

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.

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.

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.

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.

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:

- 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.

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.

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

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

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.

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 06-05 and GC Memo 07-08. 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:

- 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

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. Under most circumstances, before seeking a nontraditional remedy the Regional Office must first seek authorization from the Division of Advice. See GC Memos 00-03, 06-05, 07-07, and 07-08, and OM Memos 99-79 and 06-82.

10131.5 Decertification Petitions and Settlement Agreements

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 No. 23 (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).

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)

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.

(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

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.

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

(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.

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 statute 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.

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.

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.