.S. 867 (1959), rehearing denied 358 U.S. 938 (1959)). Such investigative subpoenas can be directed not only to the charged party, but to another party that might be derivatively liable for unfair labor practices (*NLRB v. CCC Associates,* 306 F.2d 534, 537–540 (2d Cir. 1962); *NLRB v. Thayer, Inc.,* 201 F.Supp. 602, 603–604 (D. Mass. 1962)); or indeed to any person having information relevant to the investigation (*Link v. NLRB*, 330 F.2d at 440)).

[3] See generally *S.E.C. v. O'Brien,* 467 U.S. 735 (1984).

With respect to service requirements for subpoenas, related forms and instructions, and cover letters when a witness is represented by an attorney, see Sec. 11842.3(a).

With respect to service requirements for subpoenas, related forms and instructions, and cover letters when a witness is represented by a nonattorney designated representative, see Sec. 11842.4(a) and also Sec. 10058.3. There is no requirement that a nonattorney representative of a party be notified of a subpoena to a witness who is not a supervisor or agent of the party.

11770.4 Clearance by Headquarters

(a) *Clearance Required*

Headquarters' clearance should be obtained by the Regional Office prior to issuance of an investigative subpoena where:

- A witness or entity may claim a constitutional protection
- A witness or entity may claim a privilege, such as where the subpoena seeks evidence from an organization or from current or former employees or agents concerning communications with organizational counsel, or where the subpoena seeks evidence from a member of the press to elicit testimony relating to information gained in his or her professional capacity or requiring the production of materials secured as a result of news gathering activities
- The subpoena seeks evidence from a healthcare provider, which could implicate the doctor-patient privilege or the Health Insurance Portability and Accountability Act (HIPAA) (see Sec. 10054.7)
- Party counsel claims to represent a third-party witness in an individual capacity under circumstances described in Sec. 10058.4(c)
- The Regional Office wants to issue a subpoena, subsequent to complaint and before issuance of a Board order, which is related to an issue in the complaint.

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Generally, in all of the above cases, requests for clearance should be submitted to the Division of Advice and the Special Litigation Branch. If an issue under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, clearance requests should also be submitted to the Contempt Litigation and Compliance Branch.

(b) *Clearance Not Required*

The Regional Office may issue an investigative subpoena, without Headquarters' clearance, where the issues involved in (a) above are not present and where there is a need to:

- Investigate new postcomplaint charge allegations

- Investigate the possible dissipation of assets and/or the need to initiate proceedings to obtain a protective order or other *pendente lite* relief
- Investigate the possible derivative liability of additional parties
- Preserve testimonial evidence as contemplated under Sec. 102.30, Rules and Regulations
- Investigate noncompliance with Board orders or court decrees enforcing such orders. See, e.g., *Alaska Pulp Corp.,* 149 LRRM 2684, 2688 fn. 6 (D.D.C. 1995) (court enforced subpoena investigating possible noncompliance with court enforced Board order).

For the scope of the Regional Director's discretion to issue investigative subpoenas, see Sec. 11770.2.

11770.5 Financial Institution Records

The provisions of the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 et seq., must be observed if an investigative subpoena is to be served on a financial institution for financial records of individuals and small partnerships. Compliance Manual, Secs. 10590.2, 10593.6, and 10601.3.

The RFPA does not apply to the financial records of a corporation. Nor does it restrict in any way the issuance of administrative subpoenas to obtain financial or banking records of individuals or partnerships directly from such parties or from any entity other than a "financial institution." The RFPA does not apply, for example, to a subpoena for financial or tax records issued to an individual's accountant or CPA.[4]

Frank v. HTH Corp., No. 10-15584 archived on August 29, 2011

11770.6 Problems Regarding Enforceability; Reports to Headquarters

When problems of enforceability arise following issuance of investigative subpoenas, the Regional Director should report developments to the Division of Advice and the Assistant General Counsel for Special Litigation. If the issue(s) under investigation involve a compliance matter or possible violation of a Board order or court decree enforcing such an order, the Regional Director should also report developments to the Contempt Litigation and Compliance Branch.

In order to permit the continued oversight of Agency use of investigative subpoenas, Regional Offices should maintain reporting files, which may be in electronic format, that list, for each investigative subpoena issued, the name of the case, the name of the party or witness to whom the subpoena is directed, the evidence sought, the date of issuance, a brief description of the basis for issuance, and a notation of any petition to revoke and/or enforcement proceedings.

[4] The RFPA also contains a "delayed notification" provision, 12 U.S.C. § 3409, pursuant to which the Government can request a district court to permit withholding of the required notice to an individual whose records are being sought for 90 days under exigent circumstances. The Region should consult with the Contempt Litigation and Compliance Branch regarding the availability and use of this provision. See Compliance Manual, Sec. 10601.3 for further information concerning the RFPA.

11770.7 Petition to Revoke Investigative Subpoena and Opposition

(a) *Filing of Petition to Revoke*

A petition to revoke an investigative subpoena should be filed with the Regional Director who will issue an order referring the petition to the Board. See Sec. 102.31, Rules and Regulations and Secs. 11770.8 and 11782.

(b) *Opposition to Petition to Revoke*

The Regional Office should promptly file an opposition with the Board to any petition to revoke an investigative subpoena, generally within 5 business days after receipt. See OM 10-11. The opposition should include a copy of the charge(s) and:

- Explain how the information sought in the subpoena is relevant to the specific charge allegations, and
- Respond to the arguments raised in the petition

11770.8 Referral of Petition to Revoke Investigative Subpoena and Opposition

The Regional Office should E-file with the Board a referral package containing the Regional Director's order referring the petition to revoke and proof of service, the petition to revoke with all attachments, the subpoena and proof of service, and the Region's opposition with all attachments and proof of service. When E-filing, the Region should carefully follow the detailed guidance set forth in OM 10-11.

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11772 Trial or Hearing Subpoenas

The need to subpoena testimony or the production of records at C or R Case hearings should initially be determined by the Board agent assigned, in consultation with supervision. Thus, Board agents may be required to notify supervision of the name of, and the need for, any subpoenaed person or document, along with a description of such document.

In determining whether to issue a subpoena, the Regional Director should consider both the necessity for the subpoena and the enforceability of the subpoena. The subpoena should not be requested if it appears that it cannot be enforced in the event of noncompliance. If there are foreseeable impediments to enforceability, such as the matters discussed in the first three circumstances in Sec. 11770.4(a), the issue should be submitted to the Division of Advice and the Special Litigation Branch prior to issuance of the subpoena. If the issues(s) under investigation involve a compliance matter or possible violation of a Board order or court decree enforcing such an order, the Regional Director should also notify the Contempt Litigation and Compliance Branch.

Application for a subpoena made prior to the hearing (whether by a Board agent or by other parties) should be made to the Regional Director; one made at the hearing should be made to the administrative law judge or hearing officer, as the case may be, and may be made ex parte. See Sec. 102.31(a), Rules and Regulations, for C Cases and

Sec. 102.66(c) for R Cases. These rules require only a written application for subpoenas; neither the name of the witness nor the description of the documents need be included.

Upon receipt of a request for a subpoena from a private party, the Regional Director should grant the application for the requested subpoena. However, the Regional Director retains discretion in granting an application from a Board agent.

11774 Persons Subpoenaed

Generally, witnesses that the trial attorney expects to use at the hearing should be subpoenaed. However, absent unusual circumstances, an exception should be made where the witness has a definite personal interest or stake in the outcome; e.g., a charging party, or its agents, or alleged discriminatees.

Pursuant to Sec. 102.118 Rules and Regulations, Board agents are prohibited from testifying at formal proceedings without authorization from the appropriate agency official.

11776 Subpoenas Duces Tecum

A subpoena duces tecum should seek relevant evidence and should be drafted as narrowly and specifically as is practicable. The use of the word "all" in the description of records should be avoided wherever possible. For example, the phrase "the corporate records showing total purchases" might be substituted for the phrase "all books, records, documents, and other writings that will show total purchases." Under some circumstances, the subpoena may provide for alternatives in lieu of physical production. In such instances the subpoenaed party may furnish a sworn affidavit setting forth the desired evidence or an admissible summary of that evidence, provided that pertinent records are made available to the Board agent to ensure accuracy.

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The subpoena duces tecum should be addressed to the entity with control of the records sought, whether the entity is a corporation, partnership, or labor organization. Subpoenas directed to a sole proprietorship or individual should be addressed to that individual.

Where the same person has control and knowledge of the records, the subpoena duces tecum may be addressed to the entity, attention to that person. Where the agent who can explain the records is unknown, a subpoena duces tecum should be addressed to the entity itself and a subpoena ad testificandum should be served on a person who is known or believed to be familiar with the records.

11778 Service of Subpoenas

Sec. 102.113(c), Rules and Regulations requires that subpoenas be served personally, by registered or certified mail, by telegraph, or by delivery at the principal office or business address of the person being served. Also see Sec. 11(4) of the Act. Absent unusual circumstances, such service should be by certified mail or hand delivery

with a copy served by regular mail, hand delivery, or by facsimile on any attorney or other representative of the party or witness. If a party or witness is represented by more than one attorney or representative, service on any one of such persons, in addition to the party or witness, satisfies this requirement. However, as a matter of courtesy, an effort should be made to serve all attorneys or representatives of a party or a witness. See Secs. 11842.2–.3 and Sec. 102.113(f), Rules and Regulations.

A claim form for payment of fees and mileage may in appropriate circumstances be enclosed with the subpoena if it is mailed or given to the witness if it is hand delivered.

There is no obligation on the part of the General Counsel (as opposed to outside parties) to tender witness fees at the time of service. In cases of need or emergency, travel accommodations, where authorized by the Regional Director, may be provided in advance. Where necessary, tickets may be obtained in advance through the Agency travel account.

Although no particular period of notice is prescribed, the service and return date for the following types of subpoenas should, where circumstances allow, normally be as follows:

- Investigative Subpoenas – served with a prompt and reasonable return date under all the circumstances.

- Trial Subpoenas – served at least 2 weeks prior to the return date at hearing, but, at any rate in sufficient time to allow 5 days after receipt of the subpoena to petition to revoke the subpoena. See Sec. 11782.4.

- Representation Case Subpoenas – served with a prompt and reasonable hearing return date under all the circumstances.

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11780 Witness Fees

Witnesses subpoenaed by a Board agent should be advised that they are entitled to appearance fees and travel expenses, if they make the appropriate claim. Where appropriate, witnesses are also reimbursed for travel, lodging and meal expenses. Since the amounts and terms of these reimbursements may vary from time to time, refer to the latest Administrative Policy Circular or GC Memoranda for current terms and rates.

Witnesses subpoenaed by the Board agent expected to make a claim should complete and sign a claim form promptly after appearance at the proceeding, upon release from the subpoena. Approval of a witness fee claim is the responsibility of the Board agent.

Although private parties may elect to compensate witnesses for lost income while appearing and testifying, there is no like compensation paid by the Government.

If it comes to the Board agent's attention that a private party refuses to pay appropriate fees to an employee witness, the witness and the party should be advised that such failure could violate the Act. *Howard Mfg. Co.,* 231 NLRB 731 (1977).

11782 Petition to Revoke

Secs. 102.31(b) (C cases) and 102.66(c) (R cases), Rules and Regulations set forth procedures regarding petitions to revoke subpoenas. Such rules provide that a subpoenaed person who does not intend to comply with the subpoena, whether ad testificandum or duces tecum, may file a petition to revoke within 5 days after the date the subpoena is received. Although not required by the Rules and Regulations, a copy of the subpoena should be attached to the petition to revoke.

Petitions to revoke may be based on the ground that the subpoena does not relate to any matter under investigation or at issue in a hearing, does not describe the evidence sought with sufficient particularity or if for any other reason sufficient in law the subpoena is otherwise invalid.

11782.1 Filed Prior to Hearing

A petition to revoke filed prior to a hearing is filed with the Regional Director. If the subpoena under attack is an investigative subpoena in a C case, the Regional Director should refer it to the Board for ruling; if it is a hearing subpoena in a C case, the petition should be referred to the Administrative Law Judge with a copy of the subpoena attached. If it is either an investigative or hearing subpoena in an R case, the Regional Director may rule on it or refer it to the hearing officer.

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11782.2 Filed at Hearing

A petition to revoke filed at a hearing should be filed with either the Administrative Law Judge or hearing officer, who should then rule on it.

11782.3 Notice of Filing

Notice of the filing of the petition to revoke (which need not have been served on all parties) should be given timely by the Regional Director, Administrative Law Judge, or hearing officer, as the case may be, to the party at whose request the subpoena was issued.

11782.4 Five-Day Period

Section 11(1) of the Act and Secs. 102.31(b) and 102.66(c), Rules and Regulations provide that petitions to revoke shall be filed within 5 days from the service (i.e., receipt) of a subpoena. There is case authority which holds that the 5-day period is a maximum and not a minimum. Absent a showing of prejudice, the subpoenaed party may be required to file and argue its petition to revoke and, if ordered by the Administrative Law Judge or hearing officer, produce subpoenaed testimony and documents at hearing in less than 5 days from receipt of the subpoena. See *Packaging*

Techniques, Inc., 317 NLRB 1252, 1253–1254 (1995) and *NLRB v. Strickland,* 220 F.Supp. 661, 665–666 (D.C.W. Tenn., 1962), affd. 321 F.2d 811, 813 (6th Cir. 1963).

11782.5 Not a Part of the Record

Actions and documents in connection with petitions to revoke, including rulings, are not part of the record, unless the aggrieved person specifically requests it.

11782.6 Subpoena Duces Tecum on Alleged Discriminatees and General Counsel's Witnesses

When counsel for the General Counsel learns of the issuance of a subpoena duces tecum to alleged discriminatees and/or General Counsel's witnesses in an unfair labor practice hearing, this issue should be immediately discussed with the Regional Office. Counsel for the General Counsel has standing to file a petition to revoke to:

- Prevent pretrial discovery of Board affidavits.
- Protect alleged discriminatees and/or witnesses from intimidation or harassment.
- Prevent litigation of irrelevant issues.

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11784 Witness Claims of Privilege Against Self-Incrimination

Sec. 102.31(c), Rules and Regulations addresses claims of privilege against self-incrimination. The rule provides that whenever a witness at any proceeding before the Board claims such a privilege, any party may request the Board to issue an order compelling testimony. It is necessary for the Board to obtain the U.S. Attorney General's approval before issuing an order compelling the witness claiming such privilege to testify or provide other information.

Before seeking a Board order to compel testimony from a witness claiming a privilege against self-incrimination, the Regional Office should submit a request for clearance, along with supporting reasons, to the Division of Advice. If the issue(s) under investigation involve a compliance matter, possible violation of a Board order or court decree enforcing such an order, a copy of the request for clearance should also be sent to the Contempt Litigation and Compliance Branch.

A witness who claims the privilege against self-incrimination will not be required, or permitted, to testify or give other information covered by the claim of privilege until the Board has issued the requested order.

11790–11808 ENFORCEMENT OF SUBPOENA

11790 Enforcement of Subpoena

Since the issuance of a subpoena includes prima facie authority to enforce, clearance to enforce is not normally necessary. However, when previously unforeseen impediments create enforcement problems, the matter should be referred to the Division of Advice and Special Litigation Branch for clearance and consultation. If the issue(s) under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

11790.1 Issued at Request of Private Parties

Section 11(2) of the Act provides that subpoena enforcement proceedings must be instituted "upon application by the Board." Sec. 102.31(d), Rules and Regulations provides that proceedings for enforcement of subpoenas issued at the request of a private party shall be instituted by the General Counsel in the name of the Board "on relation of such private party," unless, in the Board's judgment, the enforcement of such subpoena would be inconsistent with the law or the policies of the Act.

If a Regional Office is in doubt regarding whether the enforcement of a subpoena satisfies the above-noted criteria, it should submit the matter to the Division of Advice and Special Litigation Branch for clearance. If the subpoena involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

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Prior to filing the application, the Regional Office must advise the requesting party that it bears the responsibility for prosecuting the subpoena enforcement proceeding and that the Regional Office will not assume responsibility beyond the filing of the application. Sec. 102.31(d), Rules and Regulations. Exceptions to this policy arise when the respondent questions the Board's jurisdiction, its power to issue the subpoena or the validity of the issuance. Under these limited circumstances, the General Counsel may seek to retain control of the case, since the issues raised relate to the Board's basic authority and an adverse decision may affect other cases.

After institution of a subpoena enforcement proceeding, the Regional Office should inform Advice and Special Litigation if unusual circumstances arise. If the issue(s) under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

If there is noncompliance with an enforced subpoena, upon the request of the party on whose behalf the subpoena was issued and enforcement proceedings were instituted, the Regional Office must initiate contempt proceedings in the appropriate U.S. district court, unless contempt proceedings would be inconsistent with law or the policies of the Act.

Absent a request by the party on whose behalf the subpoena was issued, contempt proceedings need not be instituted by the Regional Office. *Best Western City View Motor Inn,* 325 NLRB 1186 (1998).

11790.2 Issued at Request of the General Counsel

Enforcement proceedings with respect to subpoenas requested by the General Counsel are handled by the Regional Office involved.

11790.3 Notification to Headquarters

In cases where clearance has been obtained from Headquarters, the Regional Office should forward, if requested, copies of the pleadings, briefs and any orders that issue to the Division of Advice and Special Litigation Branch and, if the investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, also to the Contempt Litigation and Compliance Branch.

11790.4 Appeal Proceedings

Appeal proceedings will be handled by the Special Litigation Branch. If the Regional Office's enforcement application is denied in full or in part, the Regional Office should promptly notify and make a recommendation to the Special Litigation Branch as to whether an appeal should be taken to the circuit court. Upon receipt of a notice of appeal made by another party, the Regional Office should promptly advise and provide all relevant papers to the Special Litigation Branch. If the appeal involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, notice should be also given to the Contempt Litigation and Compliance Branch.

11790.5 Stays Pending Appeal

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After an Agency subpoena has been enforced, any request for a stay pending appeal should be referred to the Special Litigation Branch. If the appeal involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, a copy of the stay request should also be forwarded to the Contempt Litigation and Compliance Branch.

11792 Subpoena Authority of the Board/Court Jurisdiction

11792.1 Authority of Board to Issue Subpoenas

Section 11(1) of the Act grants statutory authority to the Board for the exercise of subpoena power, which is similar to that of other administrative agencies. The intent of Congress to confer such authority is clear. S.Res. 573, 74th Cong., 1st Session; Sec. 6(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c)) and the courts have long upheld the power of administrative agencies to issue subpoenas. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946); *NLRB v. North Bay Plumbing,* 102 F.3d 1005, 1007 (9th Cir. 1996).

Section 11 of the Act, 29 U.S.C. § 161, grants to the Board and its agents broad investigatory authority, including the power to subpoena any evidence "that relates to any matter under investigation or in question." 29 U.S.C. § 161(1); *NLRB v. Interstate Material Corp.,* 930 F.2d 4, 6 (7th Cir. 1991) (describing the Board's broad Section 11 powers); *NLRB v. Steinerfilm, Inc.,* 702 F.2d 14, 15 (1st Cir. 1983) (same); *NLRB v. G.H.R. Energy Corp.,* 707 F.2d 110, 113 (5th Cir. 1982) (same). This broad subpoena power enables the Board "to get information from those who best can give it and who are

most interested in not doing so." *U.S. v. Morton Salt Co.,* 338 U.S. 632, 642 (1950). Thus, such subpoenas may be directed to any person having information relevant to an investigation. See, e.g., *Link v. NLRB,* 330 F.2d 437, 440 (4th Cir. 1964). See also Sec. 11770.2 above.

11792.2 Jurisdiction of Courts to Enforce Subpoenas

The district courts receive their power to order enforcement of subpoenas issued by the Board by virtue of Section 11(2) of the Act. The granting of such power has been approved and exercised repeatedly by the courts. Consistent with the bounds of reasonableness, subpoena enforcement may be sought in any district where the investigation is undertaken or where the subpoenaed person is found, resides or transacts business. *NLRB v. Ronny Line,* 50 F.3d 311, 313–314 (5th Cir. 1995); *NLRB v. Alaska Pulp Corp.,* 149 LRRM 2682, 2684 (D.D.C. 1995); *Brooklyn Manor Corp. v. NLRB,* 1999 WL 1011935 (E.D.N.Y.).

11792.3 Collateral Proceedings

Since the Board has the power to make the initial determination of its jurisdiction in any case pending before it (*Oklahoma Press,* 327 U.S. at 209–214), a court in a subpoena enforcement proceeding generally lacks the authority to decide that issue. In *NLRB v. Barrett Co.,* 120 F.2d 583 (7th Cir. 1941), the court enforced the Board's subpoena seeking commerce data. See also *Oklahoma Press,* 327 U.S. at 214; *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501 (1943); *NLRB v. Northern Trust Co.,* 56 F.Supp. 335, 337–338 (D.C. Ill. 1944), affd. 148 F.2d 24, 27 (7th Cir. 1945). Cf. *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50 (1938), where *Bethlehem* challenged the Board's jurisdiction in an injunction proceeding. If the subpoenaed party argues that the Board's jurisdiction is lacking based upon the particular facts of its case, the Regional Office should respond that such argument is not a valid basis to defend against subpoena enforcement for the above reasons. If the subpoenaed party makes a substantial argument that the Board jurisdiction is lacking as a matter of law, the Special Litigation Branch should be consulted.

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11794 Relevance

The testimony or documentary evidence sought by enforcement of a subpoena must be relevant to the matter under investigation or in question before the Board. The application should assert that the evidence is relevant to the petition, charge, complaint, or notice of hearing, which is attached to the application as an exhibit. *Oklahoma Press Publishing Co.,* 327 U.S. at 214–215. See also *NLRB v. Carolina Food Processors,* 81 F.3d 507 (4th Cir. 1996).

"For purposes of an administrative subpoena, the notion of relevancy is a broad one . . . . So long as the material requested 'touches a matter under investigation,' an administrative subpoena will survive a challenge that the material is not relevant." *Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board,* 878 F.2d 875, 882 (5th Cir. 1989) (citation omitted) and cases cited therein; *NLRB v. Alaska Pulp Corp.,* 149 LRRM 2684, 2689 (D.D.C 1995); accord: *NLRB v. Carolina Food*

Processors, 81 F.3d at 511. An investigative subpoena may properly seek evidence regarding all issues under investigation, including potential defenses. *NLRB v. North Bay Plumbing,* 102 F.3d at 1008. A party seeking to have a subpoena quashed must establish that "the subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the issuing agency." *NLRB v. Interstate Dress Carriers, Inc.,* 610 F.2d 99, 112 (3d Cir. 1979).

11796 "Fishing Expedition" as a Defense

The Board agent should carefully draft subpoenas in order to avoid potential arguments that the subpoena constitutes a "fishing expedition." The subpoena should describe all documents sought with respect to content and time period. The *Oklahoma Press* decision is especially instructive regarding whether a subpoena constitutes a "fishing expedition."

However, the Board is entitled to obtain all relevant information requested, as long as compliance with the subpoena does not impose an "undue burden" on the recipient. With respect to assertions of "undue burden," the courts have made clear that "[s]ome burden on subpoenaed parties is to be expected and is necessary in the furtherance of the agency's legitimate inquiry and the public interest . . . . The question is whether the demand is *unduly* burdensome or *unreasonably* broad." *FTC v. Texaco,* 555 F.2d 862, 882 (D.C. Cir. 1977), cert. denied sub nom. *Standard Oil of California v. FTC,* 431 U.S. 974 (1977) (emphasis in original). The burden of demonstrating unreasonableness or undue burden clearly rests with the party asked to produce the information and "[t]hat burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." Id. at 882 and cases cited there. In order to show that a subpoena is unduly burdensome, the subpoenaed party must show that the subpoena seriously disrupts regular business operations. See *EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 477 (4th Cir.), cert. denied 479 U.S. 815 (1986); *NLRB v. Carolina Food Processors,* 81 F.3d at 513.

Franki v. NTH Corp., No. 10-15984 archived on August 29, 2011

11798 Subpoena Enforcement Procedures

11798.1 Order to Show Cause Procedure

Under Section 11(2) of the NLRA, subpoena enforcement proceedings are commenced by the filing of an application by the Board. The courts repeatedly have held that subpoena enforcement proceedings need not be commenced by service of a summons and complaint normally required to commence a civil suit pursuant to Rule 4 of the Federal Rules of Civil Procedure. *Goodyear Tire & Rubber Co. v. NLRB,* 122 F.2d 450, 451 (6th Cir. 1941); *Cudahy Packing Co. v. NLRB,* 117 F.2d 692, 694 (10th Cir. 1941); *NLRB v. D. L. Baker,* enfd. mem. 166 F.3d 333 (4th Cir. 1998) (unpublished disposition).

The local rules for the U.S. district court in which the application for enforcement will be filed should be reviewed so that the application conforms to the procedural requirements of that court. In addition, the Regional Office should ensure that all court

filings comply with the federal rules regarding protecting personal identification information in court filings. See GC Memo 09-02.

The Manual contains patterns to be used in subpoena enforcement proceedings. Sec. 11800.1. The order to show cause set forth in Sec. 11806.1 as Pattern 53, when signed by the court, will provide explicit authorization for service to be accomplished pursuant to Rule 5 of the Federal Rules or by certified mail. Absent such a signed order to show cause, personal service of the application and supporting papers should be obtained in order to avoid unnecessary disputes concerning the validity of service.

11798.2 Motion Procedure

Alternatively, an application for enforcement can be treated by the Regional Office as a motion, without obtaining an order to show cause. In such circumstances, the Regional Office should obtain personal service of the application and supporting papers in order to avoid unnecessary disputes concerning the validity of service.

While this approach may be used in any such subpoena enforcement action, it can be particularly useful in situations where (a) the local district court rules permit a moving party to set the hearing date at the time a motion is filed and (b) the Regional Office is seeking summary enforcement of a subpoena, based upon the failure of the subpoenaed party to file with the Board a timely petition to revoke the subpoena. But see Sec. 11800.2(c) below, noting cases where subpoenaed parties have been permitted to raise for the first time in court constitutional and privilege defenses.

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Advice and assistance on the use of this motion procedure may be obtained from the Special Litigation and Contempt Litigation and Compliance Branches. The Contempt Litigation and Compliance Branch has had experience in treating the application as a motion and can supply sample pleadings.

11798.3 Recovery of Attorneys Fees and Costs

In appropriate circumstances, the Board may obtain recovery of its costs and attorneys' fees related to subpoena enforcement actions.[5] In such cases, the award of attorneys' fees for Board attorneys are calculated based on "prevailing market rates," i.e., "the same market rate as any other attorney with the same experience and expertise."[6] Therefore, in every subpoena enforcement action, the Regional Office should keep records that accurately reflect the specific work performed and the time expended on all related matters.

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[5] See, e.g., *NLRB v. Cable Car Advertisers, Inc.,* 319 F.Supp.2d 991 (N.D.Cal. 2004); *NLRB v. Beaird Co., Ltd.*, 2007 WL 855344 (W.D.La.); *NLRB v. Baywatch Security & Investigations,* 2005 WL 1155109 (S.D.Tex.); *NLRB v. Coughlin*, 176 LRRM 3197 (S.D.Ill 2005); *Brooklyn Manor Corp. v. NLRB*, 1999 WL 1011935 (E.D.N.Y.).

[6] *NLRB v. Gravely Bros. Roofing*, 162 LRRM 2841 (3d Cir. 1999). *Accord NLRB v. McNulty*, 183 LRRM 3344 (S.D.Ind. 2006); *NLRB v. All Seasons Construction, Inc.*, 183 LRRM 3343 (W.D.La. 2006); *NLRB v. Riza*, 183 LRRM 2308 (S.D. N.Y. 2006); *NLRB v. A.G.F. Sports, Ltd.,* 146 LRRM 3022 (E.D.N.Y. 1994).

When the Regional Office believes it has an appropriate case in which to seek an order requiring the payment of the Board's attorneys' fees and costs, the Region should confer with and obtain clearance from the Special Litigation Branch. If an issue involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

11800 Subpoena Enforcement Documents

Pattern documents suitable for general use in subpoena enforcement matters are set forth below.

11800.1 Patterns Provided

- Pattern 51 Application for order enforcing subpoena ad testificandum (Sec. 11802.1)
- Pattern 52 Application for order enforcing subpoena duces tecum (Sec. 11804.1)
- Pattern 53 Order to show cause (Sec. 11806.1)
- Pattern 54 Notice of institution of proceeding to enforce subpoena ad testificandum (Sec. 11808.1)

Frankl v. HTH Corp., No. 10-15884 archived on August 29, 2011

11800.2 Procedural Issues

(a) *Service by Certified Mail:* For language setting out service of subpoena by certified mail, see paragraph d of Pattern 52.

(b) *Personal Service:* For language setting out personal service, see paragraph c of Pattern 51.

(c) *Failure to Petition to Revoke:* Paragraph e of Pattern 52 sets out the statutory procedure for administrative revocation of the subpoena and alleges that respondent failed to utilize this procedure. This allegation will support a contention that the respondent is estopped from questioning the validity of the subpoena or the relevancy of the evidence requested. Such a contention was sustained in *NLRB v. Frederick Cowan,* 522 F.2d 26, 28 (2d Cir. 1975); *Maurice v. NLRB,* 691 F.2d 182, 183 (4th Cir. 1982); *American Motors v. FTC,* 601 F.2d 1329, 1332–1337 (6th Cir. 1979). But see *EEOC v. Cuzzins of Georgia, Inc.,* 608 F.2d 1062, 1063 (5th Cir. 1979) (constitutional defense not waived); *NLRB v. Midland Daily News,* 151 F.3d 472, 474 (6th Cir. 1998) (same); *NLRB v. Detroit News,* 185 F.3d 602 (6th Cir. 1999) (privilege defenses not waived); *EEOC v. Lutheran Social Services,* 186 F.3d 959 (D.C. Cir. 1999) (strong presumption of need to exhaust administrative remedies is not jurisdictional and exhaustion requirements may be waived by court in particular circumstances).

(d) *Petition to Revoke Denied:* If respondent petitioned to revoke the subpoena and the petition was denied, use paragraph d of Pattern 51. Paragraph e of Pattern 52 alleges that respondent did not appear in answer to the subpoena.

Frankl v. HHH Corp., No. 10-15984 archived on August 29, 2011

(e) *Refusal to Testify or Produce Records:* If respondent did appear at the hearing but refused to testify or produce the required records, see paragraph e of Pattern 51.

11802 Pattern 51, Application for Order Enforcing Subpoena ad Testificandum

This form is designed to be used where the subpoena issued at the request of a private party and was directed to an individual; for situations where the subpoena was issued at the request of the General Counsel or where respondent is a corporation, see Pattern 52 (Sec. 11804.1). (Whenever an ex rel. proceeding is brought, Pattern 54, which is the notice to the relator or his attorney, should be used.)

11802.1 Pattern 51

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
ON BEHALF OF LOCAL 1, UNITED
SQUIBB WORKERS OF AMERICA, U.S.W., IND.
Applicant

v. **Civil No. 13579**

JOHN DOE
Respondent

APPLICATION FOR ORDER ENFORCING
SUBPOENA AD TESTIFICANDUM

Pantki v. HTH Corp., No. 10-15984 archived on August 29, 2011

The National Labor Relations Board, an administrative agency of the Federal Government, on behalf of Local 1, United Squibb Workers of America, USW, Ind. (herein Local 1) applies to this Court for an order enforcing a subpoena ad testificandum issued by the Board and served on Respondent John Doe by Local 1. This application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application, the Board urges as follows:

a. This Court has jurisdiction of the subject matter of the proceeding and of the person of Respondent by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). That is, the unfair labor practice hearing to which Respondent was subpoenaed to appear occurred within this judicial district [add or substitute any other criterion applicable under 11(2), such as that Respondent resides or does business within this judicial district**].**

b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board, pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge Local 1 filed in Case 42–CC–233 that alleged that Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing and answer are attached as exhibits A, B and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of 29 C.F.R. Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have been published in the Federal Register (24 F.R. 9095), pursuant to the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2014

c. In order to procure testimony in the hearing before the administrative law judge, Local 1 requested and received a subpoena ad testificandum from the Board. On December 26, 20__, Local 1 issued the subpoena ad testificandum directing Respondent to appear at the hearing before the administrative law judge on January 7, 20_, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations. The subpoena was served on Respondent by personal service on him, as provided for in Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. Copies of the subpoena and the affidavit of service are attached as exhibits D and E, respectively.

d. On January 2, 20__, Respondent filed a petition to revoke subpoena, as provided by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Respondent's petition to revoke was

denied by Administrative Law Judge Ringer S. Williams in an order dated January 7, 20_. Copies of the petition to revoke the subpoena and the order denying the petition to revoke are attached as exhibits F and G, respectively.

e. Respondent appeared at the hearing before ALJ Williams on January 28, 20_ and was sworn as a witness. Counsel for Local 1 propounded questions to Respondent but he refused to answer the questions on the ground of irrelevancy. ALJ Williams ruled that the evidence sought was relevant to the issues in the unfair labor practice hearing before him and directed Respondent to answer. Respondent refused to comply with the ruling of ALJ Williams, withdrew from the witness stand and left the hearing room. Thereafter, ALJ Williams determined that the testimony of Respondent was necessary and pertinent to a resolution of the issues pending before him and adjourned the hearing to permit the Board to institute these proceedings to compel Respondent to testify. A copy of the pertinent portion of the transcript from the hearing is attached as exhibit H.

Frankiv HTH Corp. No. 1015984 archived on August 29, 2011

f. Respondent's refusal to testify as required by the subpoena ad testificandum and as directed by the ALJ, who concluded that Respondent's testimony is relevant to the issues in the unfair labor practice proceeding, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board and is preventing the Board from carrying out its duties and functions under the Act.

In view of Respondent's contumacious conduct, the Board requests:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order and to show cause why an order should not issue directing him to appear before ALJ Williams in Board Case 42–CC–233 at such time and place as ALJ Williams may designate and to give testimony and answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before Administrative Law Judge Ringer S. Williams, at a time and place to be fixed by ALJ Williams, and to give testimony and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and

3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated: February 7, 20__.

National Labor Relations Board

By: [GC's name], General Counsel

[RA's name], Regional Attorney

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

[signature of attorney]

Attorney for Applicant

Region 42

4 Mammoth Drive

Zenith City, NE

11804 Pattern 52, Application for Order Enforcing Subpoena Duces Tecum

This form is designed to be used where the subpoena issued at the request of the General Counsel or his agent and was directed to a corporate respondent; for situations where the subpoena was issued at the request of a private party or where respondent is an individual, see Pattern 51 (Sec. 11802.1).

11804.1 Pattern 52

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
Applicant

v. **Civil No. 13579**

GOODWILL R. R. CO.
Respondent

APPLICATION FOR ORDER ENFORCING
SUBPOENA DUCES TECUM

Frankly, HTHC corp. No. 1u15984 archived on August 29, 2011

The National Labor Relations Board, an administrative agency of the Federal Government, applies to this Court for an order compelling compliance with a subpoena duces tecum that the Board issued and served on Respondent Goodwill R.R. Co. This application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application the Board states as follows:

a. This Court has jurisdiction of the subject matter of the proceeding and of Respondent by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). The subpoena was issued within this judicial district and Respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of Nebraska, with an office at 25 Omnibus Avenue, Zenith City, Nebraska. Respondent is engaged in business in this district.

b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge filed by Local 1, United Squibb Workers of America, U.S.W Ind. in Case 42–CC–233, which alleged that

Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing and answer are attached as exhibits A, B and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of 29 C.F.R. Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have been published in the Federal Register (24 F.R. 9095), pursuant to the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

Franki v. MTH Corp., No. 10-15984 archived on August 29, 2011

c. In order to procure evidence for the hearing before the administrative law judge, a representative of the General Counsel made a written request for and received a subpoena duces tecum from the Board. On December 26, 20__, a representative of the General Counsel issued the subpoena duces tecum directing Respondent to appear at the hearing before the administrative law judge on January 7, 20_, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska to give testimony and to produce certain records and papers more fully described as follows:

> **Records and papers in the possession of the Goodwill R. R. Co., including bills of lading, consignments, receipts or other documents showing shipment of goods via Goodwill R. R. Co., to and from Fireworks Machinery Corp., Zenith City, Nebraska for the calendar year 20__.**

A copy of the subpoena is attached as exhibit D. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations.

d. The subpoena described above in paragraph c was served on Respondent by addressing and sending it by certified mail to John Doe, superintendent of the Zenith City Division of Respondent, at the offices located at 25 Omnibus Avenue, Zenith City, Nebraska 44422. Respondent acknowledged receipt of the subpoena on December 28, 20__. Service and receipt complied with Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. 29 C.F.R. 102.113 A copy of the return post office receipt is attached as exhibit E.

e. Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations provide for a period of 5 days after service of a subpoena within which any person served may petition the Board to revoke the subpoena. Respondent has not at any time filed a petition to revoke the subpoena. Nevertheless, Respondent failed to appear at the hearing on January 7, 20_ or to produce the documents as required by the terms of the subpoena. At no time on or since January 7, 20__ has Respondent produced the subpoenaed documents.

Teapkl v. HTH Corp., No. 10-15984 archived on August 29, 2011

f. Respondent's refusal to appear and to produce the subpoenaed documents, which are relevant to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board and is preventing the Board from carrying out its duties and functions under the Act.

In view of Respondent's contumacious conduct, the Board requests:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order and to show cause why an order should not issue directing him to appear before Administrative Law Judge Ringer S. Williams in Board Case 42–CC–233 at such time and place as ALJ Williams may designate and to produce the subpoenaed records described above, to give

testimony and to answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before ALJ Williams, at a time and place to be fixed by ALJ Williams, and to produce the records, give testimony and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and

3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated: February 7, 20__.

National Labor Relations Board

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

By: [GC's name], General Counsel
[RA's name], Regional Attorney

[signature of attorney]

Attorney for Applicant

Region 42

4 Mammoth Drive

Zenith City, NE

11806 Pattern 53, Order to Show Cause

This Pattern, which applies to an application for enforcement of a subpoena duces tecum involving a corporate respondent, may be used with appropriate modification in proceedings involving other types of respondents or to enforce a subpoena ad testificandum.

Note that service on respondent of the Order to Show Cause may be made by serving any officer or agent, either by certified mail or in any manner provided for in Rule 5 of the Federal Rules of Civil Procedure.

11806.1 Pattern 53

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
Applicant

v. Civil No. 13579

GOODWILL R. R. CO.
Respondent

ORDER TO SHOW CAUSE

Flanigan v. HTH Corp., No. 10-15984 and cited on August 29, 2011

The National Labor Relations Board filed an application with this Court for an order enforcing a subpoena duces tecum properly served on Respondent Goodwill R. R. Co. and good cause appearing therefor, it is hereby

ORDERED that:

1. Respondent Goodwill R. R. Co. appear in Room 200, United States Courthouse, Federal Square, City of Zenith, State of Nebraska on the _ day of April 20__ at 9 o'clock a.m. and show cause, if any exists, why an order of this Court should not issue directing Respondent to appear before the designated administrative law judge of the Board, at such time and place as the administrative law judge may determine, and produce the books, papers, records and other data described in the subpoena duces tecum served on Respondent, and give testimony in connection with the proceeding in 42–CC–233 now pending before the

Board pursuant to Section 10 of the National Labor Relations Act, as amended (29 U.S.C. 160).

2. On or before the _ day of March 20_, service be made on Respondent of a copy of this Order to Show Cause and of the Board's application. Service on Respondent may be made on any officer or agent of Respondent.

3. Respondent shall file and serve its answer to the application not later than April __ 20_.

4. Service of a copy of this order, the application and the Respondent's answer, made in any manner provided for by Rule 5 of the Federal Rules of Civil Procedure of the United States or by certified mail, shall be deemed good and sufficient service.

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

/s/ D. W. Brown
United States District Court Judge

Dated, Zenith City, Nebraska,

March ___, 20____.

11808 Pattern 54, Notice of Institution of Proceeding to Enforce Subpoena ad Testificandum

Section 11(2) of the Act provides that a proceeding to enforce a subpoena issued by the Board must be instituted "upon application of the Board." Sec. 102.31(d), Rules and Regulations provides that when the subpoena was issued at the request of a private party, enforcement proceedings shall be instituted by the General Counsel in the name of the Board "but on relation of such private party." The same section further provides that "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution" of the enforcement proceedings. Pattern 54 is designed to put relators on notice that they are primarily responsible for prosecuting the case before the court and will also serve to establish their standing in the court to participate in the proceedings. This form should be issued to relators or their attorneys in

every ex rel. proceeding and copies should be served on respondent and filed with the court.

11808.1 Pattern 54

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD, ON
RELATION OF LOCAL 1, UNITED SQUIBB
WORKERS OF AMERICA, U.S.W., IND.
Applicant

v. **Civil No. 13579**

JOHN DOE
Respondent

Frankl v. UTH Corp., No. 10-15984 archived on August 29, 2011

To: Joan Smith, Esquire
Address
City

Attorney for Relator
Local 1, UNITED SQUIBB WORKERS
OF AMERICA, U.S.W., IND.

NOTICE OF INSTITUTION OF PROCEEDING TO
ENFORCE SUBPOENA AD TESTIFICANDUM

Please take notice that the General Counsel of the National Labor Relations Board, in the name of the Board, but on behalf of Local 1, United Squibb Workers of America, U.S.W., Ind., has petitioned the Court for an order enforcing a subpoena ad testificandum issued by the Board at the request of Local 1, United Squibb Workers of America,

U.S.W., Ind. Attached are copies of the order to show cause and the application for order enforcing subpoena ad testificandum, filed with the court on _____, 20 _.

This proceeding has been instituted at your request pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 161(2)), and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board (29 C.F.R. 102.31(d)). We specifically call your attention to that portion of Section 102.31(d) of the Rules and Regulations that provides that by bringing this proceeding "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the Court."

Dated: March 20, 20__.

National Labor Relations Board

Frankl v. HTH Corp., No. 10-15984 archived on August 29, 2011

By: [GC's name], General Counsel

[RA's name], Regional Attorney

[signature of attorney]

Attorney for Applicant

Region 42

4 Mammoth Drive

Zenith City, NE

11820–11828 DISCLOSURE OF AGENCY DOCUMENTS AND SUBPOENAS OF, AND TESTIMONY BY, AGENCY PERSONNEL

11820 Policy on Disclosure of Documents and Board Agent Testimony

Generally, it is the policy of the General Counsel to preserve the confidentiality of statements and materials contained in Agency investigatory files and to prohibit Board agents from testifying or providing information or investigative documents concerning

the processing of cases. See Sec. 11824 for certain exceptions to this policy. As set forth below, this policy has been upheld in numerous cases.

It has consistently been held that the Act does not compel the Board to provide for discovery in its proceedings and that the unavailability of discovery is not a prejudicial denial of due process. See, e.g., *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978); *Wellman Industries v. NLRB,* 490 F.2d 427 (4th Cir. 1974); *NLRB v. Automotive Textile Products Co.,* 422 F.2d 1255, 1256 (6th Cir. 1970); *North American Rockwell Corp. v. NLRB,* 389 F.2d 866, 871–873 (10th Cir. 1968); *NLRB v. Movie Star, Inc.,* 361 F.2d 346 (5th Cir. 1966); *Raser Tanning Co. v. NLRB,* 276 F.2d 80 (6th Cir. 1960). In addition, the General Counsel has no obligation to disclose any exculpatory evidence contained in investigatory files. *Erie County Plastic Corp.,* 207 NLRB 564, 570 (1973), enf. mem. 505 F.2d 730 (3d Cir. 1974); *North American Rockwell,* supra.

Notwithstanding the above, pursuant to Sec. 102.118(b)(1), Rules and Regulations, upon request, certain statements and material must be made available by the General Counsel after a witness has testified at a hearing. Sec. 10394.7.

The Agency policy of restricting Board agent testimony is required since the highly sensitive and delicate role of a Board agent in processing cases would be seriously impaired if a real likelihood existed that the agent would become a witness in litigation or if confidential investigative information would become public. *Sunol Valley Golf & Recreation Co.,* 305 NLRB 493 (1991) and *G. W. Galloway Co.,* 281 NLRB 262 fn. 1 (1986). In this regard, the limited evidentiary privilege for informal deliberations of all prosecutorial agencies and branches of Government has also been recognized in the courts as applying to internal Agency documents and agent testimony. *Stephens Produce Co. v. NLRB,* 515 F.2d 1373 (8th Cir. 1975); *J. H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230 (5th Cir. 1973).

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In addition, internal deliberative memoranda are protected from disclosure based upon the historic privilege against disclosure of intra-agency memoranda and communications. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 149–152 (1975); *Davis v. Braswell Motor Freight Lines,* 363 F.2d 600, 603 (5th Cir. 1966). Further, such materials are privileged from disclosure as attorney work product. *Hickman v. Taylor,* 329 U.S. 495 (1947).

11822 FOIA Disclosure of Documents

Sec. 102.117, Rules and Regulations describes, generally, which Agency documents, records, and materials are open to public inspection and sets forth Agency procedures for the disclosure of information under the Freedom of Information Act (FOIA).

Additional direction with respect to FOIA and documents contained in case files is provided in the NLRB FOIA Manual that issued in March 2008. This Manual supercedes all prior GC and OM memoranda dealing with FOIA. It is available on the Agency's web site at www.nlrb.gov/FOIA/E-Reading_Room.aspx.

11824 Subpoena of Agency Documents and Personnel

Sec. 102.118, Rules and Regulations sets forth Agency procedures with respect to requests for the production of documents, other than those required under FOIA, and the testimony of Agency personnel. Sec. 102.118 provides that Board agents shall not produce any Agency documents or testify with respect to information coming to their attention in their official capacity in any court or Board hearing, whether in response to a subpoena or otherwise, without the written consent of the Board, its Chairman or the General Counsel, whoever has supervision of the Board agents or control of the documents.

11824.1 Delegation of General Counsel Authority

As set forth below and in detail in GC Memos 98-9, 98-7, and 94-14, the General Counsel has delegated the authority to permit Board agent testimony and disclosure of documents under Sec. 102.118, Rules and Regulations. In considering such requests, the appropriate General Counsel memoranda should be carefully reviewed to insure consistency with General Counsel policies and that appropriate written records are maintained. A summary of the delegation of Sec. 102.118 authority is set forth below.

(a) *Regional Director Authority:* Regional Directors may consider and decide whether or not to approve requests for authorization under Sec. 102.118 in the following circumstances, in the name of the General Counsel:

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- When compliance officers testify at compliance proceedings
- When a party to a representation case alleges that Board agent conduct has interfered with the conduct of an election and Board agent testimony regarding the issues is necessary to develop a complete record
- When Board agent testimony is necessary to authenticate the signature of a deceased or unavailable witness for whom the agent prepared an affidavit or to establish that the General Counsel made a good faith effort to locate the unavailable witness
- When Board agent testimony is necessary to establish that a respondent has failed to perform an affirmative act pursuant to a court enforced Board Order or
- When a request for access to Regional Office files unaccompanied by a subpoena is made by an official of a Federal, State, or local Government agency in connection with law enforcement activities

(b) *Specific Regional Director Authority to Deny:* In circumstances other than those set forth above, Sec. 102.118 requests from outside parties or counsel for nonpublic file documents or Board agent testimony, unaccompanied by a subpoena, normally should be denied by the Regional Director in the name of the General Counsel.

(c) *Associate General Counsel for Enforcement Litigation Authority:* The Associate General Counsel for the Division of Enforcement Litigation has Sec. 102.118 authority with respect to ongoing litigation in the courts and relative to bankruptcy proceedings.

(d) *Associate General Counsel for Operations-Management:* The Associate General Counsel for the Division of Operations-Management has Sec. 102.118 authority to decide any remaining requests that do not specifically fall within the above areas of previously delegated authority.

11824.2 Procedures Upon Receiving NLRB Subpoena

When an NLRB subpoena for Board employee testimony or for Board records is received by a Regional Office (or if the Region learns that a former Board employee has received such a demand), the Region should immediately:

- In the case of a subpoena ad testificandum, ascertain, if possible, the nature of the testimony being sought.
- Notify the party on whose behalf the subpoena is being served of the existence of Sec. 102.118 and the Agency official to whom the request for authorization should be directed. The Board agent should not undertake to act as an agent in requesting the General Counsel's permission to testify.
- Unless the matter falls within the delegated authority of the Regional Director, the Regional Office should apprise the appropriate Agency official of the facts, so that a request for permission to testify can be properly considered.

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11824.3 Procedures Upon Receiving Non-Board Subpoena

With respect to Agency casehandling matters, when a non-Board subpoena for Board employee testimony or for Board records is received by a Regional Office (or if the Region learns that a former Board employee has received such a demand), the Region should:

- Immediately contact the Special Litigation Branch
- Provide that office with a copy of the subpoena, any corresponding Sec. 102.118 request, and other relevant agency records and information
- Respond to the subpoena or a Sec. 102.118 request associated with such a subpoena only upon instruction from the Special Litigation Branch. See Sec. 11826.2.

11824.4 Witness Fees and Allowances

Agency employees who testify in their official capacity in private litigation are required to collect the authorized witness fees and allowances for expenses of travel. Since the employees remain in official duty status, such funds, with covering memo and certification of service, must be forwarded to the Finance Section.

11826 Agency Motion to Quash or Petition to Revoke

11826.1 Motion to Quash or for Protective Order—Non-Board Proceedings

With respect to any subpoena in non-Board proceedings, the Regional Office should contact the Special Litigation Branch to determine what action, if any, should be taken. See Sec. 11824.3.

11826.2 Testimony or Production of Records in Non-Board Proceedings

Should a motion to quash or for protective order be denied and not reversed on appeal, should there have been insufficient time in which to file the motion, or should a motion to quash or its equivalent not be applicable in the jurisdiction involved, the Regional Office should immediately consult with Special Litigation Branch and the Division of Operations-Management. When such consultation is not possible *and* when there is a court order compelling appearance and providing evidence, unless otherwise directed by the Board, the Chairman of the Board, or the General Counsel, the subpoenaed Board agent should make an appearance at the trial or hearing, accompanied by a Board attorney for representation. The Board agent should take the oath and answer preliminary questions, such as name and occupation. In response to substantive questions, the agent should respectfully decline to answer or to produce records on the grounds that (i) such testimony or document production is prohibited by Sec. 102.118, Rules and Regulations, and (ii) for the reasons that were previously asserted in the motion to quash or that would have been asserted therein had one been filed. See Sec. 11820.

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Should prior consent have been procured, the subpoenaed Board agent should testify or produce records to the extent covered by the consent. With respect to other matters that exceed the scope of the consent, except those clearly not arising in an official capacity, the agent should follow the guidance set forth in the paragraph above.

Should the Board agent be ordered to give information or produce records in violation of Sec. 102.118, the accompanying attorney representing the Board agent should request that action be delayed for a short time in order to consult with Special Litigation Branch.

11826.3 Petition to Revoke—Board Proceedings

Absent authorization to comply with any NLRB subpoena in a Board proceeding, the Regional Office should file a petition to revoke. A supporting memorandum, consistent with Sec. 11820, should be filed. See Secs. 11782–11782.5 for details on petitions to revoke.

11826.4 Petition to Revoke Denied—Board Proceedings

If a petition to revoke is denied by an NLRB administrative law judge, a request for special permission to appeal to the Board should be made, if appropriate, after consultation with the authorizing Agency official. Sec. 11824.

Unless either a petition to revoke has been granted or the Board, the Chairman of the Board, or the General Counsel has directed otherwise, the subpoenaed Board agent should appear, accompanied by an attorney from the Regional Office. The Board agent should take the oath and answer preliminary questions, such as name and occupation. In response to substantive questions, the agent should respectfully decline to answer or to produce records on the grounds that (i) such testimony or document production is prohibited by Sec. 102.118, Rules and Regulations, and (ii) for the reasons that were previously asserted in the petition to revoke or that would have been asserted therein had one been filed. See Sec. 11820.

Should prior consent have been procured, the subpoenaed Board agent should testify or produce records to the extent covered by the consent. With respect to other matters that exceed the scope of the consent, except those clearly not arising in an official capacity, the agent should follow the guidance set forth in the paragraph above.

11828 Production of Documents in Formal Proceedings

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The following Manual sections should be consulted with respect to motions made at hearing for the production of pretrial statements and other documents:

- Sec. 10394.7—Production of witness statements
- Secs. 10398 and 11820—Confidentiality of intragency documents
- Sec. 10400—Request to produce affidavits, statements or documents by opposing counsel
- Sec. 10622.6, Compliance Manual—Disclosure of factual information relevant to backpay computation

11840–11846 SERVICE, FILING, AND COMMUNICATIONS WITH PARTIES

11840 Service and Filing of Paper Documents

The following sections of the Rules and Regulations provide comprehensive guidance for the requirements of service and acceptable methods of filing and service of paper documents:

- Sec. 102.111—Time computation
- Sec. 102.112—Date of service; date of filing
- Sec. 102.113—Methods of service of process and papers by the Agency; proof of service
- Sec. 102.114—Filing and service of papers by parties; form of papers; manner and proof of filing or service

The requirements for service of a particular pleading or other document are contained in the Rules and Regulations concerning that pleading or document. For service by the Regional Office, see Sec. 11842. For filing and service by parties, see Sec. 11846.

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For detailed information about electronic filing and service of documents, visit the Agency's website at http://www.nlrb.gov and see Secs. 11841 and 11846. Additionally, for frequently asked questions about electronic filing and service, visit http://mynlrb.nlrb.gov/efilingfaq.

11840.1 Computation of Period of Time for Paper Documents

For time computation concerning the filing of paper documents, see generally Sec. 102.111(a), Rules and Regulations.

In computing time for filing or service of documents, the time period begins to run the day after the day of the triggering act, event, or default. Generally, the last day of the period so computed is included. However, when the last day falls on a weekend or a legal holiday, the period for filing or service continues until the official closing time of the receiving office on the next business day. When the period of time is less than 7 days, intermediate weekends and holidays are excluded from the computation.

11840.2 Date of Service and Proof for Paper Documents

The date of service shall be the day of personal delivery or receipt of facsimile transmission, where allowed, or day of depositing either in the mail or with a private delivery service, whichever is applicable. Sec. 102.112, Rules and Regulations. Although proof of service is desirable in all cases, failure to furnish such proof does not affect the validity of the service. Sec. 102.114(e), Rules and Regulations.

11840.3 Receipt of Paper Documents and Postmark Rule

The requirements for the timely receipt of documents, including representation petitions and objections to elections, filed with the Agency are set forth in Sec. 102.111(b), Rules and Regulations.

(a) Timely Filing: The Board will accept as timely documents delivered to the receiving office on or before the official closing time of the last day for filing. Also considered timely are those documents sent to the receiving office that are postmarked at least 1 day prior to the due date. Documents received late that are postmarked on or after the due date are untimely.

(b) Requests for Extension of Time: Requests for extension of time to file a document must be received in the appropriate receiving office no later than the official closing time on the date the document is due. Such requests may also be filed electronically at the appropriate office site on the Agency's website and must be received before midnight (i.e., 11:59 p.m.) in the time zone of the receiving office on the date the document is due. Requests for extensions of time filed within 3 days of the due date "must be grounded on circumstances not reasonably foreseeable in advance." See Sec. 102.111(b), Rules and Regulations.

(c) Late Filing: Sec. 102.111(c), Rules and Regulations permits a party to file a motion that briefs, answers, motions, and exceptions in ULP proceedings be filed *after* the filing date in the following limited circumstances:

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- Upon good cause shown based on excusable neglect, and
- When no undue prejudice would result

The party filing a motion for late filing must strictly adhere to the procedures set forth in Sec. 102.111(c), including submitting sworn affidavits by individuals with personal knowledge of the facts setting forth the extenuating circumstances.

The Board will not permit late filing because of miscalculation of a filing date, inattentiveness or carelessness, absent a showing of extenuating circumstances. *Elevator Constructors Local 2 (Unitec Elevator Services Co.),* 337 NLRB 426 (2002).

11840.4 Receipt of Paper Documents—Exceptions to Postmark Rule

Sec. 102.111(b), Rules and Regulations lists four exceptions to the above rule regarding postmarked documents. Accordingly, to be timely the following documents must be delivered to the receiving office on or before the official closing time of the last day for filing:

- Charges filed pursuant to Section 10(b) of the Act. See also Sec. 10052.2
- Applications for awards, fees, and other expenses under the Equal Access to Justice Act (EAJA)

- Petitions to revoke subpoenas
- Requests for extensions of time to file any document for which such an extension may be granted. See Sec. 11840.3(b).

11841 Electronic Service and Filing (E-Filing) of Documents

In addition to filing paper documents, parties or other persons may file documents electronically at the Agency's website at http://www.nlrb.gov. Parties or other persons filing documents electronically (E-Filing) are permitted to do so by following the instructions described on the website notwithstanding any contrary provisions that are set forth by the Rules and Regulations. See Sec. 102.114(i), Rules and Regulations and OM Memo 09-30. Accordingly, as modified by the Agency's E-Filing instructions, the following sections of the Rules and Regulations provide comprehensive guidance for the requirements of service and acceptable methods of filing and service of electronic documents:

- Sec. 102.111—Time computation
- Sec. 102.112—Date of service; date of filing
- Sec. 102.113—Methods of service of process and papers by the Agency; proof of service
- Sec. 102.114—Filing and service of papers by parties; form of papers; manner and proof of filing or service

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The requirements for service of a particular pleading or other document are contained in the Rules and Regulations concerning that pleading or document as modified by the Agency's E-Filing instructions and Secs. 102.114(a) and (i), Rules and Regulations. For service by the Regional Office, see Sec. 11842. For filing and service, see Sec. 11846.

For detailed information about electronic filing and service of documents, visit the Agency's website at http://www.nlrb.gov and also see Sec. 11846.4. Additionally, for frequently asked questions about electronic filing and service visit http://mynlrb.nlrb.gov/efilingfaq.

11841.1 Electronic Filing Permitted

Most documents may be filed electronically at the Agency's website. To file documents electronically, proceed to the website at http://www.nlrb.gov, click on E-Gov, select E-Filing, and follow the detailed instructions.

11841.2 Electronic Filing Prohibited

The following documents may not be filed electronically with any Agency office:

- Unfair Labor Practice Charges
- Representation Petitions
- Petitions for Advisory Opinions
- Documents that are more than twenty (20) megabytes in size

11841.3 Computation of Period of Time for Electronic Documents

For time computation concerning electronically filed documents, see generally Sec. 102.111(a), Rules and Regulations as modified by Sec. 102.114(i) and the instructions for E-Filing on the Agency's website.

In computing time for filing or service of documents, the time period begins to run the day after the day of the triggering act, event, or default. Generally, the last day of the period so computed is included. However, when the last day falls on a weekend or a legal holiday, the period for electronic filing or service through the Agency's website continues until midnight, i.e., 11:59 p.m., in the time zone of the receiving office on the next business day. When the period of time is less than 7 days, intermediate weekends and holidays are excluded from the computation.

For questions about the timely receipt of electronically filed documents, visit the Agency's website and see OM Memo 09-34 and Sec. 11841.5.

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11841.4 Date of Service and Proof for Electronic Documents

For date of service of electronically filed documents, see Secs. 102.112 and 102.114(i), Rules and Regulations, the rules of service set forth on the Agency's website and OM Memo 09-34.

The date of service shall be the day of complete transmission of the electronic document through the Agency's website. Although proof of service is desirable in all cases, failure to furnish such proof does not affect the validity of the service. Sec. 102.114(e), Rules and Regulations.

11841.5 Receipt of Electronic Documents

The requirements for the timely receipt of documents filed electronically with the Agency are set forth at Sec. 102.111(b), Rules and Regulations as modified by Sec. 102.114(i) and the instructions for E-Filing on the Agency's website.

(a) Timely Filing: To be timely filed, electronically filed (E-Filed) documents must be transmitted through the Agency's website at http://www.nlrb.gov with receipt of the entire document before midnight (i.e., 11:59 p.m.) in the time zone of the receiving office on the due date. A failure to timely file a document electronically will not be excused unless there is a technical failure of the Agency's E-Filing system. The Agency's website and OM Memo 09-34 set forth information on what constitutes a

"technical failure" of the Agency's website, what steps the filing party ("user") must take, and what options are available to the party experiencing transmission problems.

(b) Requests for Extension of Time: Requests for extension of time to file a document may be filed electronically through the Agency's website and must be received before midnight (i.e., 11:59 p.m.) in the time zone of the receiving office on the date the document is due. Requests for extensions of time filed within 3 days of the due date "must be grounded on circumstances not reasonably foreseeable in advance." See Sec. 102.111(b), Rules and Regulations and the Agency's website.

(c) Late Filing: In addition to a claim of "technical failure" (see Sec. 11841.5(a)), Sec. 102.111(c), Rules and Regulations permits a party to file a motion that briefs, answers, motions, and exceptions in ULP proceedings be filed *after* the filing date in the following limited circumstances:

- Upon good cause shown based on excusable neglect, and
- When no undue prejudice would result

The party filing a motion for late filing must strictly adhere to the procedures set forth in Sec. 102.111(c), including submitting sworn affidavits by individuals with personal knowledge of the facts setting forth the extenuating circumstances.

The Board will not permit a late filing because of miscalculation of a filing date, inattentiveness or carelessness, absent a showing of extenuating circumstances. *Elevator Constructors Local 2 (Unitec Elevator Services Co.),* 337 NLRB 426 (2002).

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11842 Service by the Agency

11842.1 Service of Charge by the Regional Office

The responsibility for proper and timely service of a charge rests with the charging party. Sec. 102.14, Rules and Regulations and Sec. 10012.8. However, the Regional Office will, as a matter of courtesy, serve charges and amended charges by regular mail on the person against whom the charge is made. Sec. 10040.5. When serving a copy of the charge on the charged party by regular mail, the Regional Office should record service by an affidavit of service. This affidavit should be modeled on Form NLRB-877. The affidavit should list the names and addresses to which the charge was mailed, the date of mailing, and the name of the individual performing the mailing. Form NLRB-877 must be modified to state that the service was by regular mail. This affidavit of service should be placed in the investigative file so that the Board agent assigned to the investigation can ensure that the form has been completed. The affidavit of service could be used, if necessary and upon proper authentication, to prove service of the charge.

11842.2 Service of Other Formal Documents

Complaints, compliance specifications, amendments to either, notices of hearing in C cases, final Board Orders, Administrative Law Judge decisions, and subpoenas must

be served personally, by registered or certified mail, by telegraph, or by leaving a copy at the principal office or place of business of the person on whom service is sought. Sec. 102.113(a)–(c), Rules and Regulations.

To establish necessary proof of service, return receipts must be requested when complaints, compliance specifications, and amendments thereto are served on respondents by certified mail. Subpoenas served by certified mail should also require a return receipt. Although return receipts are a practical necessity in the above circumstances, the rules do not require that return receipts be obtained. Accordingly, to save expense, return receipts should not be requested for certified mail delivery of complaints, compliance specifications, and amendments thereto to charging parties, parties to the contract, and parties of interest. Attorneys or representatives should be served by regular mail. Other documents may be served by any of the foregoing methods, as well as by regular mail or private delivery service, or, with the permission of the person receiving service, by facsimile transmission. Sec. 102.113(d), Rules and Regulations.

Note: If a party or person is represented by an attorney, the instructions regarding service set forth in Sec. 11842.3 should also be followed. On the other hand, if a party or person is represented by a nonattorney designated representative, the instructions regarding service set forth in Sec. 11842.4 should be followed.

11842.3 Service When a Party or Person is Represented by an Attorney

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When a party's or person's representative is an attorney, Model Rule 4.2, the skip counsel rule described in Sec. 10058, regulates the service of all documents and correspondence. Accordingly, all documents and correspondence, regardless of the method of service, should be addressed to and served exclusively on the attorney unless:

- Service of documents and correspondence on the party or person has been authorized by the attorney, for example by checking the appropriate box on a Notice of Appearance, Form NLRB-4701 (See Sec. 10058.1(b))[7]
- Direct contact with a party or person is otherwise authorized by the attorney,[8] or
- Direct contact with a party or person is authorized by law as set forth below in subparagraphs (a), (b), or (c).

(a) *Service on Party or Person with Copy to Attorney:* The following documents and/or correspondence should be addressed to and served on the appropriate party(ies) or

[7] Service of post complaint litigation documents such as motions, briefs, and exceptions, as well as compliance related documents, should be exclusive to the attorney unless the attorney has consented to service on the party or person.

[8] For example, both before and after the requirements of compliance have been agreed upon and the charged party/respondent through its attorney has advised the Regional Office of its intention to comply, documents necessary to accomplish compliance may not be sent directly to the party absent consent of the attorney. Such documents may include notices for posting pursuant to a settlement agreement, an ALJ decision, or a Board Order; requests for a certification of posting; and a cover letter that includes instructions concerning the details of compliance. Absent consent of the attorney, such documents can be sent only to the attorney.

person(s) with a copy(ies) to their attorney(s) and, if appropriate, with copies to other parties and their attorneys or designated representatives:

- Charges, amended charges, and standard service letters (see Sec. 10040)
- Petitions, amended petitions, and standard service letters (see Sec. 11009)
- Correspondence confirming agreed upon election arrangements, election notices, and letters requesting and supplying *Excelsior* lists accompanied by a copy of the approved consent or stipulated election agreement
- Objections and standard service letters (see Sec. 11392.9)
- Subpoenas, related forms and instructions, and standard cover letters which do not convey substantive information or invite a response. However, written communications conveying substantive information or inviting a response which may accompany subpoenas must be addressed to and served exclusively on the attorney unless the attorney has consented to service on the party or person.

(b) Service on All Parties, Persons, and Attorneys: The following documents should be served on all parties and persons and their attorneys:

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- Complaints, compliance specifications, amendments to either, notices of hearing, final Board Orders and Administrative Law Judge decisions in unfair labor practice cases and in connection with 10(k) hearings, and cover letters which do not invite a response. However, written communications conveying substantive information or inviting a response which may accompany any of these documents must be addressed to and served exclusively on the attorney unless the attorney has consented to service on the party or person.
- Notices of hearing, decisions, orders, reports, supplemental decisions, and certifications in representation cases

(c) Service on Attorney with Copy to Party: The following documents and/or correspondence should be addressed to and served on the attorney(s) of the appropriate party(ies) with a copy(ies) to such party(ies) and with copies to other parties and their attorneys or nonattorney designated representatives:

- Dismissal and withdrawal letters
- Final *Collyer*, *Dubo*, and administrative deferral letters
- Final appeal letters, final compliance appeal letters, and letters acknowledging an appeal, ruling on motions for reconsideration, and conditioning the denial of an appeal
- Closing compliance letters

11842.4 Service When a Party or Person is Represented by a Nonattorney Designated Representative

When a party's or person's designated representative is not an attorney, Model Rule 4.2, the skip counsel rule described in Sec. 10058, does not apply. Although all documents and correspondence, including post complaint litigation and compliance related documents, regardless of the method of service, should be addressed to and served on the designated representative, copies may also be sent to the party or person unless one of the situations set forth below in subparagraphs (a), (b), or (c) applies:

(a) Service on Party or Person with Copy to Nonattorney Designated Representative: The following documents and/or correspondence should be addressed to and served on the appropriate party(ies) or person(s) with a copy(ies) to their nonattorney designated representative(s) and, if appropriate, with copies to other parties and their attorneys or nonattorney designated representatives:

- Charges, amended charges, and standard service letters (see Sec. 10040)
- Petitions, amended petitions, and standard service letters (see Sec. 11009)
- Correspondence confirming agreed upon election arrangements, election notices, and letters requesting and supplying *Excelsior* lists accompanied by a copy of the approved consent or stipulated election agreement
- Objections and standard service letters (see Sec. 11392.9)
- Subpoenas, related forms and instructions, and standard cover letters

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(b) Service on All Parties, Persons, and Nonattorney Designated Representatives: The following documents should be served on all parties and persons and their nonattorney designated representatives:

- Complaints, compliance specifications, amendments to either, notices of hearing, final Board Orders, and Administrative Law Judge decisions in unfair labor practice cases and in connection with 10(k) hearings.
- Notices of hearing, decisions, orders, reports, supplemental decisions, and certifications in representation cases

(c) Service on Nonattorney Designated Representative with Copy to Party: The following documents and/or correspondence should be addressed to and served on the nonattorney designated representative(s) of the appropriate party(ies) with a copy(ies) to such party(ies) and with copies to other parties and their attorneys or designated representatives:

- Dismissal and withdrawal letters
- Final *Collyer*, *Dubo*, and administrative deferral letters

- Final appeal letters, final compliance appeal letters, and letters acknowledging an appeal, ruling on motions for reconsideration, and conditioning the denial of an appeal
- Closing compliance letters

11842.5 Service on Multiple Attorneys or Nonattorney Designated Representatives

If a party or person is represented by more than one attorney or nonattorney designated representative, service on any one of such attorneys or designated representatives in addition to the party or person, where appropriate, satisfies the requirements of Sec. 102.113(f) of the Board's Rules and Regulations. However, as a matter of courtesy, an effort should be made to serve all attorneys or designated representatives of a party or person.

11844 Oral and Electronic Communications with Parties or Persons

(a) Party or Person Represented by an Attorney: If a party's or person's representative is an attorney, all oral and electronic communications should be directed exclusively to the attorney since the skip counsel rule applies to all forms of communications, including oral and electronic communications. See Sec. 10058. Copies of electronic communications should not be sent to the party or person unless direct contact is authorized by the attorney, or authorized by law as set forth in Sec. 11842.3(a), (b), or (c) regarding service.

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(b) Party or Person Represented by a Nonattorney Designated Representative: If a party's or person's designated representative is not an attorney, all oral and electronic communications should be directed to the representative. However, copies of electronic communications may also be sent to the party or person.

11846 Filing and Service

Filing of paper documents by hand delivery, by registered, certified, or regular mail, or by private delivery service satisfies the requirements for filing with the Board, the General Counsel, Regional Offices, or Administrative Law Judges. Sec. 102.114, Rules and Regulations. In addition, filing by facsimile transmission may be used in certain circumstances, as set forth below in Secs. 11846.1, .2 and .3. Electronic filing and service of documents is also permitted as detailed on the Agency's website at http://www.nlrb.gov. See also Secs. 11841 and 11846.4.

11846.1 Facsimile Filing Permitted

Parties may file unfair labor practice charges, representation petitions, objections to elections, and requests for extension of time by facsimile transmission, if transmitted to the facsimile machine of the appropriate office of the Agency. Receipt of such

facsimile transmission by the Agency constitutes filing. Sec. 102.114(f), Rules and Regulations.

11846.2 Facsimile Filing Permitted only with Consent

The filing by facsimile transmission of documents other than those set forth above, except those specifically prohibited as set forth in Sec. 11846.3, will be accepted by the appropriate office of the Agency, only with the advance permission of the receiving office. Sec. 102.114(g), Rules and Regulations.

11846.3 Facsimile Filing Prohibited

Sec. 102.114(g), Rules and Regulations prohibits the filing by facsimile of a showing of interest, requests for review, and appeals from dismissal of petitions in representation cases; appeals from dismissal of unfair labor practice charges; objections to settlements; answers to complaints; exceptions, cross-exceptions and briefs; Equal Access to Justice Act (EAJA) applications and a variety of motions. See Sec. 102.114(g) for a complete list of exclusions from filing by facsimile transmission.

11846.4 Electronic Filing and Service

Most documents may be filed with the Agency electronically notwithstanding any contrary provisions elsewhere in the Board's Rules and Regulations. See Sec. 102.114(i). The rules governing such filings are set forth at the Agency's website at http://www.nlrb.gov. and are discussed below in subparagraphs (a) through (d) and in Sec. 11841. Additionally, for frequently asked questions about electronic filing and service visit http://mynlrb.nlrb.gov/efilingfaq.

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(a) Electronic Filings with the Agency: As noted in Sec. 11841, most documents may be filed electronically (E-Filed) at the Agency's website. Subject to the 20 megabyte limitation for all documents, the only documents which may not be E-Filed are unfair labor practice charges, representation petitions, and petitions for advisory opinions. For a detailed discussion of electronic filing and service, see the Agency's website. See also Secs. 11841–11841.5, OM Memos 09-30, 09-34, and 09-41.

(b) Service of Electronically Filed (E-Filed) Documents on Other Parties: Documents E-Filed with the Board/Office of the Executive Secretary, the Division of Judges, or with the Regional Office that require service on other parties must be served by electronic mail (e-mail), if possible. See Sec. 102.114(a) and (i), Rules and Regulations and OM Memo 09-30. If a party to be served does not have the ability to receive e-mail service, notification by telephone regarding the substance of the electronically transmitted document is required. Additionally, after such telephonic notification, a copy of the document must be served on that party by:

- Personal service no later than the next day
- Overnight delivery service, or,
- With the permission of the party receiving the document, by facsimile transmission.

A document, whether E-Filed or filed as a paper document, may always be served by E-Filing at the Agency's website on the Regional Director, Hearing Officer, or counsel for the General Counsel at the Agency's website. See Sec. 11846.4(c). However, when a paper document has been filed, service on other parties must be accomplished by means allowed by Sec. 102.114(a), (h), and (i), Rules and Regulations. See also Sec. 11846.5.

The instructions on the Agency's website as well as Sec. 102.114(a) and (i), Rules and Regulations should be carefully reviewed for all electronic filing and service questions.

(c) Service on the Regional Director, Hearing Officer, or counsel for the General Counsel by E-Filing at the Agency's website: Electronic service on a Regional Director, Hearing Officer, or counsel for the General Counsel is available at the Agency's website at http.//www.nlrb.gov for all documents requiring service under Sec. 102.114(a) and (i), Rules and Regulations. Such service by E-Filing, unless prohibited (see Sec. 11841.2), is available regardless of whether the document to be served was E-Filed or filed as a paper document. See OM Memo 07-07 (Revised) dated November 15, 2006. To serve documents electronically on a Regional Director, Hearing Officer, or counsel for the General Counsel, proceed to the Agency's website click on E-Gov, select E-Filing, and follow the detailed instructions.

The above-described E-Filing service option is not available for service on other parties. Service on other parties must be accomplished by means allowed under Sec. 102.114(a), (h), and (i), Rules and Regulations. For service of E-Filed documents on other parties, see Sec. 11846.4(b). For service of paper documents on other parties, see Sec. 11846.5.

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(d) Service on the Regional Director, Hearing Officer, or counsel for the General Counsel by E-mail When E-Filing: Documents filed electronically with the Board, the Division of Judges, or a Regional Office through the Agency's website at http://www.nlrb.gov may also be served by e-mail on the Regional Director, Hearing Officer, or counsel for the General Counsel. See Sec. 102.114(a) and (i), Rules and Regulations, and Sec. 11846.4(b). Additionally, as noted in Sec. 11846.4(c), such electronic service may also be made by E-Filing through the Agency's website.

E-mail service on a Regional Director, Hearing Officer, or counsel for the General Counsel is not effective service if the document was filed as a paper document instead of by E-Filing at the Agency's website. See Sec. 102.114(a) and (i), Rules and Regulations.

11846.5 Service of Paper Documents on Other Parties

Where service of paper documents by a party on other parties is required, such service may be made personally or by registered mail, certified mail, regular mail, or by private delivery service. Service of documents by a party on other parties by any other means, including facsimile transmission, is permitted only with the consent of the party being served. In general, service on all parties shall be in the same manner as that utilized in filing the document with the Board or in a more expeditious manner. See Secs. 102.114(a), (h), and (i) Rules and Regulations for specific applications.

11846.6 Registration for Electronic Service (E-Service)

Parties, or their representatives, who register for E-Service at the Agency's E-FILING site under E-GOV at http.//www.nlrb.gov ("registrants") will receive e-mail notification of and access to both E-Filed documents as described below in subparagraph (a) and the issuance of Board and ALJ decisions as described below in subparagraph (b).

(a) Notification of Electronically Filed (E-Filed) Documents: Registrants for E-Service will receive e-mail notification of documents that have been E-Filed with the Board or with the Division of Judges by another party to their case. This e-mail notification will be simultaneous with the E-Filing and will provide a link to the electronically filed document. E-mail notification does not relieve counsel for the General Counsel or any other party from service on the other parties as required by the Rules and Regulations. See Sec. 11846.4(b). Regional Offices should review OM Memo 09-34 regarding receipt of e-mail notification, routing of the document, and placement in the Regional case file.

(b) Electronic Issuance and Service of Board and ALJ Decisions: Registrants for E-Service will receive e-mail notification of the issuance of Board and ALJ Decisions with a link to the decision upon its posting on the Agency's E-docket sheet. Thereafter, the decision will be posted on the Agency's website on the following business day at 2 p.m. Eastern time. Parties, or their representatives, who do not register for E-Service will continue to receive service of decisions by traditional means, usually by mail. However, parties, or their representatives, who register for E-Service will not receive service by any other means. The Agency's website at http://www.nlrb.gov and in particular mynlrb.nlrb.gov /efilingfaq should be carefully reviewed for all electronic filing and service questions. See also OM Memos 08-66 and 09-34.

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11850–11860 CASE FILES AND DOCUMENTARY EVIDENCE

11850 Case Files

The paper case file should reflect all action taken in the investigation and be kept up to date. It must be sufficiently complete and current to permit appropriate supervisory review on an ongoing basis and, if necessary, to allow another agent to continue the investigation with a minimum of duplication. Although the Agency has ongoing pilot projects utilizing electronic case files, the paper case file remains the official case file for Agency purposes.

In all unfair labor practice and representation cases, Regional Offices must also maintain electronic file folders for each case consistent with the Agency's revised Standard Storage and Naming Convention Protocol for Electronic Documents and the policies related to E-discovery rules under the Federal Rules of Civil Procedure (FRCP) as set forth below:

(a) *Standard Storage and Naming Convention Protocol for Electronic Documents:* As Regional Offices are brought onto the centralized servers, they should comply with guidance set forth in OM Memos 07-55, 08-04 and 08-33 as to naming and storage conventions for electronic documents. Thus, Regional Offices will set up

electronic file folders for each case which will allow Regional managers and supervisors and Headquarters office personnel to access the files.

(b) *FRCP E-Discovery Rules*: Sec 11862, GC Memo 07-09 and OM 07-64 provide guidance for managing electronically stored information to ensure compliance with the FRCP E-Discovery Rules. Since such rules apply to the Board in any civil proceeding in federal district court and it cannot be determined which cases may ultimately be subject to civil litigation, all Regional case files must be maintained in a uniform manner consistent with the appropriate instructions in this area.

11850.1 Organization of Paper Case Files

Paper Case Files should be so organized that specific material may be easily found. No special sectional breakdown is required. The need for organization will often depend on the case and on the extent of the work already done, but a desirable breakdown would consist of sections devoted to the (1) formal (public) documents, (2) memos and correspondence, (3) affidavits and statements, and (4) other documents. Normally, the affidavits and statements should be arranged alphabetically and other documents chronologically.

11850.2 File Should Contain Complete History of Case

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There should be no gaps in the case file. Where an item inserted in the file speaks for itself, it is unnecessary to recite the surrounding facts in a memo, but, for example, an unsuccessful interview attempt should be documented in a memo; in this way, the file will show the point has not been overlooked.

From time to time, if the case is long and involved, the Board agent assigned should, by memo, bring the circumstances up to date and signify further steps to be taken.

11860 Documentary Evidence

The term documentary evidence means any paper whether in written, printed, graphic, electronic or other visual form, containing facts germane to the case that might be necessary to introduce at a hearing. Documentary evidence includes correspondence to the Regional Office, other letters, e-mails and attachments, records, charts, pictures, affidavits, and other signed statements.

All documentary evidence should be retained in the original form if possible; otherwise, such evidence should be photocopied. E-mails and electronically supplied documents must be printed and placed in the file. See Sec. 11862, GC Memo 07-09 and OM Memos 07-64 and 10-48 for specific guidance for managing electronically stored information.

Unless the source and circumstances of receipts of a document are self-explanatory, they should be recited in a file memorandum.

No marks should be made on documentary evidence. Notes, questions, remarks, or instructions should be inserted on separate sheets and not on the face of the document. This is particularly applicable to the practice that sometimes exists of writing on the document the name(s) of the person(s) in the Regional Office to whom it is to be routed; separate routing slips should be used for this purpose.

11862 E-Discovery and Guidance for Managing Electronically Stored Information

The Federal Rules of Civil Procedure (FRCP) address discovery requests in civil litigation covering all types of information including information that is electronically stored. These discovery rules apply to Regional Offices as well as to the rest of the Agency in civil proceedings before the federal courts. Examples of such litigation include case handling matters involving injunctions and contempt, and special litigation matters involving personnel and procurement related litigation. GC Memo 07-09 and OM Memo 07-64 address electronic discovery (E-Discovery) requests and set forth comprehensive guidance and best practices which should be followed for managing electronically stored information.

NOTE: The guidance set forth in GC Memo 07-09 and OM Memo 07-64 concerning the storage of electronic documents applies to the handling of all cases from initial filing through the conclusion of each case. Regional Offices must be able to describe and follow their records storage and retention policy and be able to identify, locate, and preserve relevant electronic documents. Accordingly, each Regional Office is responsible for implementing and following a written policy for records storage and retention of electronic documents.

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OM Memo 07-64 briefly explains the E-Discovery amendments to the FRCP, the impact of such amendments on Regional Offices, and specifies steps Regions must take to ensure their ability to comply with such amendments. The memorandum also sets forth best practices regarding what electronic documents must be kept and where they should be kept as well as the procedures which must be followed during a "litigation hold."

11863 Litigation Hold

A litigation hold is a directive to suspend normal disposition procedures and preserve documents, including electronically stored information, which may be related to pending or reasonably foreseeable litigation. See OM Memos 07-64 and 10-48. Such requires preservation of all related documents, both paper and electronic, in the form they existed when the litigation hold issues as well as the preservation of any related paper or electronic documents created after issuance of the litigation hold. A litigation hold may be implemented by the Regional Office, Special Counsel, or other General Counsel branches within the Agency. The Regional Office should implement a litigation hold whenever it recommends initiating or decides to initiate proceedings that may result in

litigation in a federal district court or circuit court. Situations requiring Regional implementation of a litigation hold include:

- When a Regional Office determines that 10(l) injunctive relief is appropriate, a litigation hold must be instituted immediately. The litigation hold remains in effect until there is a final decision that 10(l) injunction proceedings or 10(l) contempt proceedings are not warranted (see Sec. 10242), the Board issues its order in the underlying case, all injunction litigation is completed, or the underlying case is otherwise closed.

- When a Regional Office determines to recommend that 10(j) injunctive relief or 10(j) contempt proceedings are appropriate (see Sec. 10310.3(b)), a litigation hold must be instituted immediately. The litigation hold remains in effect until there is a final decision that 10(j) injunction or contempt proceedings are not warranted, the Board issues its order in the underlying case, all injunction litigation is completed, or the underlying case is otherwise closed.

- When a Regional Office determines to recommend that 10(e) injunction proceedings in circuit court are appropriate (see Sec. 10320), a litigation hold must be instituted immediately. The litigation hold remains in effect until there is a final decision that 10(e) injunction proceedings are not warranted, all injunction litigation is completed, or the underlying case is otherwise closed.

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- When a Regional Office determines that an unfair labor practice charge alleges violations of the Act that are arguably encompassed by an outstanding court judgment enforcing a Board order, a litigation hold must be instituted immediately. Such charges include instances when the allegations involve the same section of the Act as the court judgment or involve a different section of the Act but might reasonably be expected to raise the possibility of contempt. A litigation hold must also be implemented immediately upon receipt by a Region of an allegation asserting noncompliance by a respondent with any affirmative or negative provision(s) of a judgment, even if no new unfair labor practice charge is filed. Whenever there is any uncertainty as to the appropriateness of implementing a litigation hold, a Region should err on the side of imposing a litigation hold. The litigation hold remains in effect until there is a final decision that contempt proceedings are not warranted or all contempt litigation is completed.

GC Memo 07-09 provides specific information and guidance involving litigation on behalf of the Board in federal courts with respect to the discovery of electronically stored information. See also OM Memos 07-64 and 10-48.

11870 REPORTING SERVICE

11870 Official Reporting Service

Contracts, based on competitive bids, are awarded annually for reporting the Agency's hearings. Regional Directors and officers-in-charge are notified in advance of the beginning of the fiscal year as to the selected contractor for the coming year and the rates and fees stipulated under the contract. The contractor notifies Agency field offices of its designated local subcontractor or agent for reporting service in each field office.

11870.1 Notification of Hearing Schedule

Notification of all hearing schedules must be sent to both the contractor and the local subcontractor. It is very important that this information be issued promptly and accurately in every case. The current contract should be consulted for time limitations for notification of hearing schedules.

11870.2 Coordination with the Local Reporter

Regional Offices should cooperate with the reporting service to the extent possible to coordinate the number and locations of hearings in order to permit the economic use of the service's resources without sacrificing the Agency's commitment to quality and timely service to the public.

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11870.3 Scheduling Hearings

Although there are other considerations relative to the scheduling of hearings, the Regional Office should make an effort to schedule hearings in the Regional, Subregional, or Resident Office city since this usually results in better delivery time of the transcript, savings in staff time and travel expense and, under some contracts, a lower reporting rate.

11870.4 Timely Notification of Cancellations or Postponements

Pursuant to the court reporting contract, the Agency is charged a cancellation fee if the reporting service is not notified of the cancellation or postponement of a hearing sufficiently in advance of the hearing date. These fees can usually be avoided by notification to the reporting service by a designated time on the last business day before the hearing date. Since these fees constitute a significant expense, all staff members, particularly those involved in obtaining election stipulations, must be alert to notify the appropriate Regional Office personnel of any cancellations or postponements.

The reporting service and/or subcontractor should be notified of such action by telephone as soon as possible. The current reporting contract should be consulted for time limitations for notification of cancellations or postponements.

11870.5 Report of Obligated Cost of Hearing, Form NLRB-4237

It is the responsibility of the hearing officer in an R case and the trial attorney in a C case to complete this form immediately upon the close of the hearing or as of the last day of the month, if the hearing continues into the subsequent month. Likewise, if the hearing is postponed or canceled at the hearing site, this form must be completed by the respective hearing officer or trial attorney.

A hearing that is adjourned for 5 or more calendar days is considered a complete hearing for purposes of attendance fees. Therefore, in such situations, this form must be completed and submitted to the Regional Office immediately upon such adjournment. A new Form NLRB-4237 should be completed for the reopened hearing. If the hearing officer or trial attorney is away from the Regional Office on the last day of the month, he/she should inform the Regional Office of the estimated cost of hearing through that date.

11870.6 Sales of Copies of Transcript

A party seeking a copy of the transcript should order it from the reporting service. Such copy must be provided to the party at the actual cost of duplication. Pub. L. 92-463. Care must be exercised with respect to the use by the parties of Regional Office copies of the transcript. Although the transcript is part of the formal file and as such is accessible to the public, use of the transcript should not be volunteered. When a request is received to read or hand copy the Regional Office copy, it should be made promptly available under such circumstances as will not delay Board personnel in processing the case. Loan of the transcript for use outside the office is not permitted.

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11870.7 Reporting Service Compliance with Contract

Inasmuch as the service provided by the court reporter is vital to many of the most important aspects of Agency work, it is imperative that the quality of the reporting service's performance be carefully monitored. Records should be maintained as to late arrival of reporters, poor or inaccurate transcripts and inappropriate or unprofessional behavior by reporters. Any such deficiencies should be relayed promptly to Division of Administration, Facilities and Services Branch.

11870.8 Other Contract Provisions

The current reporting service contract contains information relating to other provisions, such as:

- Fees—attendance fees, cancellation fees (for cancellations and postponements), and additional service fees
- Delivery of transcripts, appropriately formatted diskettes and copies—ordinary copy, expedited copy, prompt copy, and daily copy
- Timely delivery of transcripts
- Liquidated damages for delay in delivery of transcripts
- Receipt and processing of transcripts and exhibits

- Retention of stenographic notes and transcripts

11880–11886 COMMUNICATIONS AND TRAVEL

11880 Communication with Headquarters

If a direct communication is received by a Regional Office from another part of the Agency on a matter that should properly be routed through the Division of Operations-Management, answers addressed to the individual initiating the communication should be sent through Operations-Management, along with copies of the original communication.

In submitting other than routine material to Operations-Management, such material should be identified.

Each of the Assistant General Counsels in Operations-Management is the focal point of contact between Washington and the Regional Offices assigned to the Assistant General Counsel. Serving as the General Counsel's representative, the Assistant General Counsel exercises general supervision over the Regional Office's casehandling, performance, personnel, and administration. The Assistant General Counsel participates in Washington agendas involving regional cases and assists in handling matters or problems involving the Assistant General Counsel's Regional Offices.

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11881 Communication with the Board

All communications that are sent directly to the Board should be addressed to the Office of the Executive Secretary.

11882 Travel Beyond Regional Boundaries

Board agents are authorized to travel within their Region and to geographic areas in adjoining Regions in the performance of official duties.

11884 Communication With Other Agencies

Normally, a Regional Office's contacts with other agencies need not be cleared through the Division of Operations-Management. Thus, the Regional Office may directly contact field offices of other agencies in order to procure information (such as, in connection with an actual case) that is available through such offices. Likewise, Regional Offices, within the limitations of Secs. 102.117 and .118 of the Rules and Regulations and Secs. 11820–11828, should cooperate in furnishing to offices of other Government agencies such information as may be requested by them. With respect to possible violations of other Federal statutes, see Sec. 10070.

However, in limited circumstances, Regional Offices must seek clearance from Operations-Management before referral to other agencies, such as when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings). See Sec. 10070. Similarly, the clearance requirement applies prior to referral when alleged unethical conduct of attorneys is involved. See Secs. 10058.6 and 11754.2(a).

For more specific guidance pertaining to Occupational Safety and Health Act matters, refer to GC Memos 75-29, 76-14, and 79-4. With respect to the Mine Safety and Health Act, see GC Memo 80-10. See also Sec. 10070.2.

11886 Congressional Inquiries

11886.1 Reply by Regional Directors

Regional Directors have the authority to respond directly to members of Congress concerning inquiries about a status of a case or questions concerning the handling of a case. Courtesy copies of such letters are forwarded to the Division of Operations-Management so that Headquarters might be fully apprised of all matters in which congressional interest has been expressed.

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11886.2 Reply by the Division of Operations-Management

Congressional inquiries concerning the following matters are referred to the Division of Operations-Management for consideration and response:

- Multiregional cases
- Regional or general operations casehandling procedures
- Cases pending in the Division of Advice
- Cases of national importance or widespread interest
- Proposed legislation with respect to changes in our Act
- The establishment of new Regional, Subregional, or Resident Offices
- The relocation of regional boundaries

- A change in the status of an existing office
- Any congressional inquiries of such a nature that a reply should be more appropriately made by the General Counsel

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15004 REGIONAL AND SUBREGIONAL OFFICES

15004 Alphabetical List

Alphabetical list of States showing location in relation to Regions and Subregions. (Note that respective Region number follows Subregion number to facilitate locating areas serviced.)

Alabama 10, 15
Alaska 19
Arizona 28
Arkansas 16, 26
California 20, 21, 31, 32
Colorado 27
Connecticut 34
Delaware 4, 5
District of Columbia 5
Florida 12, 15
Georgia 10, 12
Hawaii S-37 (20)
Idaho 19, 27
Illinois 13, 14, SR-33 (14)
Indiana 9, 13, 25
Iowa 17, 18, SR-33 (14)
Kansas 17
Kentucky 9, 25, 26
Louisiana 15
Maine 1
Maryland 5
Massachusetts 1
Michigan 7, 30
Minnesota 18
Mississippi 15, 26
Missouri 14, 17
Montana 19, 27
Nebraska 17, 27
Nevada 28, 32
New Hampshire 1
New Jersey 4, 22
New Mexico 28
New York 2, 3, 29
North Carolina 11
North Dakota 18
Ohio 8, 9
Oklahoma 17
Oregon SR-36 (19)

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Pennsylvania 4, 5, 6
Rhode Island 1
South Carolina 11
South Dakota.....18
Tennessee.....10, 11, 26
Texas 16
Utah.....27
Vermont 1
Virginia 5, 11
Washington 19, SR-36 (19)
West Virginia.....5, 6, 9, 11
Wisconsin.....18, 30
Wyoming.....27
Puerto Rico.....24
U.S. Virgin Islands.....24

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15010 Areas Served By Regional and Subregional Offices

(Listed in numerical order except that Subregions appear directly under respective Regions.)

Region 1. Boston, Massachusetts. Services *Maine, New Hampshire, Vermont, Massachusetts,* and *Rhode Island*.

Region 2. New York, New York. In *New York*, services the boroughs of Manhattan and the Bronx in New York City; and Orange, Putnam, Rockland, and Westchester Counties.

Region 3. Buffalo, New York. Services all *New York* State Counties except the New York City metropolitan area counties serviced by Regions 2 and 29.

Persons may also obtain service at the Resident Office located in Albany, New York.

Region 4. Philadelphia, Pennsylvania. In *Pennsylvania*, services Berks, Bucks, Carbon, Chester, Delaware, Lackawanna, Lancaster, Lehigh, Luzerne, Monroe, Montgomery, Northampton, Philadelphia, Pike, Susquehanna, Wayne, and Wyoming Counties; in *New Jersey*, services Atlantic, Burlington, Camden, Cape May, Cumberland, Gloucester, Ocean, and Salem Counties.

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Region 5. Baltimore, Maryland. Services *Maryland, Delaware,* and the *District of Columbia*; in *Pennsylvania*, services Adams, Cumberland, Franklin, and York Counties; in *Virginia*, services Accomack, Albemarle, Amelia, Arlington, Augusta, Brunswick, Buckingham, Caroline, Charles City, Chesterfield, Clarke, Culpeper, Cumberland, Dinwiddie, Essex, Fairfax, Fauquier, Fluvanna, Frederick, Gloucester, Goochland, Greene, Greensville, Hanover, Henrico, Highland, Isle of Wight, James City, King and Queen, King George, King William, Lancaster, Loudoun, Louisa, Lunenberg, Madison, Mathews, Middlesex, Nelson, New Kent, Northampton, Northumberland, Nottoway, Orange, Page, Powhatan, Prince Edward, Prince George, Prince William, Rappahannock, Richmond, Rockingham, Shenandoah, Southampton, Spotsylvania, Stafford, Surry, Sussex, Warren, Westmoreland, and York Counties, and the independently incorporated Virginia cities not part of, but located within or adjacent to, the territory defined by these Virginia counties; and in *West Virginia*, services Berkeley, Grant, Hampshire, Hardy, Jefferson, Mineral, Morgan, and Pendleton Counties.

Persons may also obtain service at the Resident Office located in Washington, D.C.

Region 6. Pittsburgh, Pennsylvania. In *Pennsylvania*, services Allegheny, Armstrong, Beaver, Bedford, Blair, Bradford, Butler, Cambria, Cameron, Centre, Clarion, Clearfield, Clinton, Columbia, Crawford, Dauphin, Elk, Erie, Fayette, Forest, Fulton, Greene, Huntingdon, Indiana, Jefferson, Juniata, Lawrence, Lebanon, Lycoming, McKean, Mercer, Mifflin, Montour, Northumberland, Perry, Potter, Schuylkill, Snyder, Somerset, Sullivan, Tioga, Union, Venango, Warren, Washington, and Westmoreland Counties; and in *West Virginia*, services Barbour, Braxton, Brooke, Calhoun, Doddridge,

Gilmer, Hancock, Harrison, Lewis, Marion, Marshall, Monongalia, Ohio, Pleasants, Pocahontas, Preston, Randolph, Ritchie, Taylor, Tucker, Tyler, Upshur, Webster, Wetzel, Wirt, and Wood Counties.

Region 7. Detroit, Michigan. In *Michigan*, services Alcona, Allegan, Alpena, Antrim, Arenac, Barry, Bay, Benzie, Berrien, Branch, Calhoun, Cass, Charlevoix, Cheboygan, Chippewa, Clare, Clinton, Crawford, Eaton, Emmet, Genesee, Gladwin, Grand Traverse, Gratiot, Hillsdale, Huron, Ingham, Ionia, Iosco, Isabella, Jackson, Kalamazoo, Kalkaska, Kent, Lake, Lapeer, Leelanau, Lenawee, Livingston, Luce, Mackinac, Macomb, Manistee, Mason, Mecosta, Midland, Missaukee, Monroe, Montcalm, Montmorency, Muskegon, Newaygo, Oakland, Oceana, Ogemaw, Osceola, Oscoda, Otsego, Ottawa, Presque Isle, Roscommon, Saginaw, St. Clair, St. Joseph, Sanilac, Schoolcraft, Shiawassee, Tuscola, Van Buren, Washtenaw, Wayne, and Wexford Counties.

Persons may also obtain service at the Resident Office located in Grand Rapids, Michigan.

Region 8. Cleveland, Ohio. In *Ohio*, services Allen, Ashland, Ashtabula, Auglaize, Belmont, Carroll, Columbiana, Coshocton, Crawford, Cuyahoga, Defiance, Delaware, Erie, Fulton, Geauga, Guernsey, Hancock, Hardin, Harrison, Henry, Holmes, Huron, Jefferson, Knox, Lake, Licking, Logan, Lorain, Lucas, Mahoning, Marion, Medina, Monroe, Morgan, Morrow, Muskingum, Noble, Ottawa, Paulding, Portage, Putnam, Richland, Sandusky, Seneca, Stark, Summit, Trumbull, Tuscarawas, Union, Van Wert, Washington, Wayne, Williams, Wood, and Wyandot Counties.

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Region 9. Cincinnati, Ohio. In *Ohio*, services Adams, Athens, Brown, Butler, Champaign, Clark, Clermont, Clinton, Darke, Fairfield, Fayette, Franklin, Gallia, Greene, Hamilton, Highland, Hocking, Jackson, Lawrence, Madison, Meigs, Mercer, Miami, Montgomery, Perry, Pickaway, Pike, Preble, Ross, Scioto, Shelby, Vinton, and Warren Counties; in *Indiana*, services Clark, Dearborn, and Floyd Counties; in *West Virginia*, services Boone, Cabell, Clay, Fayette, Jackson, Kanawha, Lincoln, Logan, McDowell, Mason, Mingo, Nicholas, Putnam, Raleigh, Roane, Wayne, and Wyoming Counties; and in *Kentucky*, services Anderson, Bath, Bell, Boone, Bourbon, Boyd, Boyle, Bracken, Breathitt, Bullitt, Campbell, Carroll, Carter, Casey, Clark, Clay, Elliott, Estill, Fayette, Fleming, Floyd, Franklin, Gallatin, Garrard, Grant, Greenup, Hardin, Harlan, Harrison, Henry, Jackson, Jefferson, Jessamine, Johnson, Kenton, Knott, Knox, Larue, Laurel, Lawrence, Lee, Leslie, Letcher, Lewis, Lincoln, McCreary, Madison, Magoffin, Marion, Martin, Mason, Meade, Menifee, Mercer, Montgomery, Morgan, Nelson, Nicholas, Oldham, Owen, Owsley, Pendleton, Perry, Pike, Powell, Pulaski, Robertson, Rockcastle, Rowan, Scott, Shelby, Spencer, Taylor, Trimble, Washington, Whitley, Wolfe, and Woodford Counties.

Region 10. Atlanta, Georgia. In *Georgia*, services Baker, Baldwin, Banks, Barrow, Bartow, Ben Hill, Berrien, Bibb, Bleckley, Bryan, Bulloch, Burke, Butts, Calhoun, Candler, Carroll, Catoosa, Chatham, Chattahoochee, Chattooga, Cherokee, Clarke, Clay, Clayton, Cobb, Colquitt, Columbia, Cook, Coweta, Crawford, Crisp, Dade, Dawson, De Kalb, Dodge, Dooly, Dougherty, Douglas, Early, Effingham, Elbert, Emanuel, Evans, Fannin, Fayette, Floyd, Forsyth, Franklin, Fulton, Gilmer, Glascock,

Gordon, Greene, Gwinnett, Habersham, Hall, Hancock, Haralson, Harris, Hart, Heard, Henry, Houston, Irwin, Jackson, Jasper, Jefferson, Jenkins, Johnson, Jones, Lamar, Laurens, Lee, Liberty, Lincoln, Long, Lumpkin, McDuffie, McIntosh, Macon, Madison, Marion, Meriwether, Miller, Mitchell, Monroe, Montgomery, Morgan, Murray, Muscogee, Newton, Oconee, Oglethorpe, Paulding, Peach, Pickens, Pike, Polk, Pulaski, Putnam, Quitman, Rabun, Randolph, Richmond, Rockdale, Schley, Screven, Spalding, Stephens, Stewart, Sumter, Talbot, Taliaferro, Tattnall, Taylor, Telfair, Terrell, Tift, Toombs, Towns, Treutlen, Troup, Turner, Twiggs, Union, Upson, Walker, Walton, Warren, Washington, Webster, Wheeler, White, Whitfield, Wilcox, Wilkes, Wilkinson, and Worth Counties; in *Tennessee*, services Anderson, Blount, Bradley, Campbell, Carter, Claiborne, Cocke, Grainger, Greene, Hamblen, Hamilton, Hancock, Hawkins, Jefferson, Johnson, Knox, Loudon, McMinn, Meigs, Monroe, Morgan, Polk, Rhea, Roane, Scott, Sevier, Sullivan, Unicoi, Union, and Washington Counties; and in *Alabama*, services Autauga, Bibb, Blount, Calhoun, Chambers, Cherokee, Chilton, Clay, Cleburne, Colbert, Coosa, Cullman, De Kalb, Elmore, Etowah, Fayette, Franklin, Greene, Hale, Jackson, Jefferson, Lamar, Lauderdale, Lawrence, Lee, Limestone, Madison, Marion, Marshall, Morgan, Perry, Pickens, Randolph, St. Clair, Shelby, Sumter, Talladega, Tallapoosa, Tuscaloosa, Walker, and Winston Counties. Persons may also obtain service at the Resident Office in Birmingham, Alabama.

Region 11. Winston-Salem, North Carolina. Services *North Carolina* and *South Carolina*; in *Tennessee*, services the city of Bristol in Sullivan County; in *Virginia*, services Alleghany, Amherst, Appomattox, Bath, Bedford, Bland, Botetourt, Buchanan, Campbell, Carroll, Charlotte, Craig, Dickenson, Floyd, Franklin, Giles, Grayson, Halifax, Henry, Lee, Mecklenburg, Montgomery, Patrick, Pittsylvania, Pulaski, Roanoke, Rockbridge, Russell, Scott, Smyth, Tazewell, Washington, Wise, and Wythe Counties, and the independently incorporated Virginia cities not part of, but located within or adjacent to, the territory by these Virginia counties; and *in West Virginia*, services Greenbriar, Mercer, Monroe, and Summers Counties.

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Region 12. Tampa, Florida. In *Florida*, services Alachua, Baker, Bradford, Brevard, Broward, Charlotte, Citrus, Clay, Collier, Columbia, Dade, De Soto, Dixie, Duval, Flagler, Gadsden, Gilchrist, Glades, Hamilton, Hardee, Hendry, Hernando, Highlands, Hillsborough, Indian River, Jefferson, Lafayette, Lake, Lee, Leon, Levy, Madison, Manatee, Marion, Martin, Monroe, Nassau, Okeechobee, Orange, Osceola, Palm Beach, Pasco, Pinellas, Polk, Putnam, St. Johns, St. Lucie, Sarasota, Seminole, Sumter, Suwannee, Taylor, Union, Volusia, and Wakulla Counties; and in *Georgia*, services Appling, Atkinson, Bacon, Brantley, Brooks, Camden, Charlton, Clinch, Coffee, Decatur, Echols, Glynn, Grady, Jeff Davis, Lanier, Lowndes, Pierce, Seminole, Thomas, Ware, and Wayne Counties.

Persons may also obtain service at the Resident Offices in Miami and Jacksonville, Florida.

Region 13. Chicago, Illinois. Services Cook, Du Page, Kane, Lake, and Will Counties in *Illinois*, and Lake County in *Indiana*.

Region 14. St. Louis, Missouri. In *Illinois* services Adams, Alexander, Bond, Brown, Calhoun, Christian, Clark, Clay, Clinton, Coles, Crawford, Cumberland, Edgar,

Edwards, Effingham, Fayette, Franklin, Gallatin, Greene, Hamilton, Hardin, Jackson, Jasper, Jefferson, Jersey, Johnson, Lawrence, Macoupin, Madison, Marion, Massac, Monroe, Montgomery, Perry, Pike, Pope, Pulaski, Randolph, Richland, St. Clair, Saline, Scott, Shelby, Union, Wabash, Washington, Wayne, White, and Williamson Counties; and in *Missouri*, services Audrain, Bollinger, Butler, Callaway, Cape Girardeau, Carter, Clark, Crawford, Dent, Dunklin, Franklin, Gasconade, Iron, Jefferson, Knox, Lewis, Lincoln, Madison, Maries, Marion, Mississippi, Monroe, Montgomery, New Madrid, Oregon, Osage, Pemiscot, Perry, Phelps, Pike, Ralls, Reynolds, Ripley, St. Charles, St. Francois, St. Louis, St. Genevieve, Scotland, Scott, Shannon, Shelby, Stoddard, Warren, Washington, and Wayne Counties, and the Independent City of St. Louis.

Subregion 33. Peoria, Illinois. In *Illinois*, services Boone, Bureau, Carroll, Cass, Champaign, De Kalb, De Witt, Douglas, Ford, Fulton, Grundy, Hancock, Henderson, Henry, Iroquois, Jo Daviess, Kankakee, Kendall, Knox, La Salle, Lee, Livingston, Logan, Macon, Marshall, Mason, McDonough, McHenry, McLean, Menard, Mercer, Morgan, Moultrie, Ogle, Peoria, Piatt, Putnam, Rock Island, Sangamon, Schuyler, Stark, Stephenson, Tazewell, Vermilion, Warren, Whiteside, Winnebago, and Woodford Counties; and in *Iowa*, services Clinton, Des Moines, Dubuque, Jackson, Lee, Louisa, Muscatine, and Scott Counties.

Region 15. New Orleans, Louisiana. Services *Louisiana*; in *Mississippi*, services Adams, Amite, Claiborne, Clarke, Copiah, Covington, Forrest, Franklin, George, Greene, Hancock, Harrison, Hinds, Issaquena, Jackson, Jasper, Jefferson, Jefferson Davis, Jones, Kemper, Lamar, Lauderdale, Lawrence, Leake, Lincoln, Madison, Marion, Neshoba, Newton, Pearl River, Perry, Pike, Rankin, Scott, Sharkey, Simpson, Smith, Stone, Walthall, Warren, Wayne, Wilkinson, and Yazoo Counties; in *Alabama*, services Baldwin, Barbour, Bullock, Butler, Choctaw, Clarke, Coffee, Conecuh, Covington, Crenshaw, Dale, Dallas, Escambia, Geneva, Henry, Houston, Lowndes, Macon, Marengo, Mobile, Monroe, Montgomery, Pike, Russell, Washington, and Wilcox Counties; and in *Florida*, services Bay, Calhoun, Escambia, Franklin, Gulf, Holmes, Jackson, Liberty, Okaloosa, Santa Rosa, Walton, and Washington Counties.

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Region 16. Fort Worth, Texas. Services *Texas;* in *Arkansas*, services Miller County.

Persons may also obtain service at the Resident Offices located in Houston and San Antonio, Texas.

Region 17. Kansas City, Kansas. Services *Oklahoma* and *Kansas*; in *Missouri*, services Adair, Andrew, Atchison, Barry, Barton, Bates, Benton, Boone, Buchanan, Caldwell, Camden, Carroll, Cass, Cedar, Chariton, Christian, Clay, Clinton, Cole, Cooper, Dade, Dallas, Daviess, De Kalb, Douglas, Gentry, Greene, Grundy, Harrison, Henry, Hickory, Holt, Howard, Howell, Jackson, Jasper, Johnson, Laclede, Lafayette, Lawrence, Linn, Livingston, McDonald, Macon, Mercer, Miller, Moniteau, Morgan, Newton, Nodaway, Ozark, Pettis, Platte, Polk, Pulaski, Putnam, Randolph, Ray, St. Clair, Saline, Schuyler, Stone, Sullivan, Taney, Texas, Vernon, Webster, Worth, and Wright Counties; in *Iowa*, services Fremont, Mills, and Pottawattamie Counties; and in *Nebraska*, services Adams, Antelope, Arthur, Blaine, Boone, Boyd, Brown, Buffalo, Burt, Butler, Cass, Cedar, Chase, Cherry, Clay, Colfax, Cuming, Custer, Dakota,

Dawson, Dixon, Dodge, Douglas, Dundy, Fillmore, Franklin, Frontier, Furnas, Gage, Garfield, Gosper, Grant, Greeley, Hall, Hamilton, Harlan, Hayes, Hitchcock, Holt, Hooker, Howard, Jefferson, Johnson, Kearney, Keith, Keya Paha, Knox, Lancaster, Lincoln, Logan, Loup, McPherson, Madison, Merrick, Nance, Nemaha, Nuckolls, Otoe, Pawnee, Perkins, Phelps, Pierce, Platte, Polk, Red Willow, Richardson, Rock, Saline, Sarpy, Saunders, Seward, Sherman, Stanton, Thayer, Thomas, Thurston, Valley, Washington, Wayne, Webster, Wheeler, and York Counties.

Persons may also obtain service at the Resident Office in Tulsa, Oklahoma.

Region 18. Minneapolis, Minnesota. Services *North Dakota*, *South Dakota*, and *Minnesota*; in *Iowa*, services Adair, Adams, Allamakee, Appanoose, Audubon, Benton, Black Hawk, Boone, Bremer, Buchanan, Buena Vista, Butler, Calhoun, Carroll, Cass, Cedar, Cerro Gordo, Cherokee, Chickasaw, Clarke, Clay, Clayton, Crawford, Dallas, Davis, Decatur, Delaware, Dickinson, Emmet, Fayette, Floyd, Franklin, Greene, Grundy, Guthrie, Hamilton, Hancock, Hardin, Harrison, Henry, Howard, Humboldt, Ida, Iowa, Jasper, Jefferson, Johnson, Jones, Keokuk, Kossuth, Linn, Lucas, Lyon, Madison, Mahaska, Marion, Marshall, Mitchell, Monona, Monroe, Montgomery, O'Brien, Osceola, Page, Palo Alto, Plymouth, Pocahontas, Polk, Poweshiek, Ringgold, Sac, Shelby, Sioux, Story, Tama, Taylor, Union, Van Buren, Wapello, Warren, Washington, Wayne, Webster, Winnebago, Winneshiek, Woodbury, Worth, and Wright Counties; and in *Wisconsin*, services Ashland, Barron, Bayfield, Buffalo, Burnett, Chippewa, Clark, Douglas, Dunn, Eau Claire, Iron, Jackson, Pepin, Pierce, Polk, Price, Rusk, St. Croix, Sawyer, Taylor, Trempealeau, and Washburn Counties.

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Persons may also obtain service at the Resident Office located in Des Moines, Iowa.

Region 19. Seattle, Washington. Services *Alaska* and all counties in *Washington* except Clark; in *Idaho*, services Adams, Benewah, Bonner, Boundary, Clark, Clearwater, Custer, Fremont, Idaho, Kootenai, Latah, Lemhi, Lewis, Nez Perce, Shoshone, and Valley Counties; and in *Montana*, services Beaverhead, Broadwater, Cascade, Deer Lodge, Flathead, Gallatin, Glacier, Granite, Jefferson, Lake, Lewis and Clark, Liberty, Lincoln, Madison, Meagher, Mineral, Missoula, Pondera, Powell, Ravalli, Sanders, Silver Bow, Teton, and Toole Counties.

Subregion 36. Portland, Oregon. Services *Oregon* and Clark County in *Washington*.

Persons may also obtain service at the Resident Office located in Anchorage, Alaska.

Region 20. San Francisco, California. In *California*, services Butte, Colusa, Del Norte, Glenn, Humboldt, Lake, Lassen, Marin, Mendocino, Modoc, Napa, Nevada, Placer, Plumas, Sacramento, San Francisco, San Mateo, Shasta, Sierra, Siskiyou, Solano, Sonoma, Sutter, Tehama, Trinity, Yolo, and Yuba Counties.

Subregion 37. Honolulu, Hawaii. Services *Hawaii*, American Samoa, Guam, and the Commonwealth of the Northern Mariana Islands.

Region 21. Los Angeles, California. In *California*, services Imperial, Orange, Riverside, and San Diego Counties and that portion of Los Angeles County lying east of

Harbor Freeway and South Gaffey Street, south and east of Pasadena Freeway and Arroyo Parkway, and south of Foothill Freeway and Baseline Road (State Route 30).

Persons may also obtain service at the Resident Office located in San Diego, California.

Region 22. Newark, New Jersey. In *New Jersey*, services Bergen, Essex, Hudson, Hunterdon, Mercer, Middlesex, Monmouth, Morris, Passaic, Somerset, Sussex, Union and Warren Counties.

Region 24. Hato Rey, Puerto Rico. Services *Puerto Rico* and the *U.S. Virgin Islands*.

Region 25. Indianapolis, Indiana. Services *Indiana*, with the exception of Clark, Dearborn, Floyd, and Lake Counties; and in *Kentucky*, services Daviess and Henderson Counties.

Region 26. Memphis, Tennessee. Services all of *Arkansas* except for Miller County; in *Tennessee*, services Bedford, Benton, Bledsoe, Cannon, Carroll, Cheatham Chester, Clay, Coffee, Crockett, Cumberland, Davidson, Decatur, De Kalb, Dickson, Dyer, Fayette, Fentress, Franklin, Gibson, Giles, Grundy, Hardeman, Hardin, Haywood, Henderson, Henry, Hickman, Houston, Humphreys, Jackson, Lake, Lauderdale, Lawrence, Lewis, Lincoln, Marion, McNairy, Macon, Madison, Marshall, Maury, Montgomery, Moore, Obion, Overton, Perry, Pickett, Putnam, Robertson, Rutherford, Sequatchie, Shelby, Smith, Stewart, Sumner, Tipton, Trousdale, Van Buren, Warren, Wayne, Weakley, White, Williamson, and Wilson Counties; in *Mississippi*, services Alcorn, Attala, Benton, Bolivar, Calhoun, Carroll, Chickasaw, Choctaw, Clay, Coahoma, De Soto, Grenada, Holmes, Humphreys, Itawamba, Lafayette, Lee, Leflore, Lowndes, Marshall, Monroe, Montgomery, Noxubee, Oktibbeha, Panola, Pontotoc, Prentiss, Quitman, Sunflower, Tallahatchie, Tate, Tippah, Tishomingo, Tunica, Union, Washington, Webster, Winston, and Yalobusha Counties; and in *Kentucky*, services Adair, Allen, Ballard, Barren, Breckinridge, Butler, Caldwell, Calloway, Carlisle, Christian, Clinton, Crittenden, Cumberland, Edmonson, Fulton, Graves, Grayson, Green, Hancock, Hart, Hickman, Hopkins, Livingston, Logan, Lyon, Marshall, McCracken, McLean, Metcalfe, Monroe, Muhlenberg, Ohio, Russell, Simpson, Todd, Trigg, Union, Warren, Wayne, and Webster Counties.

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Persons may also obtain service at the Resident Offices in Little Rock, Arkansas and in Nashville, Tennessee.

Region 27. Denver, Colorado. Services *Wyoming*, *Colorado*, and *Utah*; in *Nebraska*, services Banner, Box Butte, Cheyenne, Dawes, Deuel, Garden, Kimball, Morrill, Scotts Bluff, Sheridan, and Sioux Counties; in *Idaho*, services Ada, Bannock, Bear Lake, Bingham, Blaine, Boise, Bonneville, Butte, Camas, Canyon, Caribou, Cassia, Elmore, Franklin, Gem, Gooding, Jefferson, Jerome, Lincoln, Madison, Minidoka, Oneida, Owyhee, Payette, Power, Teton, Twin Falls, and Washington Counties; and in *Montana*, services Big Horn, Blaine, Carbon, Carter, Chouteau, Custer, Daniels, Dawson, Fallon, Fergus, Garfield, Golden Valley, Hill, Judith Basin, McCone, Musselshell, Park, Petroleum, Phillips, Powder River, Prairie, Richland, Roosevelt, Rosebud, Sheridan,

Stillwater, Sweet Grass, Treasure, Valley, Wheatland, Wilbaux, and Yellowstone Counties.

Region 28. Phoenix, Arizona. Services *Arizona* and *New Mexico*; in *Nevada*, services Clark, Lincoln, and Nye Counties.

Persons may also obtain service at the Resident Offices in Albuquerque, New Mexico and in Las Vegas, Nevada.

Region 29. Brooklyn, New York. In *New York*, services the boroughs of Brooklyn, Queens, and Staten Island in New York City; and Kings, Nassau, Queens, Richmond, and Suffolk Counties.

Region 30. Milwaukee, Wisconsin. In *Wisconsin*, services Adams, Brown, Calumet, Columbia, Crawford, Dane, Dodge, Door, Florence, Fond du Lac, Forest, Grant, Green, Green Lake, Iowa, Jefferson, Juneau, Kenosha, Kewaunee, La Crosse, Lafayette, Langlade, Lincoln, Manitowoc, Marathon, Marinette, Marquette, Menominee, Milwaukee, Monroe, Oconto, Oneida, Outagamie, Ozaukee, Portage, Racine, Richland, Rock, Sauk, Shawano, Sheboygan, Vernon, Vilas, Walworth, Washington, Waukesha, Waupaca, Waushara, Winnebago, and Wood Counties; and in *Michigan*, services Alger, Baraga, Delta, Dickinson, Gogebic, Houghton, Iron, Keweenaw, Marquette, Menominee, and Ontonagon Counties.

Region 31. Los Angeles, California. In *California*, services Inyo, Kern, San Bernardino, San Luis Obispo, Santa Barbara, and Ventura Counties and that portion of Los Angeles County lying west of Harbor Freeway and South Gaffey Street, north and west of Pasadena Freeway and Arroyo Parkway, and north of Foothill Freeway and Baseline Road (State Route 30).

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Region 32. Oakland, California. In *California*, services Alameda, Alpine, Amador, Calaveras, Contra Costa, El Dorado, Fresno, Kings, Madera, Mariposa, Merced, Mono, Monterey, San Benito, San Joaquin, Santa Clara, Santa Cruz, Stanislaus, Tulare, and Tuolumne Counties; and in *Nevada*, services Churchill, Douglas, Elko, Esmeralda, Eureka, Humboldt, Lander, Lyon, Mineral, Ormsby, Pershing, Storey, Washoe, and White Pine Counties.

Region 34. Hartford, Connecticut. Services *Connecticut*.

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