

10620 Formal Compliance Proceedings

10620.1 Overview: Formal compliance proceedings may be used to litigate or compel compliance of almost any compliance issue under a Board order, including backpay, specific bargaining requirements, reinstatement, and successorship, alter ego, or other derivative liability issues.

Compliance proceedings are appropriate when a respondent disputes the Region's determination of net backpay or other compliance requirements. Compliance proceedings may also be appropriate to fully liquidate backpay liabilities or other compliance requirements even when no specific issue has been disputed by the respondent, but where the respondent has not cooperated or has asserted an inability to pay liabilities.

In those situations in which, pursuant to a judgment enforcing a Board order that does not liquidate backpay, the amount of backpay is computed and paid, there is ordinarily no need for compliance proceedings to formally liquidate backpay due.

Note that compliance proceedings are appropriate whenever a legitimate dispute exists concerning compliance requirements under a Board order. When a respondent is refusing to comply with clear provisions of an enforced Board order, institution of contempt proceedings rather than, or in addition to, compliance proceedings may be warranted. See Compliance Manual section 10592.3 regarding criteria for recommending contempt proceedings.

Note also that compliance proceedings are restricted to controversies arising from the requirements of remedial provisions of a Board order. They may not be used as a means to relitigate underlying findings of violations of the Act or other issues already decided in the Board order.

Formal compliance proceedings begin when the Region issues a compliance specification in which it alleges compliance requirements under the Board order. Issuance of the compliance specification leads to a supplemental hearing before an administrative law judge at which disputed issues are litigated, followed by the issuance of a supplemental decision, and a Board supplemental decision and order that will direct the respondent to undertake clearly defined actions in compliance with provisions of its underlying order.

10620.1–10620.2

For example, a typical Board supplemental decision and order arising from disputed backpay issues will make findings concerning all the disputed compliance issues, and then direct the respondent to pay a specified sum in net backpay, plus interest, to a discriminatee.

Compliance requirements under a Board supplemental order should be clear and not subject to continuing dispute. The Region may refer a Board supplemental order for enforcement using procedures set forth in Compliance Manual section 10585.

The following Compliance Manual sections set forth procedures for undertaking formal compliance proceedings.

10620.2 Court Enforcement of Board Order Normally Required Before Compliance Specification May Issue: In general, a Board order must be enforced by a United States court of appeals before a compliance specification may be issued.

Thus, if compliance with a Board order cannot be resolved, it is generally appropriate to refer the case for initiation of enforcement proceedings, as set forth in Compliance Manual section 10585.

Note that there are situations when court enforcement is not required to issue a compliance specification. These situations are set forth in the sections immediately following.

Note also that although the Region should normally seek voluntary compliance with an enforced Board order or settlement of disputed compliance issues, it may initiate formal compliance proceedings at any time after a judgment has been entered enforcing the Board order.

Formal compliance proceedings growing out of 8(a)(3) and 8(b)(2) violations should be given the same priority as other 8(a)(3) or 8(b)(2) cases at various other stages. See Unfair Labor Practice Proceedings Manual section 11740.

In cases with a court-enforced Board order, the Region may issue a compliance specification without prior authorization from the Division of Operations-Management.

Compliance proceedings also should be accelerated in cases where there appears to be a likelihood of collection problems, or in no-answer summary

10620.2–10620.5

judgment cases, or in cases when no exceptions are taken to the administrative law judge's decision.

10620.3 Compliance Proceeding Combined With Unfair Labor Practice Proceeding: In the following situations, when consolidation will facilitate full resolution of a dispute, the Regional Director may consolidate compliance proceedings with underlying unfair labor practice proceedings:

1. When the backpay periods are of relatively short duration and have ended before the unfair labor practice hearing begins.
2. When alter ego or successor liability issues arise prior to the opening of the hearing.
3. When backpay or other compliance issues are relatively simple and their consolidation would not confuse, impede, or unduly prolong the unfair labor practice hearing.

See Section 102.54(b) of the Board's Rules and Regulations.

In the above situations, a compliance specification should be prepared and served on the respondent in addition to the complaint. Novel or complex issues should be submitted to the Division of Operations-Management for clearance.

10620.4 Division of Operations-Management Authorization Required: If the Region concludes that compliance proceedings in a Board order case should move forward immediately although enforcement of the Board order has not been obtained, it should request Division of Operations-Management authorization. No such authorization is required when respondent has entered into a compliance stipulation as described in section 10620.5, or when compliance proceedings are combined with unfair labor practice proceedings pursuant to section 10620.

Situations where authorization may be appropriate include when the respondent is in bankruptcy or otherwise incapable of paying remedial liabilities.

10620.5 Compliance Proceedings Based on a Compliance Stipulation: To forgo enforcement proceedings, but to litigate disputed compliance issues under a Board order, a respondent may enter into a stipulation that provides for compliance proceedings without enforcement of the Board order.

If a respondent does not dispute the findings in a Board order that it violated the Act, but does dispute specific remedial requirements, such

10620.5–10621.1

a stipulation should be proposed as an alternative to enforcement proceedings to provide for compliance proceedings to address the compliance dispute.

10620.6 Unresolved Reinstatement Issues; Potential Contempt Issues: In some situations, reinstatement issues may provide a basis for contempt proceedings. As set forth in Compliance Manual section 10527.7, authorization from the Contempt Litigation Branch is required before issuing a compliance specification when reinstatement issues are involved.

10620.7 Sample Stipulation: See Appendix 13 for a sample stipulation providing for compliance proceedings under a Board order without court enforcement.

Note that among the provisions of the stipulation is a waiver of the respondent's right to contest the underlying findings of the Board order. Only compliance issues are subject to further litigation.

Note also that the Regional Director has authority to approve the stipulation.

10621 Preparation of Compliance Specification and Notice of Hearing

10621.1 Overview: The basic purpose of the compliance specification is to narrow proceedings to those compliance issues in dispute and to set forth clearly the compliance requirements of those disputed issues.

Provisions of the Board order that have been complied with should not be addressed in the compliance specification.

For example, if a respondent has posted remedial notices, reinstated a discriminatee, and complied with all other provisions of a Board order, but disputes the Region's determination of backpay, the compliance specification should make allegations only concerning backpay.

In addressing the disputed compliance issues, the compliance specification should reflect the Region's determination of full compliance requirements, regardless of any positions taken or offers made during the course of efforts to settle the issues. See Compliance Manual section 10564.16.

10621.1–10621.4

The specification should be as specific, detailed, and accurate as the circumstances of the case permit. Each affirmative allegation should be set forth to call for an admission or a denial in the respondent's answer.

With respect to allegations concerning backpay, the specification should set forth all relevant facts upon which backpay was determined, such as the dates the backpay period began and ended, wage rates in effect for relevant employees, the appropriate method for determining backpay, arithmetic calculations, and the resulting amount of net backpay due.

With respect to allegations concerning issues other than backpay, the specification should allege clearly all aspects of the respondent's failure to fully comply with the Board order, including a description of any specific conduct at issue, the names of respondent's representatives who engaged in this conduct and the dates and places where the conduct occurred, leading to allegations as to affirmative actions required to comply.

10621.2 Regional Authority to Issue Compliance Specifications: The Regional Director may issue a compliance specification without clearance from the Division of Operations-Management except in situations addressed in Compliance Manual section 10620.4.

A compliance specification is prepared and served over the signature of the Regional Director. See Sections 102.54 and 102.55 of the Board's Rules and Regulations.

10621.3 All Joint Respondents to be Named: All respondents to the compliance proceeding should be named in the caption of the compliance specification, and served with the compliance specification. See Compliance Manual section 10622.3. Respondents that should be named include all jointly liable respondents, sole proprietors, partners, successors, alter egos, joint employers, fraudulent transferees, and individuals against whom individual liability is sought.

In cases of joint and several liability, even when one of the parties has paid its share of backpay, it should nevertheless be named as a respondent in the compliance specification. See Compliance Manual section 10564.13.

10621.4 Burdens of Proof: The Region's burden of proof in compliance proceedings regarding allegations other than those that pertain to backpay is generally the same as its burden in an underlying unfair labor

10621.4–10621.5

practice proceeding; that is, allegations must be proved by a preponderance of the record evidence.

In backpay cases, the Region's specific burden is to establish that the gross backpay formula and amount is reasonable. See Compliance Manual section 10532.1.

In cases where the respondent has not cooperated by providing records needed to determine or calculate backpay, allegations should be based on other sources of information or fair approximations. Any doubts should be resolved against the respondent. The respondent's noncooperation should be pled and the Region should ask the Board for an order foreclosing the respondent from introducing previously demanded records in order to contest gross backpay. Cf. Fed.R.Civ.P. 37(b)(2)(B).

It is also the Region's burden to establish expenses incurred by the discriminatees in seeking or maintaining interim employment that should be offset against interim earnings. See Compliance Manual section 10544.

Often, discriminatee expenses are minimal; even so, allegations concerning expenses incurred in seeking employment support discriminatee contentions concerning mitigation. See Compliance Manual section 10545.

All elements of a backpay case that diminish the respondent's gross backpay liability, such as interim earnings and whether the discriminatee met his or her obligation to mitigate, are the respondent's burden to establish.¹⁶⁷ The Region, however, should admit in a compliance specification interim earnings, a failure to mitigate, and other facts that reduce gross backpay that have been established to the Region's satisfaction during the course of the backpay investigation.

If the respondent establishes that the discriminatee quit an interim job, it becomes the burden of the General Counsel to demonstrate that the decision to quit was reasonable. See Compliance Manual sections 10545.4 and 10631.8.

10621.5 Affirmative Allegations: The compliance specification should address all compliance issues for which the Region assumes the burden of proof in the form of affirmative allegations.

¹⁶⁷ *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648, 655 (1989); *Colorado Forge Corp.*, 285 NLRB 530, 538 (1987); *Rainbow Coaches*, 280 NLRB 166, 179–180 (1986).

10621.5–10621.6

Complaint pleading manual paragraphs should be followed as closely as possible for alleging nonbackpay issues.

The specification should affirmatively plead the ultimate facts on which successorship, individual liability, or other derivative liability is sought.

Regarding backpay, the compliance specification should contain affirmative allegations regarding all the basic facts, such as the dates of the backpay period, rates of pay, and hours worked by replacement employees, the method used to determine gross backpay, and the calculations leading to a resulting backpay amount due.

Allegations set forth in the specification should generally be supplemented with appendices that set forth and summarize underlying facts and figures and the calculations applied to them to show gross backpay, interim earnings, or other adjustments, and final net backpay for each discriminatee.

Note that appendices may be produced using computer spreadsheet programs now available in the Regions.

Calculations should be based on calendar quarters. Final net backpay is the sum of net backpay due for each quarter of the backpay period. See Compliance Manual section 10550.2.

10621.6 Pleading Issues for Which the Respondent Bears the Burden of Proof: The compliance specification should not make affirmative allegations concerning issues for which the respondent bears the burden of proof. Where established to the Region's satisfaction, these issues should be admitted. For example, the compliance specification should admit the interim earnings of each discriminatee. See Compliance Manual section 10540 regarding interim earnings.

The Region should only admit the interim earnings that it has concluded should be offset against gross backpay, even if the respondent disputes the Region's conclusions and is expected to raise the issue in the compliance hearing. The Region should not make affirmative allegations concerning interim earnings in anticipation of respondent arguments. Rather, the respondent will bear the burden in the compliance hearing of proving that additional interim earnings should be offset against gross backpay.

If the Region has concluded that there is no net backpay entitlement for a discriminatee, either because interim earnings exceeded gross backpay

10621.6–10621.7

for every quarter of the backpay period, or because the discriminatee was unavailable for interim employment throughout the backpay period, the compliance specification should not include that discriminatee. That is, no allegations concerning gross backpay should be made, followed by admissions that lead to the conclusion that no net backpay is due for a particular discriminatee. Rather, that discriminatee will not be a part of the compliance proceeding.

If the Region has concluded that a discriminatee was available for interim employment, or has met his or her obligation to mitigate, it should not set forth these conclusions in the compliance specification as affirmative allegations, even if the issues are close, or if it expects the respondent to raise these issues in the compliance hearing. Rather, net backpay due the discriminatee should be set forth on the basis of allegations concerning gross backpay, with no deduction admitted. It will be the respondent's burden at the compliance hearing to prove that deductions from gross backpay are warranted as a result of these issues.

If the Region has concluded that a discriminatee was unavailable for interim employment or failed to meet his or her obligation to mitigate for part of the backpay period, this should be admitted in the compliance specification, with the appropriate periods set forth.

Note, however, that in close or doubtful situations concerning mitigation, the Region should obtain Division of Operations-Management clearances before admitting a tolling of backpay in the compliance specification.

See Compliance Manual sections 10545 and 10546 regarding mitigation and issues concerning unavailability for interim employment.

10621.7 Missing or Uncooperative Discriminatees: The Board's backpay remedy is a public and not a private right and is directed primarily towards effectuating the purposes of the Act; this is, to discourage the commission of unfair labor practices. To waive backpay for missing or uncooperative discriminatees would be, in effect, leaving to such discriminatees the effectuation of public policy. Thus, backpay should be alleged in the compliance specification for missing and uncooperative discriminatees.¹⁶⁸

¹⁶⁸See, for example, *Steve Aloi Ford, Inc.*, 190 NLRB 661 (1971); and *Iron Workers Local 373 (Building Contractors)*, 295 NLRB 648 fn. 5 (1989).

10621.7–10621.9

If a discriminatee is missing at the time of hearing or has been uncooperative during the investigation of the backpay claim, and interim earnings data has not been obtained, the compliance specification should include the claim at the level of full gross backpay. No admission should be made concerning interim earnings and employment. Net backpay will thus be the same as gross backpay in these cases.¹⁶⁹ The respondent will have the burden of proving any offsets to gross backpay.

See Compliance Manual section 10629.4 regarding the scope of the Region's responsibility for making discriminatees available as witnesses for the respondent.

See Compliance Manual section 10629.7 for the statements to be made at hearing regarding discriminatees who are not present to testify.

See Compliance Manual sections 10645.3 and 10646 regarding holding of funds and extinguishment of backpay entitlements for missing discriminatees.

10621.8 Deceased Discriminatees: Backpay should be claimed for deceased discriminatees in the compliance specification¹⁷⁰ and, when collected, paid as provided in Compliance Manual section 10635.6.

Because the date of death is a fact that diminishes the respondent's gross backpay liability, it should not be affirmatively alleged in the compliance specification, but admitted if known. If the Region cannot establish the date of death, it is the respondent's burden to prove it.

10621.9 Sample Specification: See Appendix 14 for a sample compliance specification and notice of hearing which may be used as a guide. Note the following considerations:

a. Paragraph designation: The paragraph designation system of the sample specification may be altered to accord with Regional Office practice or the requirements of a particular case. There should be a paragraph and subparagraph outline consistently lettered or numbered, however, to enable the respondent in its answer to refer to the specification by paragraph and subparagraph for the purpose of making denials, admissions, and explanations with the specificity required by Section 102.56 of the Board's

¹⁶⁹*Iron Workers Local 373 (Building Contractors)*, supra at 655 fn. 41.

¹⁷⁰*St. Regis Paper Co.*, 285 NLRB 293, 295 (1987).

10621.9–10621.10

Rules and Regulations. See Compliance Manual section 10624 regarding the requirements of an answer to a compliance specification.

Because the sample specification is illustrative, only the first of each of the various appendices referred to in various paragraphs of the text are reproduced.

b. Demand for interest: Note that because the Board includes interest accrued on back wages as part of the make-whole remedy, the summary in paragraph 20 of the sample specification indicates that interest is to be added to the amounts of net backpay found due. Because the date of payment and hence the interest amount on backpay are not known at the time the compliance specification is issued, partial amounts of interest should not be set forth in the specification.

10621.10 Sample of Specification With Computation in Text:

In complex cases, when varying circumstances, pay rates, job classifications, and backpay periods must be considered, it may be helpful to set forth a separate specific computation with separate allegations in the text rather than to attach separate appendixes for each discriminatee as in the sample that follows. In using this format, the description of the basic method of computing gross backpay with supporting tabulations must be noted in a prior section of the specification, while the name of each discriminatee should be preceded by a numeral or letter (as appropriate in accordance with the outline being used for the specification as a whole) so that the denials, admissions, or explanations of the respondent's answer may be keyed to the specification as expeditiously as possible.

For example:

I. Boyd, Alvy:

a. Boyd's backpay period begins February 13, 19__, and ends July 25, 19__.

b. Boyd was employed in the job classification "mechanic repairman" at the pay rate of \$1.10 per hour prior to discrimination.

c. It is admitted that his interim employment and earnings are as follows, and it is alleged his expenses are as follows:

10621.10–10622.3

| <i>Calendar Qtr.</i> | <i>Remarks</i> | <i>Interim Earnings</i> | <i>Expenses</i> |
|----------------------|---|-------------------------|-----------------|
| 19__-1 | Unemployed | None | |
| | Transportation seeking work | ----- | \$6.00 |
| 19__-2 | Self-employed | \$262.50 | |
| | Transportation seeking work-\$4 | | |
| | Transportation to and from work-\$22.50 | ----- | 26.50 |
| 19__-3 | Self-employed | 87.50 | |
| | Transportation to and from work | ----- | 7.50 |

d. Boyd’s gross and net backpay by calendar quarters is set forth below:

| <i>Calendar Qtr.</i> | <i>Hrs. and Pay rates</i> | <i>Gross Back-pay</i> | <i>Net Interim Earnings</i> | <i>Net Backpay</i> |
|----------------------|---------------------------|-----------------------|-----------------------------|--------------------|
| 19__-1 | 321 at \$1.10 | \$353.10 | \$0.00 | \$353.10 |
| 19__-2 | 616 at \$1.10 | 677.60 | 236.00 | 441.60 |
| 19__-3 | 145 at \$1.10 | 159.50 | 80.00 | 79.50 |

10622 Procedures Following Issuance of Compliance Specification

10622.1 Complaint Case Procedures Generally Applicable: The procedures and trial techniques noted in Unfair Labor Practice Manual sections 10267 through 10452 covering formal proceedings in complaint cases should be followed except where they are inconsistent with this manual, the Rules and Regulations, or are otherwise inappropriate or inapplicable. Also, Sections 102.52 through 102.59 of the Board’s Rules and Regulations should be observed.

10622.2 Procurement of Hearing Date: The procedures of Unfair Labor Practice Manual section 10258 should be followed, substituting “Compliance Specification” for “Complaint” except for the last paragraph of that item, which does not apply to compliance proceedings.

10622.3 Service of Compliance Specifications: A copy of the compliance specification and notice of hearing should be served on each named original and additional respondent and on the charging party by certified mail or as otherwise provided by section 102.113 of the Board’s

10622.3–10622.6

Rules and Regulations as soon as possible prior to the hearing, but at least 21 days before the date set for the hearing.

10622.4 Notice of Issuance to Division of Operations-Management: On issuance of a specification, the Regional Director should forward one copy to the Division of Operations-Management.

10622.5 Notice to Discriminatees: The discriminatees should be notified of the hearing by letter and advised that they will be called for interview and possibly subpoenaed for testimony during a specific period when the trial attorney and/or compliance officer will be in the area of the hearing for that purpose.

10622.6 Disclosure of Factual Information Relevant to the Compilation: It is Board policy to make available to the respondent, on request, and after issuance of the compliance specification, all factual information or documents obtained or prepared by the Regional Office that are relevant to the computation of net backpay, restitution, or reimbursement. This policy does not apply where the respondent has refused to cooperate in the Region's backpay investigation.

This disclosure policy extends to information contained in documents in the possession of the Regional Office, including affidavits or other documents concerning discriminatee interim employment and earnings, search for employment, or availability for employment.

The disclosure policy pertains only to backpay or related computations, and does not require disclosure of information relating to other issues, such as successor employer, joint employer, or alter ego.

Disclosure prior to issuance of a compliance specification is not required. Requests for disclosure prior thereto should be refused, unless the Regional Director determines that such disclosure will enhance possibilities of settlement.

The disclosure obligation will normally be satisfied by making the materials available for inspection and copying. It should be made clear to persons requesting the information that it is not routine public information, and it is to be supplied only for use in the proceeding.

Because the policy extends only to factual information relevant to the computation of net backpay, disclosure is not required of documents that

10622.6–10624.2

contain information reflecting (a) deliberative or policy-making processes of the agency; (b) the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation; (c) other information that would not normally be available to a party in private litigation; (d) the identification of confidential sources of information to the Agency; or (e) intimate details of a personal nature having only slight relevance to the backpay inquiry.

10624 Analysis and Response to Respondent's Answer to Compliance Specification:

10624.1 No Answer Filed: Section 102.56(c) of the Rules and Regulations provides that absent a denial or an adequate explanation, each allegation in the compliance specification is deemed to be admitted and the respondent is precluded from controverting the allegation of the specification. If the respondent fails to file an answer within the time allowed, the trial attorney should communicate in writing with the respondent's counsel or, if not represented, with the respondent, advising that no answer has been filed in accord with the Board's 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, the General Counsel will file a motion for summary judgment with the Board.

If the answer is not filed within the applicable deadline, the trial attorney should file a motion for summary judgment with the Board and obtain an order postponing hearing indefinitely. See Board's Rules and Regulations, Section 102.56. Unfair Labor Practice Manual sections 10290 and 10292 should be followed in filing motions.

10624.2 Answer Filed, Allegations not Specifically Denied: Section 102.56(b) of the Board's Rules and Regulations provides that if the respondent disputes the accuracy of the backpay amount or the premises on which it is based as alleged in the compliance specification, its answer to the compliance specification shall specifically state the basis for the disagreement, setting forth in detail the respondent's position as to applicable premises and furnishing appropriate alternative figures and amounts.

General denials by the respondent to allegations regarding the calculation of backpay are not sufficient and do not comply with the requirements of Section 102.56(b) and (c) of the Board's Rules and Regulations. Pursuant to a motion for summary judgment, these allegations will be deemed by the Board to be admitted as true.

10624.2–10626.1

General denials by the respondent with respect to the allegations concerning the interim earnings and mitigation of the discriminatees, and to the allegations relating to issues other than the computation of backpay, such as alter ego or successor status, are sufficient to require a hearing.¹⁷¹

The answer should be analyzed carefully, comparing it point by point with the specification. Allegations in the specification that are not specifically answered, or that are admitted, should be noted. If the answer is defective, the Region should consider filing a motion for summary judgment or partial summary judgment as appropriate.

The Region may also make a motion at the compliance hearing that the administrative law judge deem allegations not properly answered be admitted without taking evidence in support of the allegations and precluding the respondent from offering evidence to controvert them. See Compliance Manual section 10629.2

Before filing either a motion with the Board or with the administrative law judge, the trial attorney should advise the respondent in what manner the answer is deficient and, following the procedures in Compliance Manual section 10624.1, allow the respondent a period of time to file an amended answer.

10625 Amendment of Compliance Specifications: Section 102.55 of the Board's Rules and Regulations permits the Regional Director to amend the specification after the issuance of the notice of hearing and prior to the opening of the hearing at his or her discretion, and after the opening of the hearing on leave of the administrative law judge or the Board for good cause. When substantial amendment is involved, a copy of the amended specification should be sent to the Division of Operations-Management.

10626 Withdrawal of Specification on Compliance:

10626.1 Before the compliance hearing: On compliance or settlement, the Regional Director may withdraw the compliance specification on receipt of backpay. Standards set forth in Compliance Manual section 10564 apply after a compliance specification has issued. Where Division of Operations-Management authorization is required before the Region may accept a settlement, the compliance specification should not be withdrawn

¹⁷¹ See, for example, *Best Roofing Co.*, 304 NLRB 727, 728 (1991); and *Castaways Management, Inc.*, 303 NLRB 374, 375 (1991).

10626.1–10627.2

until authorization is obtained. In general, the compliance specification should not be withdrawn until there has been full compliance and backpay actually paid.

10626.2 At the Hearing but Before Transfer of Case to Board: Withdrawal at this stage is to be performed in the same manner as above except that it should be subject to the granting of leave by the administrative law judge.

10626.3 After Transfer of Case to Board: Settlement agreements obtained at this stage will be transferred to the Board for its consideration.

10627 Preparation for the Compliance Hearing

10627.1 Overview: The compliance hearing is conducted in a manner analogous to an unfair labor practice hearing. Generally, procedures set forth in Unfair Labor Practice Manual sections following 10330 are applicable. Considerations particular to compliance proceedings are addressed below.

10627.2 Arrangement for Production of Records, Service of Subpoenas, and Pretrial Stipulations: The trial attorney should subpoena or make reliable advance arrangements for the production of records necessary to prove backpay or other affirmative allegations contained in the compliance specification. Unless the gross backpay computation is admitted by the respondent, the presence in the hearing room of the records of the gross employer, whether or not it is a respondent, on which the gross backpay computation was based should be assured by the service of a subpoena duces tecum on the gross company before the opening of the hearing. Thus, if the gross backpay is challenged at any point, supporting evidence will be available and appropriate portions may be demonstrated or copied for introduction into evidence.

Unfair Labor Practice Manual section 10340 should be followed with regard to the service of subpoenas.

Every effort should also be made to obtain factual stipulations concerning matters contained in the gross employer's records or matters that are not subject to controversy. The exploration of possible stipulations or requests for the production of the respondent's records should not be left for handling at the hearing. When the hearing opens, the attorney should be ready

10627.2–10628.2

to place stipulations in the record and to proceed with the General Counsel's case.

10628 Preparation of Testimony and Evidence Concerning Gross Backpay Computation and Discriminatee Expenses

10628.1 Testimony of Compliance Officer: If the respondent disputes any allegation concerning gross backpay, either underlying facts or the method applied to them to compute backpay amounts, testimony of the compliance officer is generally used to explain the source of factual information and the rationale for the method applied to compute backpay.

When the respondent's answer raises challenges to any allegation, the compliance officer should be prepared to testify concerning the basis of the computation and the reasoning in selecting and implementing the gross backpay formula.

The compliance officer should also be prepared to undergo cross-examination, and will usually be forewarned of the areas of cross-examination from prior discussions with the respondent's counsel. As appropriate, the compliance officer should also prepare to testify concerning the propriety of any alternative computation offered by the respondent.

10628.2 Preparing Supplementary Tabulations; Explaining Computation; Answering Defenses: If specific complex portions of the gross backpay computation are difficult to understand by themselves, supplementary tabulations or exhibits may be compiled in preparation for the hearing to be introduced into evidence simultaneously with the compliance officer's testimony describing the reasoning in reaching the conclusions contained in the specification.

For example, if the Region contends, over respondent opposition, that a specific raise in pay would have been received by the discriminatees during the backpay period, a summation of data from the gross company's records, showing the employees who received such a raise and its amount and time of payment, may form an exhibit.

Similar tabulations to establish that bonuses were paid, that the discriminatees would have been transferred to other departments, that they would not have been reached in layoffs, that they would have been reemployed at a specific date, or similar contentions should be prepared.

10628.3–10628.5

10628.3 Testimony of Discriminatees Regarding Gross Backpay

Computation: Occasionally, the trial attorney may prove elements of gross backpay through testimony of discriminatees or others, such as other employees of the gross employer. Such testimony may serve to establish the identity of employees who replaced a discriminatee, changes that took place during the backpay period, determination of eligibility for fringe benefits, and similar elements of gross backpay. Accordingly, if it is known that their testimony may be required as to these matters, the trial attorney should review the relevant facts with the discriminatees in advance of the hearing.

10628.4 Testimony of Discriminatees and Evidence Concerning Expenses

Expenses: The General Counsel has the burden of establishing expenses incurred by discriminatees in seeking and holding interim employment that are deductible from their interim earnings. See Compliance Manual section 10621.4. Expenses may be established by discriminatee testimony when there is no documentary evidence of expenses. The trial attorney should prepare the discriminatees for such testimony. If, in the course of trial preparation, new expenses are established, it may be necessary to amend the specification to include them.

10628.5 Preparation of Discriminatees for Examination by Respondent

Respondent: The respondent's counsel will often examine discriminatees concerning their efforts to seek work during periods of unemployment. When this is expected, the trial attorney should interview and prepare the discriminatee for testimony concerning the details of interim employment, earnings, expenses, and search for work. Although much of this information is not within the Region's burden of proof, the discriminatees should be prepared for it so that the record will be as clear and concise as possible.

Note that the respondent may not go into these issues unless it has raised them in its answer.

The discriminatees should review appropriate documents, and be prepared to state, as precisely as they can, the names of the firms they canvassed in applying for work, the times when they made such applications, the people to whom they spoke, and whether they filed written applications. Whenever possible, an inquiry should be made concerning the existence of corroborative witnesses to their search for work.

Their periods of application at state employment services for unemployment compensation should be reviewed with them and proof of such applications

10628.5–10628.7

as are available, including their unemployment compensation booklets noting the times when they applied for unemployment compensation, should be prepared for introduction into evidence.

They should be prepared to account for their employment history during the backpay period.

All discriminatees should be cross-examined as a test and in preparation for the kind of cross-examination they will receive at the hearing, particularly concerning their efforts to find work during periods of unemployment and low earnings. It should be stressed that the truth and only the truth should be the basis of their testimony. As appropriate, they should be reminded that where it is established that a discriminatee has concealed interim earnings, it is Board policy to deny backpay for the period of concealment. See Compliance Manual section 10540.5.

10628.6 Preparation for Testimony Concerning Labor Market

Conditions: To support its contention that a discriminatee failed to mitigate, the respondent's counsel may call expert witnesses familiar with the labor market in the area where most of the discriminatees were living and seeking work during the backpay period. If deemed appropriate, in preparation for cross-examination and rebuttal, the trial attorney should interview knowledgeable local officials of the state employment service and knowledgeable union officials, particularly skilled trades unions, to obtain a thorough grounding on how local market conditions affected the search for work of people with the skills and experience of the discriminatees. Another valuable source of information is the Area Trends in Employment and Unemployment Bulletin published monthly by the Manpower Administration of the U.S. Department of Labor.

The respondent's witnesses may be expected to testify concerning the number of job vacancies that existed in the employment area during the backpay period. The trial attorney, on the basis of pretrial interviews, should be prepared to elicit testimony concerning not only the number of job vacancies that occurred, but the number within the job experience and background of the discriminatees, the rates of pay offered, and the number of people remaining unemployed on the rolls of the state employment service or union simultaneous with the existence of the job openings.

10628.7 Service of Subpoenas: The presence in the hearing room of the records of the gross company, whether or not it is the respondent,

10628.7–10629.3

on which the gross backpay computation was based, should be assured by the service of a subpoena duces tecum on the gross employer.

10629 Conduct of the Compliance Hearing

10629.1 Overview: The conduct of a compliance hearing is governed in large part by the General Counsel's burden of proof, set forth in Compliance Manual section 10621.4, and Section 102.56 of the Rules and Regulations, which requires that the respondent raise its defenses in its answer. Sections 10380–10412 of the Unfair Labor Practice Manual dealing with hearings in complaint cases are also generally applicable to compliance hearings.

10629.2 Specificity of Answer, Motion to Preclude: If the respondent's answer was insufficient with respect to any allegations of the compliance specification, it may be appropriate to make a motion to have the administrative law judge deem those allegations to be admitted and to preclude the respondent from litigating those issues at the compliance hearing. See Compliance Manual section 10624.2.

The necessary legal research and the drafting of the motion papers, showing in detail in what respects the respondent's answer is defective, are done well in advance of the hearing. The field attorney should not go to proof of the allegations that have not been properly answered, and should make appropriate objection if the respondent attempts to bring such matters into the hearing.

10629.3 Trial Technique: It is a cardinal rule of advocacy in compliance proceedings that the trial attorney should not assume any part of the respondent's burden or litigate backpay issues not properly placed in issue by the answer unless some gain to the case might be achieved. Rarely will it aid the General Counsel's case to litigate defenses not properly raised by the respondent.

Trial counsel therefore should completely familiarize themselves with the case law arising under Section 102.56(b) of the Rules and Regulations and be vigilant that no defenses not properly raised are placed in litigation at the hearing. They should oppose all efforts to do so, and should not do so themselves.

In addition, although they may proffer evidence in areas in which the respondent has the burden of proof, trial counsel should not only disavow

10629.3–10629.5

in express words but should take particular care that by their conduct they do not place themselves in the position of assuming any burden of proof in areas that are properly the respondent's responsibility.

10629.4 Scope of the Region's Responsibility for Making Discriminatees Available as Witnesses for Respondent: Although the General Counsel may not call all or even any discriminatees as witnesses, the respondent will often desire to call discriminatees to prove its case. The Region's trial attorney should cooperate with the respondent in its efforts to obtain the presence of the discriminatees to the extent that it is practicable and reasonable to do so.¹⁷²

The trial attorney should furnish the desired discriminatee's present or last known address so that individual may be subpoenaed or located. Subpoenas may be issued to compel the appearance and testimony of uncooperative discriminatees at compliance hearings.

Should the discriminatee object to revealing his/her address for apparently good cause, that individual may properly be asked to voluntarily waive formal service (but not fees and mileage) so long as it is agreed that testimony will be given at the time requested by the respondent. Should failure to accept service tend to prolong or delay the proceedings, the discriminatee's location should no longer be treated as confidential unless the most compelling reason exists.

To avoid the possibility of delay at the hearing, it is good practice to explore the issue of discriminatee witnesses with the respondent's counsel in advance of the hearing.

10629.5 Formal Exhibits: At the outset of the hearing, the trial attorney should introduce into evidence the following papers:

- Board Decision and Order
- Court decision and judgment
- Compliance specification and notice of hearing
- Each written postponement request and order
- Affidavits of service
- Respondent's answer and affidavit of service
- Form NLRB-4688, Statement of Standard Procedure in Formal

¹⁷²E.g., *Cornwell Co.*, 171 NLRB 342 fn. 2 (1968): "[T]he General Counsel's function in producing back-pay claimants for examination by Respondent is merely advisory and cooperative." See also *Iron Workers Local 480 (Building Contractors)*, 286 NLRB 1328, 1334 (1987); *Colorado Forge Corp.*, 285 NLRB 530, 541 (1987).

Hearing

Relevant stipulations or documentation relating to proceeding to a compliance hearing before enforcement proceedings (see Compliance Manual sec. 10620.5) should also be introduced.

10629.6 Opening Statement: In the opening statement the trial attorney should normally state the factual and legal theory of the case if it is not otherwise apparent, as well as the theory of the burden of proof. Additionally, the trial attorney should present to the administrative law judge any problem of missing, distant, unavailable, or deceased witnesses; clear up any problem with the use of the discriminatees as the respondent's witnesses; and reasonably cooperate in securing their presence.

10629.7 Missing or Unavailable Discriminatees: If interim earnings are available for missing or unavailable discriminatees, their backpay claims should be treated like the claims of discriminatees who are present at the hearing. The burden of proving further offsets to backpay rests on the respondent.

If the respondent wants missing or unavailable discriminatees for testimony, the trial attorney should offer cooperation, such as proposing to take depositions, if credibility issues do not seem likely to become involved, or to move the hearing to a date, time, or place more convenient to the particular discriminatee. The trial attorney should argue in support of such procedures that the wrongdoer rather than the injured party should bear the inconvenience and cost of travel.

It is very important that the record reflect in the most detailed factual terms the cooperation proffered the respondent, whether it occurred before or at the hearing, and the fact that discriminatees were available to it as witnesses. To this end, the trial attorney should state, preferably in the opening statement, past offers and efforts of cooperation, as well as continued willingness to cooperate, and should elicit from the respondent its desires in the matter.

Before the hearing closes, counsel should summarize on the record all the respondent's requests for testimony by discriminatees and the result of counsel's efforts at cooperation, lest it be subsequently claimed that the respondent was prevented from proving its defense.

10629.7–10629.9

The administrative law judge should be requested to make findings concerning the gross backpay of missing or unavailable discriminatees for whom there is no interim earnings information. When these discriminatees are found, their interim earnings may be established and backpay paid. See Compliance Manual section 10621.7. See Compliance Manual section 10646 concerning the eventual extinguishment of backpay entitlement for a discriminatee who remains missing after compliance is otherwise closed.

Note also that after a missing discriminatee has been found, a further compliance hearing may be held concerning interim earnings, mitigation, or any other issue that cannot be resolved informally.¹⁷³

10629.8 Deceased Discriminatees: The trial attorney should offer evidence of gross backpay and expenses regarding deceased discriminatees if the respondent's answer has put these elements in issue. The admissions in the compliance specification concerning interim earnings and unavailability for employment should be sufficient to complete the case. The respondent bears the burden of establishing further reductions from gross backpay.

10629.9 Presentation of Documents: All documentation of interim earnings for all discriminatees should be offered or proffered to the respondent's counsel to offer in the record. The trial attorney should be careful to state on the record that although the General Counsel does not have the burden of proving interim employment and earnings and that this is the respondent's burden, an offer is being made of documentary information of such matters in the interests of accuracy, to expedite the hearing, and as part of the General Counsel's policy to offer as much assistance as possible to the respondent in presenting information relevant to backpay issues for the consideration of the administrative law judge. Any shortcomings of the documents should be described.

Note that all such documents should have been provided to the respondent's counsel in advance of the hearing, had they been requested. See Compliance Manual section 10622.6.

If the respondent refuses to agree to the admission of such exhibits, the offer should nevertheless be made on the record but no effort should be made to have them admitted over its objection unless it is indicated

¹⁷³E.g., *Brown & Root, Inc.*, 132 NLRB 486, 495–497 (1961); and see 327 F.2d 958, 959 (8th Cir. 1964), clarifying court's opinion in 311 F.2d 447, 456 (8th Cir. 1963), on this point. See also *Continental Insurance Co.*, 289 NLRB 579, 585 (1988); *Colorado Forge Corp.*, 285 NLRB 530, 542 (1987).

10629.9–10630.2

by the administrative law judge that they would be helpful. The trial attorney should make clear on the record that the evidence on interim earnings was made available to the respondent in advance of hearing.

10630 The General Counsel's Case

10630.1 Compliance Officer Testimony: The General Counsel's burden of proof on the backpay allegations at issue is normally met by the introduction of evidence and compliance officer testimony. In cases involving relatively complex computations of gross backpay, the testimony of the compliance officer who prepared the computation is usually extremely helpful to the administrative law judge and presents a frame of reference for the introduction of supplementary exhibits.¹⁷⁴

In addition to describing the basis of the computation, the compliance officer should tell how to adjust the computation of backpay in the event the administrative law judge finds the entitlement of backpay of some discriminatees changed on the basis of evidence introduced at the hearing.

If the respondent has properly alleged in its answer that the specification's gross backpay formula is incorrect or inappropriate, it will have set forth, with supporting data, an alternative method for computing gross backpay. The compliance officer should present testimony concerning the defects of the respondent's approach.¹⁷⁵ Alternatively, this may be relegated to argument by the trial attorney or included in a brief.

10630.2 Discriminatee Testimony: In most cases, the trial attorney should have a discriminatee testify only to prove expenses, to present facts necessary to the computation of gross backpay that cannot be otherwise established, and to anticipate known respondent defenses.

The discriminatee should testify in detail concerning expenses incurred in seeking and maintaining interim employment. Available documentation of expenses should also be presented. Because expenses have no effect on net backpay during quarters in which there were no interim earnings, testimony regarding expenses for such quarters is relevant only to establish efforts to seek employment.

¹⁷⁴E.g., *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, 151 NLRB 972, 981–986 (1965); *Food & Commercial Workers Local 1357*, 301 NLRB 617, 618 (1991).

¹⁷⁵E.g., *Operating Engineers Local 138 (Nassau & Suffolk Contractors)*, supra at 987–988; *Rainbow Coaches*, 280 NLRB 166, 173–178 (1986); *Big Three Industrial Gas*, 263 NLRB 1189, 1193–1196 (1982).

10630.2–10631.1

The trial attorney may decide that an orderly presentation of the facts on mitigation overrules the considerations set out in Compliance Manual section 10629.3, and that it is advisable to put a discriminatee on the stand to testify regarding his/her search for work rather than wait for the respondent to raise the issue. When this is done, the examination of the discriminatee should generally be limited to the specific period or periods for which mitigation has been raised.

10631 The Respondent's Case

10631.1 Respondent's Attack on Gross Backpay Computation:

The respondent's attack on the General Counsel's gross backpay computation may take any number of forms. It will often be based on the testimony of company officials who will attempt to show that projected earnings alleged in the compliance specification were unreasonably high, or that the earnings or hours of representative or replacement employees selected by the General Counsel were not representative of the probable earnings of the discriminatees.

The respondent may also present testimony or evidence to dispute fringe benefits claimed as elements of gross backpay.

When the respondent contests the representative character of the employees used to measure gross backpay, the trial attorney should consider whether, on rebuttal, the testimony of discriminatees or other employees would be helpful.

Respondent's documents and employment records may be the best evidence of a discriminatee's entitlement to such benefits as vacations, bonuses, and medical insurance. The respondent's witnesses may be cross-examined with regard to these documents and the respondent's practices with regard to the implementation of its benefits policies. The trial attorney may also find it advisable on rebuttal to question the discriminatees, other employees, and, in the case of contractual benefits, appropriate union officials, on these issues as well.

The respondent may attempt to prove that some change in its organization or operations terminated the backpay period because the discriminatee(s) would have been laid off at the time the change was made. This kind of contention should prompt a careful inquiry (including, as appropriate, an examination of relevant respondent records) to determine what happened to other employees who worked in the same operation as the discriminatee(s)

10631.1–10631.4

(e.g.—were they transferred to another operation? permanently laid off? temporarily laid off and then recalled?)

10631.2 The Respondent's Case Regarding Interim Earnings:

The respondent may attempt to prove reductions from gross backpay by establishing interim earnings beyond those admitted in the compliance specification. Evidence in the form of documents, testimony from other employers or witnesses, and examination of the discriminatee may be used.

The trial attorney should scrutinize documents proffered to establish additional interim earnings and to cross-examine witnesses who testify regarding additional employment.

Note that there are serious consequences for discriminatees who conceal interim earnings. See Compliance Manual section 10540.5.

10631.3 The Respondent's Examination of Discriminatees Regarding Mitigation:

The respondent will often question the discriminatee in detail concerning the individual's search for work, including the names of firms to which the discriminatee applied, whether or not written applications were filed, whom the witness saw when application was made, and other details. The discriminatee may be asked whether he or she reviewed newspaper want ads for available jobs or made job applications to other specific employers engaged in the same or similar business as the respondent.

The respondent may also question the discriminatee concerning any employment obtained by the individual for the purpose of showing that he or she failed to mitigate damages by accepting employment that is not substantially equivalent or by voluntarily quitting an otherwise suitable job without justification or by engaging in gross or deliberate misconduct that resulted in discharge.

10631.4 Introduction in Evidence of Newspaper Advertisements:

The respondent may attempt to prove a lack of diligence in seeking interim employment by putting into evidence newspaper advertisements showing the existence of jobs in the classifications of the discriminatees.

It should be argued that newspaper advertisements do not reliably establish either the general availability of jobs or that a discriminatee could have obtained a particular job. In oral argument, or in a brief, it should be pointed out to the administrative law judge that advertisements normally

10631.4–10631.6

say little about wage rates, working conditions, or the location of the position advertised. Further, advertisements will not show how many people applied for the jobs that were advertised and leave to pure speculation the likelihood the discriminatees would have been employed by responding.

10631.5 Contention of Willful Idleness Based on Testimony of Employment Agency: The respondent may also attempt to prove a lack of diligence through other testimony regarding the number of jobs available in the labor market during the backpay period.

Testimony of this kind should be completely amplified under cross-examination. To prepare for this, discussion with officials of the local state employment service may be appropriate in advance of the hearing. On cross-examination the respondent's witnesses should be requested to testify concerning the number of applicants in the skill classifications of the discriminatees who remained unplaced by the agency during the backpay period. The number of such persons who draw their maximum unemployment insurance benefits without obtaining a job should be obtained from the state employment service and placed in the record.

In addition, testimony should be elicited from the witness to establish the location of job vacancies, their actual classifications, and the rates of pay offered concerning jobs asserted to be available. If a significant number of such vacancies were at relatively long distances from the homes of the discriminatees, the jobs were such that the discriminatees could not qualify, or the rates of pay were excessively low, it may be argued that the discriminatees were not obliged to apply for or accept them. If the witness is a person who hires for another employer, ask how many applicants are interviewed per job vacancy to be filled.

10631.6 Discriminatee's Decision not to Return to Work: The respondent may also attempt to elicit testimony to the effect that discriminatees would not have returned to work at the gross company by asking them whether they would have accepted reinstatement during the backpay period. The trial attorney should object to such a question on the grounds it is hypothetical.

Further, the Board has found irrelevant evidence that at some time prior to a valid offer of reinstatement, discriminatees have stated that they would not return to work. See Compliance Manual section 10529.8.

10631.7–10631.9

10631.7 Respondent's Effort to Bar Reinstatement or Disparage or Discredit Discriminatees: The respondent may attempt to establish discriminatee misconduct in order to contend that, even in the absence of its unlawful action, the discriminatee would not have retained employment, and that backpay should thus be tolled. The respondent assumes the burden of establishing that reinstatement is not warranted. See Compliance Manual section 10528.4.

Such contentions may be countered primarily through a complete advance knowledge of the discriminatee's side of the case. If appropriate, the contentions should be challenged and testimony elicited to present the discriminatee in as favorable a light as possible.

Another defense against this type of attack is to investigate the possibility that other people with like or even worse records continued in the employ of the gross company or that prior to the discrimination the respondent was aware of the misconduct and did not discharge the discriminatee.

10631.8 Rehabilitation of Discriminatees Regarding Mitigation: Doubts, bad impressions, and contradictions in the record resulting from respondent examination are often caused by the confusion or misunderstanding of the discriminatee. Cross-examination by the trial attorney should aim to clarify earlier testimony and generally rehabilitate the discriminatee following examination by the respondent. Advance preparation will be very important in accomplishing this.

On cross-examination, the trial attorney should bring out all the efforts made by the discriminatee during periods of unemployment to look for work, clarifying any testimony elicited by the respondent that varies with any documentary evidence or prior testimony.

If the discriminatee's credibility has been impugned, friends or relatives should be brought to the stand to corroborate the discriminatee's testimony.

If the respondent establishes that the discriminatee quit an interim job, it becomes the burden of the General Counsel to demonstrate that the decision to quit was reasonable. Therefore, the trial attorney should be prepared to question the discriminatee with respect to the reasons the discriminatee voluntarily left any interim employment.

10631.9 Special Problems; Remote and Speculative Defense by Employers: In some compliance hearings an unduly prolonged hearing

10631.9

and a very unwieldy record may result from counsel pressing what can be characterized as rather remote and speculative claims to justify affirmative defenses. In the interest of keeping the length of the hearing and the record within bounds, the trial attorney may find it advisable to rely on the words of the Supreme Court as a basis for urging the administrative law judge to place some limits on the evidence that may be admitted on this issue:

The Board has a wide discretion to keep the present matter within reasonable bounds through flexible procedural devices. The Board will thus have it within its power to avoid delays and difficulties incident to passing on remote and speculative claims by employers, while at the same time it may give appropriate weight to a clearly unjustifiable refusal to take desirable new employment. [*Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 199–200 (1941).]¹⁷⁶

¹⁷⁶See also *Heinrich Motors v. NLRB*, 403 F.2d 145, 149 (2d Cir. 1968), enfg. 153 NLRB 1575 (1965), and *Corning Glass Works v. NLRB*, 129 F.2d 967, 973 (2d Cir. 1942).