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PRACTICING UNDER THE NLRA

PANEL

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INTRODUCTION

Set forth in these materials are some best practices for Representation (R) cases, Unfair Labor Practice (C) cases, ALJ Trials, and Settlements/Compliance. Many of these practices are found in various GC and OM Memos.

Also referenced are some practices found in the Regions which appear to the panel to be the best practices or practices worthy of consideration.

NLRB BEST PRACTICES

Introduction:

The following “best practices” are collected from General Counsel and Operations Management memoranda. Many are recommendations of committees of Regional Office personnel tasked with “identify[ing] and shar[ing] successful casehandling practices among Regional Offices.” Separate reports focusing on representation, unfair labor practice and compliance cases were issued in 1997, 1999 and 2002, respectively. Many of these recommendations have been incorporated into the NLRB’s casehandling manuals, now maintained and updated online. Where appropriate, references to the NLRB’s Rules & Regulations and Manuals are also included. All documents cited are listed in the Attachment to this paper and are available on the NLRB’s website: www.nlr.gov.

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REPRESENTATION CASES

Petitions

Parties are to be notified of a petition filing and given a proposed hearing date via fax on the day the petition is filed. GC 96-2 (2/23/96)

At their option, Regional Directors can issue:

- a formal notice of hearing immediately,
- an informal notice of proposed hearing, or
- include a proposed hearing date in the initial letter to the parties.
GC 98-1 (1/26/98)

Petitions in complex cases

When petitions present issues which may delay timely processing, such as large units, numerous eligibility issues, or complex or novel legal questions, Regional Directors are offered a protocol to minimize unnecessary delays, which includes:

- scheduling pre-hearing conferences,
- assigning a decision drafting coordinate, and/or
- seeking assistance from Headquarters.
OM 98-61 (7/23/98)

Notices of Hearing

A formal Notice of Hearing in an R case must be received by the parties at least 5 working days in advance of the hearing. *Croft Metals, Inc.*, 337 NLRB No. 106 (2002); OM 02-87 (8/30/02) This 5-day requirement is not satisfied by a letter or informal notice.¹

The Best Practices Guide recommends that parties be advised in the Region's initial correspondence and again by the Hearing Officer that the hearing will be conducted on consecutive days until completed. GC 98-01A p. 2, 6 (1/26/98).

Requests for Postponements

¹ The Representation Cases Best Practices Report recommends as a best practice: A NOH (Notice of Hearing), either formal or "informal" (anticipated or proposed) should also be faxed to all parties on the date the petition is filed. In no instance should a formal NOH issue less than 5 days before the hearing is opened. Mail service of the NOH should occur as soon as possible following the fax transmission. (GC 98-1A, pp. 2-3 (1/26/98)).

A request for a hearing postponement will be granted only in limited circumstances (within 3 days of hearing only under “extreme conditions”) and must meet the following requirements:

- Be in writing
- Set forth in detail the grounds for the request
- Offer alternative dates
- Ascertain the positions of all the other parties and include them in the request
- Be simultaneously served on all the other parties and include a statement of service in the request

NLRB Form 4338; NLRB Case Handling Manual ¶ 11143.1.

The Best Practices Guide places the burden of justifying a request for a postponement on the party making the request.

Subpoenas

Regions are expected to provide subpoenas sufficiently in advance of the start of the 5-day period before the hearing, in order to provide the full time period to file a petition to revoke. If no Notice of Hearing has issued, the Region is authorized to include, on the subpoenas, the words: “or any adjourned or rescheduled date” to obviate the need to provide new subpoenas if the hearing is rescheduled. OM 02-56 (4/10/02); OM 99-30 (6/28/99)²

Regions can make subpoenas available to the parties by overnight mail, at the party’s expense.

No limits are to be placed on the number of subpoenas provided. OM 01-45 (3/30/01)³

R Case Hearings

R case hearings are considered non-adversarial, investigatory proceedings.

² This change was the result of a general reluctance by Regional Offices to issue subpoenas prior to issuance of the formal Notice of Hearing, which created a practical problem for a party requesting a subpoena: how to have it served in time to allow the subpoenaed party sufficient time to file a petition to revoke prior to the start of the hearing. This tension led to a directive to the Regions authorizing them to provide requested subpoenas immediately after informing the parties of the proposed hearing date, even if the formal Notice of Hearing has not yet issued, and/or the designated place of the hearing has not been established. By including on the subpoenas the words “or any adjourned or rescheduled date,” the need to provide new subpoenas is obviated in the event the hearing is rescheduled. OM 02-56 (4/10/02); OM 99-30 (6/28/99)

³ If a party abuses the subpoena privilege, disciplinary proceedings are available under Section 102.177 of the Board’s Rules and Regulations.

The hearing officer is responsible for developing a complete record and has authority to:

- Cross-examine and call and examine witnesses
- Call for and introduce appropriate documentary evidence

The hearing officer is obliged to:

- Ask follow up questions to obtain specific examples when generalized testimony is given
- Ask questions to clear up confusing, unclear or incomplete testimony
- Interrupt the presentation of a party and conduct some or all of the questioning of a witness(es) “when necessary to ensure the development of a record that is complete, concise and cogent.” HOG 6-7
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The hearing officer is obliged to provide interpreters for non-English speaking witnesses with the Guidelines for Interpreters. The hearing officer should take care to ensure that the translation includes the full answer of the witness, that the witness appears to agree with the translation and that complex and compound questions should be avoided. OM 06-75 HOG p. 26

Parties are asked to state on the record their positions as to issues to be heard; failure to do so foreclose the party from presenting evidence on that issue. R Manual §§11899 and 11217

At the conclusion of the hearing, oral arguments can be helpful to marshal evidence and clarify the parties’ positions. Parties are “entitled” to a “reasonable period” to present oral argument at the close of the hearing, but only if they make such a request. When deciding whether to request oral argument, keep in mind that the decision-writing is often well underway by the time the briefs are filed with the Region. R&R 102.66(d)

Preelection hearings: the hearing officer does not make any recommendations or participate in any phase of the decisional process and may or may not be the same agent who handled the case earlier or who may handle it later.

Postelection hearings: the hearing officer makes credibility resolutions, findings of fact, conclusions of law and recommendations to either the Regional Director or the Board. HOG p. 1.

Briefs in R Case Hearings: Extensions of Time

- Extensions of time to file briefs based on a delay or non-receipt of the transcript will usually be denied unless a party has requested an expedited copy of the transcript.
- Hearing officers have discretion to grant extensions beyond the automatic 7 days, but not beyond 14 days. R&R 102.67

- Additional time can be requested from the Regional Director, but such extensions are rare. At the time of the hearing, a request can be made to the hearing officer to contact the Regional Director with such a request.

Unresolved Issues

Regions may proceed to an election without resolving all eligibility issues where the number of employees in dispute is less than approximately 10% of the unit and the issues raised involve close questions that would require a lengthy hearing to resolve. GC 98-1A, p. 6 (1/26/98)

Elections

- A recommended “best practice” is to address challenges at the time of the election, upon the closing of the polls. GC 98-1A, pp. 6, 20 (1/26/98)
- Also recommended as a “best practice” is the solicitation of the parties’ as to the accuracy of the Excelsior list when it is distributed, to discover possible challenge ballot issues. GC 98-1A, p. 6 (1/26/98), p. 20

Objections

Filing requirements:

- Objections must be filed by the close of business 7 days [5 working days] after service of the tally of ballots, which is required to be done immediately following the vote count, typically on the day of the election.
- Objections must be filed in this manner whether or not challenges are sufficient to determine the outcome of the election.
- Objections may be filed by facsimile.
R & R 102.69(a)

Evidence in support of objections/challenges:

- Must be filed 7 days after the objections are due and must identify all witnesses and provide a brief summary of their testimony and any documentation.
- Additional time to submit evidence may be requested and must be supported by good cause.
R&R 102.69(a)

Administrative investigations:

Although Regions may investigate challenges and objections administratively, without a hearing, Regional Directors have been directed to “be especially sensitive to the risk of resolving post-election matters administratively” in view of the number of

remands by the Board and Court of Appeals, which typically come years after the initial proceedings. OM 04-26 (2/12/04)

Briefs:

- In postelection hearings [challenges/objections], the parties have no right to file briefs, but briefs may be allowed by the hearing officer.
- Seven days is the usual rule except under most unusual circumstances.

Requests for Review

In the event that the Board has not ruled on a request for review or on the merits of the appeal, the Board Agent conducting the election will typically impound the ballots, pending a Board decision on the merits.

Regional Director Decisions

The NLRB website, www.nlr.gov, contains Regional Director decisions back to 1995, under “Research,” then “Decisions,” and then “Regional Director.” Decisions can be searched by case name, case number or keyword.

C Cases

Intake

Due Dates:

When opened, each C case is to include an “impact analysis category” and due date for the case. [The due date is not communicated to the parties upon intake.]

Impact Analysis Categories:

These were instituted in 1995, GC 95-15 (8/22/95), and revised in 2000, GC 00-06 (8/10/00), and again in 2001, GC 02-02 (12/6/01). They are designed to “ensure that the resources of the [Agency] continue to be focused on resolving cases with the greatest impact.” GC 00-06 (8/10/00) Category III “exceptional cases” are central to the NLRB’s mission and are to be resolved in 7 weeks;⁴ Category II “significant” cases are to be resolved in 9 weeks;⁵ Category I “important” cases are deferrable or involve conduct for which there is an alternative remedy and have a 12 week resolution period.⁶

Investigations

Affidavit testimony:

- In-person, sworn testimony, recorded by a Board Agent, remains the “cornerstone” and most effective and most widely used method of investigation. GC 02-02 (12/6/01)
- During periods of budgetary restraints telephone affidavits, questionnaires and statements of fact have been allowed. Such techniques remain available, but are reserved for Category I and certain Category II cases. GC 02-02 (12/6/01)

Requests for position statements:

A practice “worthy of consideration” is to send a letter to the charging party early in the investigation of a charge raising complex theories or numerous allegations

⁴ Category III: 10(j) and 10(l) cases; blocking charge cases; cases in which the establishment or continuation of a union’s status as a 9(a) representative is at stake, e.g., cases involving a *Gissel* bargaining order, the relocation, transfer or elimination of a bargaining unit, etc.; cases involving the resolution of whether a strike or lockout is based on economic or ULP considerations; any case involving the issue of whether a strike is unprotected; 8(g) case; 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; national cases or cases of unusually high visibility such as *Greyhound* or *Beck* type violations.

⁵ Category II: 8(a)(1), (3) and (4) discrimination cases which do not involve permanent or indefinite employment loss; refusal to hire cases; non 10(j) picket line violence or misconduct cases; 8(a)(5)/8(b)(3) refusal to provide information cases; 8(a)(5) unilateral changes cases; 8(b)(1)(A) DFR cases; independent 8(a)(1) allegations.

⁶ Category I: *Collyer/Dubo* and other deferral cases; 8(a)(5) pension and welfare contribution collection cases.

requesting that the charging party provide a statement of its theories and evidence in support of its charge. GC 99-6, p. 5 (8/16/99)

Responsibilities of the charging party:

The charging party is responsible for complying with the Board agent's request 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

In addition, institutional charging parties are responsible for presenting all witnesses within their control to the Board agent for the purpose of taking affidavits. R&R §10054.1

Communications with Charged Parties:

When communicating with the charged party to obtain evidence, Board agents are to "relate the basic contentions that have been advanced with regard to all violations alleged." R&R §10054.4 But Board agents should avoid providing details that would likely disclose the identity of the witness, which should be protected.

Charged Party Cooperation:

If the charged party fails to provide full and complete cooperation, [i.e., provide material witnesses for affidavits and requested, relevant documentary evidence], the Regional Office may, depending upon a careful assessment of all the circumstances:

- Decide the case on the basis of any 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. ULP Manual §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 ULP Manual §§10058.2 and 10058.5.
ULP Manual §10054.5

Position Statements:

- Evidence and statements of position submitted by parties will be used by the Agency without qualification or condition and may be introduced into the record if the case is litigated.

- Conditions incorporated into the position statement, such as “this position statement cannot be used in the event of litigation” will be disregarded.
- Regional Offices should ensure that docketing letters specifically inform charged parties that evidence and statements of position submitted by them will be used without qualification or condition.

OM 99-35 (7/14/99); R&R §10054.6; See also Federal Rules of Evidence 801(d)(2)(C).

Proper parties:

The Best Practices Committee recommends as a “best practice” the examination of the respondent’s status, name and corporate form with ChoicePoint or a comparable service provider at the time the complaint is issued, for the purposes of: ensuring that the proper parties have been named, determining respondent’s corporate status, and identifying derivatively liable entities. GC 02-04 (2/11/04)

Interpreters:

It is the policy of the Agency, when obtaining sworn Board affidavits, to provide affiants with appropriate interpreter assistance when requested or when a need for such assistance is discerned. GC 03-02 (4/21/03)

Trial Assignments

- A recommended best practice is to assign trials to a trial attorney at least 60 days in advance of the hearing date. GC 99-6, p. 14 (8/16/99)
- There is no recommended practice with regard to whether the investigating attorney should be assigned as the trial attorney.
- In cases in which the Region has concluded that Section 10(j) relief is warranted, absent compelling circumstances, the Region should immediately proceed to hearing within 8 weeks of the issuance of complaint. The Region should also immediately prepare and submit its recommendation for 10(j) to the Injunction Litigation Branch. (OM 06-60)

ALJ Trials

Bench Book

One source for guidance on trial practice is the NLRB Judges Division Bench Book, issued in September 2001 and supplemented in 2005.⁷ Although the Bench Book is addressed to judges, it is useful for counsel in NLRB trials. It is available on the Board's website: www.nlr.gov.

Stipulations

- To an ALJ: Section 102.35(a)(9) of the Board's Rules and Regulations was amended in 2002 to authorize stipulations of fact that "waive a hearing and provide for a decision by the administrative law judge." Stipulations made to an ALJ [instead of directly to the Board], may lead to a more expeditious Board decision.⁸
- To the Board: Alternatively, the parties may agree to stipulate the matter directly to the Board, a procedure previously utilized but never before formally embodied in the Board's Rules.
Bench Book Supplement, §11-800.

Summary Judgment Motions and Default Judgments

- Generally, such motions are submitted directly to the Board, where they are handled by the Solicitor's office; but they may also be submitted directly to an ALJ. Bench Book, §11-350
- An ALJ has the authority to rule on motions for summary judgment, notwithstanding failure of the moving party to file such a motion with the Board no later than 28 days prior to the scheduled hearing. R&R §§102.24(b), 102.35(a); *Calyer Architectural Woodworking Corp.*, 338 NLRB 315 (2002).

⁷ Excerpts from the Bench Book and the Supplement are included in the latest editions of the BNA-P&P Committee's book, *How to Take a Case Before the NLRB*.

⁸ Factors in favor of stipulations going directly to ALJs are: (1) the parties benefit from the expertise of the ALJ in fashioning stipulations which include all the relevant facts; (2) stipulations made directly to the Board encounter a multi-step process in which the Board has to first decide whether to accept the stipulation, then ask for briefs, and, later, issue its decision; (3) logistically, Board staffs are more experienced working from ALJ decisions than writing initial decisions themselves; and (4) an ALJ decision may focus more directly on the particular issues involved, which can encourage settlement or at least to a more focused appeal. Of course, if the issue is a purely legal one, and the facts are not in dispute, going directly to the Board might be the better option.

- Motions for default judgment may be granted where a respondent has failed to file an answer. Such motions may be made either to the Board or to the ALJ and are not subject to the requirement that they be filed no later than 28 days before the hearing. R&R §102.35
- Test of certification 8(a)(5) cases are to be processed from filing of charge to issuance of Board decision in a median of 80 days. The goal for the Field is to file the motion for summary judgment 40 days from the filing of the charge. Where the charge includes other allegations, the Regions should process the “technical” allegation separately. OM 06-27 CHM 10025
- In test of certification cases the Regional Office should immediately contact the employer’s representative by telephone or e-mail to determine whether there will be compliance with the Board order. Absent agreement to comply the cases should immediately be referred to the Board’s Appellate Court Branch for court enforcement. (GC 06-07)

Bench Decisions [Chapter 12, Bench Book]

- ALJs may issue “bench decisions delivered within 72 hours after conclusion of oral argument.” R&R §102.35(a)(10); *NLRB v. Beverly Manor Nursing Home*, 174 F.3d 13, 35 (1st Cir. 1999), enforcing 325 NLRB 598 (1998).
- Whether to issue bench decisions or decisions without briefs is within the discretion of the ALJ.
- Normally, the ALJ notifies the parties early in the hearing, preferably during the conference call held with the parties prior to the hearing, that the judge intends to issue a bench decision.
- When issuing a bench decision, an ALJ will typically invite oral argument, held at the conclusion of the trial, take a break to compose the decision, and then reconvene the hearing to read the bench decision into the record.
- When the transcript arrives, the ALJ issues a written copy of the decision by certifying and attaching the appropriate parts of the transcript containing the bench decision, any corrections, and the appropriate order.
- The time for the filing of exceptions to an ALJ bench decision runs from the date the written copy of the bench decision is served on the parties because that is when the case is transferred to the Board.
- The bench decision should contain all the elements that would appear in a regular written decision, including appropriate credibility determinations, necessary findings of fact and conclusions of law, and adequate rationale on all relevant issues.
- The Board has cautioned that bench decisions should be issued only in short, relatively simple cases, such as those which:
 - turn on a very straightforward credibility issue
 - are concluded with a one-day trial
 - present well-settled legal issues with no factual disputes

○ involve a party which defaults by not showing up at a hearing.
See *Des Moines Register and Tribune Co.*, 339 NLRB 1035 fn. 1 (2003), -
petition for rehearing denied., 381 F.3d 767 (8th Cir. 2004).

- The number of bench decisions has decreased over the last 12 years, from 8% in the early years of the initiative, to 4% or 11 bench decisions in 2006.

Testimony by Telephone/Video [Chapter 11, Bench Book, §11-601; Supplement, §11-602]

- Hearings may be opened by telephone, especially in lengthy cases where the opening of the hearing involves housekeeping issues such as subpoena matters or motions.
- Testimony may be taken by telephone or video conferencing, with the consent of all parties. *Westside Painting*, 328 NLRB 796 (1999). Query whether video conferencing allows the ALJ to observe the witness for credibility purposes; this remains an open issue.

Role of ALJ in Settlements [Chapter 9, Bench Book]

- Approximately 20% of cases settle after the intervention of the ALJ, either before, during or after the hearing, with 458 ALJ settlements in 2006.
- Once assigned to a case, an ALJ schedules a conference call with the parties to discuss settlement and pre-trial issues.
- If settlement is not reached during the pre-trial conference call, the ALJ will try to settle the case on site before the trial opens.
- Most settlements with ALJ participation are all party settlements, which are carried out under the auspices of the regional offices.
- Only after the hearing opens does the ALJ have jurisdiction over the settlement. Typically, the settlement is approved by the ALJ who then remands the case to the region to oversee the details of the settlement.
- Once an ALJ has official jurisdiction of the case, the ALJ has the authority to take a settlement over the objection of one of the parties.

- Settlements as to which a party objects, including ALJ settlements, are evaluated under the formula set forth in *Independent Stave Co.*, 287 NLRB 740, 743 (1987).⁹

Settlement Judges:

- If all parties agree, a settlement judge – who is not the trial judge – may be appointed to help the parties to settle a case, typically through telephone conferences.
 - If necessary, the discussions can be face-to-face, especially where the case is particularly complicated.
 - A settlement judge can be assigned at any stage of the proceeding, even after the trial opens or closes.
 - The settlement judge process can be initiated by calling the chief judge, who will assign a settlement judge to the case if all parties agree to the procedure.
- Region 3, Philadelphia: Conducts a separate periodic settlement docket of cases, shortly after the complaint issues and well before the trial date, in which a settlement judge conducts a face-to-face meeting in Philadelphia with the parties. Cases are scheduled for the settlement docket with the agreement of all the parties.

Subpoenas [Chapter 8, Bench Book]

- Almost all judges try, in their pre-trial telephone conference calls, to have the parties produce subpoenaed material in advance of trial, either earlier on the day of the trial or the day before.
- Subpoenas returnable on the first date of hearing tend to delay the proceedings and lessen the likelihood of settlement.
- Most subpoena issues, including rulings on motions to quash, can be resolved in the pre-trial telephone conference call.

⁹ The Board “[w]ill examine all the circumstances including but not limited to (1) whether the charging party, the respondent and the individual discriminatees have agreed to be bound and the position of the General Counsel regarding the settlement; (2) whether the settlement is reasonable in light of the nature of the violations alleged, the risks inherent in litigation, and the stage of the litigation; (3) whether there has been any fraud, coercion or duress by any of the parties in reaching the settlement; and (4) whether the respondent has engaged in a history of violations of the Act or has breached previous settlement agreements resolving unfair labor practice disputes.”

- In lengthy cases, some judges use the first day of trial to address procedural matters, including subpoena issues. The judge then has the authority to set future hearing dates and give the parties time to exchange or study documents. On some occasions, judges have opened hearings by telephone to accomplish this result.

E-Filing

Certain motions and even briefs may be filed electronically; procedures are set forth on the Board's web site.

Settlements and Compliance

Facilitating Settlement Agreements:

- Regions are directed to pursue settlement discussions prior to issuance of a complaint. ULP Manual §10126.2
- The Best Practices Guide recommends sending out a proposed settlement agreement in “most” cases immediately following a merit decision. GC 99-6, p. 12 (8/16/99)
- Regions are directed to send a proposed settlement, in writing, to the charged party promptly after the issuance of complaint. ULP Manual §10126.3
- Regions may delay issuance of a complaint for a short period, if such would be helpful to its settlement, but issuance of the complaint should not be unreasonably delayed and “[w]here it is clear that settlement at this stage will not be achieved, complaint should issue immediately.” ULP Manual §10126.2
- There is no recommendation regarding the involvement of the Charging Party in the preparation of proposed settlement agreements. GC 99-6, pp. 12-13 (8/16/99)
- Early on, respondents should be provided with a computation of backpay, which should be periodically updated. OM 00-45; (6/26/00)
- Use of a settlement coordinator is recommended as a best practice, particularly where the region has the resources to permit such designation and when the region’s calendar extends more than six months. GC 99-6, p. 13 (8/16/99)

Early Collection of Information:

Regions should obtain the following information at the beginning of the investigation to facilitate later compliance:

- Employer federal tax ID number
 - The identity of all potential discriminatees
 - Backpay information from all potential discriminatees
- GC 04-02 (2/11/04)

Backpay:

- Interest “should be routinely included” in all settlements, including informal settlement agreements. It should be considered part of “full” backpay when calculating 80% of backpay. ULP Manual §10130.2 (b); OM 05-57 (4/20/05). GC 02-04 (2/11/04).
- Regions should request compound interest as a remedy in cases involving interest. GC 07-07
- Section 11 subpoenas may be utilized to obtain information necessary for the calculation of gross backpay and other monetary remedies. GC 02-04 (2/11/02); OM 00-45 (6/26/00); Compliance Manual §10522 and 10618.1

- All potential discriminatees should be identified as soon as a prima facie case is established; Section 11 subpoenas may be utilized to obtain necessary information. Compliance Manual §§10530.4 and 10540.2; GC 02-04 (2/11/02)
- Search for work and interim earnings requirements should be explained to potential discriminatees during the initial investigation and they should be advised to keep written records; complete contact information for each potential discriminatee should be recorded by the Board agent. ULP Manual §10054.5(b)

Remedies:

- When special remedial provisions are sought, they should be addressed in the initial litigation and not left to the compliance stage, e.g., multi-facility posting, foreign language notices, *Fieldcrest Cannon* remedies, first contract bargaining remedies. GC 02-04 (2/11/02), See also GC 07-08 with regard to additional remedies in first contract bargaining cases.
- Electronic 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 (8/15/06); ULP Manual §10132.4

Non-Board Settlements

- The Agency has identified concerns about certain provisions in non-Board adjustments: (1) waiver of the right to file NLRB charges on future unfair labor practices and on future employment; (2) waiver of the right to assist employees in the investigation and trial of NLRB cases; (3) confidentiality clauses; (4) penalties for breach of settlement requiring return of backpay, assessing costs and attorneys' fees and (5) arrangements for tax treatment of backpay. See OM 07-27.

Consolidating Compliance Issues with the Complaint:

The Best Practices Committee recommended as “a practice worthy of consideration,” the consolidation of compliance issues with the underlying complaint, particularly in cases involving derivative liability, such as alter ego and individual liability, or a finite backpay period.. GC 02-04 (2/11/02) Regional Directors have authority for such consolidation. R&R 102.54 (c)

Compliance issues should be consolidated with complaints in situations where default judgment will be sought. OM 07-59.

Default Language:

Regions should include the default language in informal settlement agreements to avoid the expense and delay in the event a settlement agreement is set aside and the case is litigated. It should be a necessary part of a settlement where there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations: ULP Manual §10146.7; Compliance Manual 10594.8; GC 02-04 (2/11/02)

Installment Payments:

Settlement agreements involving large sums of money, installment payments, or the substantial likelihood that respondent will be unwilling or unable to fulfill its obligations should be secured by a formal settlement agreement, default language, promissory note, deed of trust against specific real estate, letters of credit, performance bond, assignment of contract proceeds, or a security agreement identifying specific assets. Compliance Manual 10592.12; GC 02-04 (2/11/02)

ADR Pilot Program

By notice of December 5, 2005, the Board instituted a two year pilot ADR program for cases pending before the Board. (See OM 06-17)

Injunctive Relief:

- When a Section 10(j) injunction expires as a result of the issuance of a Board order, immediate action should be initiated to obtain a new injunction pursuant to Section 10(e), absent compliance. GC 02-04 (2/11/02)
- 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. ULP Manual 10320

Bankruptcy:

The Board is a creditor of a debtor in bankruptcy as to unpaid backpay awards. A Region is charged with the responsibility to become aware of the existence of a bankruptcy case involving a respondent, timely file a Proof of Claim with the bankruptcy court, and take all other appropriate action to protect the Board's jurisdiction and its right to collect monetary relief from the debtor, including participating in the first meeting of creditors, conducting an examination of the debtor and monitoring the proceedings. Compliance Manual §10670.1; GC 02-04 (2/11/02)

Dissipation of assets/establishment of an alter ego:

The Region should regularly monitor respondent's financial condition and regularly assess its ability to comply with a potential monetary award, particularly in cases involving prior evidence of threats to relocate or cease operations or the manipulation of its corporate form, such as through the creation of an alter ego. When it appears that respondent is rendering itself incapable or significantly incapable of complying with a monetary award, the Region, after investigation, should initiate injunctive proceedings pursuant to Section 10(j) or 10(e). Compliance Manual 10674.2; GC 02-04 (2/11/02)

Other

The Best Practices Committee recommended, as a practice “worthy of consideration” the establishment of a local practice and procedure committee, including members of the labor and management bar, to meet periodically with the Regional staff to discuss local issues. GC 99-6, p. 24 (8/16/99)

Expanded outreach to all facets of the community has been encouraged in the field. OM 06-66

Attachment

NLRB General Counsel Memos:

GC 95-15 (8/22/95): Lightening the Regional Office Workload
http://www.nlr.gov/shared_files/GC%20Memos/1995/gc95-15.pdf

GC 96-2 (2/23/96): Representation Case Procedures
http://www.nlr.gov/shared_files/GC%20Memos/1996/gc96-2.pdf

GC 98-1 (1/26/98): Representation Cases Best Practices Report
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/GC%20Memo/1998/GC98-01.htm&size=28

GC 98-01A (1/26/98): Report of Best Practices Committee Representation Cases
December 1997
http://www.nlr.gov/shared_files/GC%20Memo/1998/GC%2098-01%20Attachment.pdf

GC 00-06 (8/10/00): Impact Analysis Program Modifications
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/GC%20Memos/2000/gc00-06.html&size=5

GC 02-02 (12/6/01): Impact Analysis Program Modifications
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/GC%20Memos/2002/gc02-02.html&size=17

GC 03-02 (4/21/03): Practice and Procedure Committee Mid-Winter Meeting – 2003
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/GC%20Memos/2003/gc03-02.html&size=23

GC 02-04 (2/11/04): Best Practice Compliance Case Report
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/GC%20Memos/2002/gc02-04.html&size=50

NLRB Operations Management Memos:

OM 98-61 (7/23/98): Addendum to GC 98-1, Representation Case Best Practices Report, Protocol to Expedite Processing of Election Petitions
http://www.nlr.gov/shared_files/OM%20Memos/1998/Om98-61.pdf

OM 99-30 (6/28/99): Representation Case Best Practice – Subpoenas
http://www.nlr.gov/shared_files/OM%20Memos/1999/OM99-30.pdf

OM 99-35 (7/14/99): Conditional Party Position Statements Revocation of OM 99-13

http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/OM%20Memos/1999/OM99-35.html&size=18

OM 00-45 (6/26/00): Compliance Best Practices-Early Computation of Backpay
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/OM%20Memos/2000/om00-45.html&size=12

OM 01-45 (3/30/01): Issuance of Subpoenas in Representation Cases
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/OM%20Memos/2001/om01-45.html&size=34

OM 02-56 (4/10/02): Timely Issuance of Subpoenas in Representation Cases
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/OM%20Memos/2002/om02-56rev.html&size=20

OM 02-87 (8/30/02): Croft Metals, Inc.
http://www.nlr.gov/research/memos/template_html.aspx?file=http://www.nlr.gov/shared_files/OM%20Memos/2002/om02-87.html&size=4

OM 05-57 (4/20/05): Report of FY 2005 Quality Committee
http://www.nlr.gov/shared_files/OM%20Memo/2005/OM%2005-57%20Report%20of%20FY%202005%20Quality%20Committee.pdf

OM 04-26 (2/12/06): Administrative Investigations vis-a-vis Hearings in Post-Election Proceedings
http://www.nlr.gov/shared_files/OM%20Memos/2004/om04-26.pdf

GC 06-07 Procedural Initiatives in Election Cases
<http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/GC%20Memoranda%20Files/GC%2006-07%20Procedural%20Initiatives%20in%20Election%20Cases.pdf>

OM 06-17 Alternative Dispute Resolution Program
<http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2006-17%20Alternative%20Dispute%20Resolution%20Program.pdf>

OM 06-27 Technical 8(a)(5) cases
[http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2006-27%20Technical%208\(a\)\(5\)%20Cases.pdf](http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2006-27%20Technical%208(a)(5)%20Cases.pdf)

OM 06-60 Section 10(j) Cases and Expedited Hearings

[http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2006-60%20Section%2010\(j\)%20Cases%20and%20Expedited%20Hearings.pdf](http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2006-60%20Section%2010(j)%20Cases%20and%20Expedited%20Hearings.pdf)

OM 06-66 Outreach to Promote a Broader Awareness of the Act

<http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2006-66%20Outreach%20to%20Promote%20a%20Broader%20Awareness%20of%20the%20Act.pdf>

OM 06-75 Non-English Speaking Witnesses in Representation Cases

<http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2006-75%20Non-English%20Speaking%20Witnesses%20in%20Representation%20Cases.pdf>

OM 06-82 (8/15/06): Electronic Notice-Posting

http://www.nlr.gov/shared_files/OM%20Memo/2006/OM%2006-82%20Electronic%20Notice-Posting.pdf

GC 07-07 Seeking Compound Interest on Board Monetary Remedies

<http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/GC%20Memoranda%20Files/GC%2007-07%20Seeking%20Compound%20Interest%20on%20Board%20Monetary%20Remedies.pdf>

GC 07-08 Additional Remedies in First Contract Bargaining Cases

<http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/GC%20Memoranda%20Files/GC%2007-08%20Additional%20Remedies%20in%20First%20Contract%20Bargaining%20Cases.pdf>

OM 07-27 Non-Board Settlement

<http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2007-27%20Non-Board%20Settlement.pdf>

OM 07-59 Consolidating Compliance Issues with ULP Complaints

[http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2007-59%20\(CH\)%20Consolidating%20Compliance%20Issues%20with%20ULP%20Complaints.pdf](http://nlrbnet.nlr.gov/operations/GCOMmemos/OM-GC%20Files/OM%20Memoranda%20files/OM%2007-59%20(CH)%20Consolidating%20Compliance%20Issues%20with%20ULP%20Complaints.pdf)