



United States Government
NATIONAL LABOR RELATIONS BOARD
OFFICE OF THE GENERAL COUNSEL
Washington, DC 20570
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February 25, 2011

The Honorable Phil Roe
Chairman, Subcommittee on Health,
Employment, Labor and Pensions
Committee on Education and the Workforce
House of Representatives
Washington, DC 20515

Dear Chairman Roe:

I have served as Acting General Counsel of the National Labor Relations Board since June 21, 2010. President Obama has also nominated me to serve a four-year term as General Counsel. I have spent my entire career with the Agency, beginning as a field examiner in 1972, and have worked for nine different Members of the Board. Prior to being appointed Acting General Counsel, I was the Director of the Office of Representation Appeals.

I appreciate this opportunity to supplement the record of the Subcommittee's February 11, 2011 hearing on "Emerging Trends at the National Labor Relations Board." The NLRB General Counsel is responsible for directing and managing the casehandling operations of the Agency. Among the matters addressed by the witnesses at the hearing were four initiatives that I have undertaken as Acting General Counsel of the Board. I have attached each of the initiatives to this letter and I ask that they be made part of the hearing record. I hope the following explanation of the genesis and rationale for each of the initiatives will be helpful to the Subcommittee as it evaluates the work of the Agency. These initiatives follow the tradition of administrative strategies undertaken by past General Counsels to more effectively enforce the National Labor Relations Act.

Deferral to Arbitral Awards and Grievance Settlements (GC Memorandum 11-05)

This initiative was begun by my predecessor, General Counsel Ronald Meisburg. See, OM Memorandum 10-13 (CH), "Casehandling Regarding Application of *Spielberg/Olin* Standards" (November 3, 2009). That Memorandum recognized that caselaw in Court of Appeals for the D.C. Circuit and the Supreme Court compelled a reexamination of the Board's standards for deciding whether to defer to an arbitral award as the resolution of an unfair labor practice charge. GC Memorandum 11-05 represents the fruits of our year long analysis of the issue.

When conduct alleged as an unfair labor practice is also the subject of a grievance alleging that the conduct violated a collective-bargaining agreement, the Board has two concerns: on the one hand, to carry out its statutory mandate to prevent unfair labor practices by investigating and deciding the charge and, on the other hand, to foster the statutory policy in favor of private resolution of disputes through the collective bargaining process. Initially, under its *Collyer/Dubo* deferral policy, the Board effectively implements both policies by suspending processing of the unfair labor practice charge, once it determines that the charge has “arguable merit,” and awaiting the outcome of the grievance proceeding. Typically, the grievance-arbitration resolution is satisfactory to all parties and thus resolves the unfair labor practice charge as well. GC Memorandum 11-05 does not disturb this widely accepted practice.

Occasionally, however, grievants claim that although the grievance-arbitration process resolved the contract claim, it did not properly resolve their claim of a violation of their individual statutory right to be free of discrimination and other interference with protected activity. In that minority of cases, the Board’s mandate to decide unfair labor practice allegations may be in conflict with its policy to foster collective bargaining. The Board’s *Spielberg/Olin* line of cases attempts to reconcile these policies and articulate a test for deciding when to defer to an arbitral award or grievance settlement as the resolution of the unfair labor practice charge. In essence, the Board accepts the arbitral resolution of the NLRA claim if (1) the contractual and statutory issues were “factually parallel,” (2) the facts relevant to the statutory claim were “presented generally” to the arbitrator, and (3) the arbitrator’s award or the grievance settlement is not “clearly repugnant” to the Act or “palpably wrong”, that is, it is susceptible to an interpretation consistent with the Act. By its terms, this standard permits deferral even in circumstances where the statutory issue was not considered by the arbitrator.

This test has been subjected to significant criticism. Specifically, since 1986, the D.C. Circuit has challenged the Board to articulate a convincing theory animating its decisions in this area. In frustration with the Board’s adherence to the *Spielberg/Olin* test, that court has more recently adopted its own “contractual waiver” theory, under which it has refused to enforce the Board’s decisions. Because any party to a Board proceeding may seek review of the Board’s decision in the D.C. Circuit, both my predecessor, Mr. Meisburg, and I thought it essential to craft a response to that court’s criticisms.

Another source of guidance has been Supreme Court decisions regarding the circumstances under which employees will be deemed to have waived a federal court forum for resolution of their individual statutory right claims, in favor of arbitration of those claims. The Court has made clear that for a collective bargaining agreement’s purported waiver of access to the judicial forum to be enforceable, the agreement must give the arbitrator the authority to decide the statutory issue and the arbitrator must in fact do so. See, *14 Penn Plaza, LLC v. Steven Pyett*, 129 S. Ct. 1456, 1469-1471 (2009).

These decisions do not directly control the Board's deferral policy – that policy is an exercise of the Board's discretion; §10(a) of the Act expressly preserves the Board's authority to decide unfair labor practice cases “[un]affected by any other means of adjustment.” Nevertheless, they are instructive as to the prevailing view of the appropriate place of arbitration in the resolution of statutory employment claims.

Based on all of these considerations, I concluded that the Board should apply a more stringent standard for determining which arbitral awards and grievance settlements are appropriate resolutions of an unfair labor practice claim. Accordingly, I will urge the Board to change the *Spielberg/Olin* standard and to defer only if the arbitrator or parties to the grievance settlement had the authority to, and did, consider the statutory claim. The position we will advocate does not alter the “clearly repugnant” test of *Spielberg/Olin* for rejecting arbitral awards and grievance settlements that have considered the statutory issue. Nor would it affect questions of deferral in unfair labor practice cases that turn on the interpretation of a collective-bargaining agreement.

I anticipate that this change will have no adverse impact on the Agency's workload or ability to handle the entire range of cases before it. Indeed, from 2001 to date, our deferred case inventory has declined substantially, and I expect the change to affect only a small percentage of these cases.

Casehandling Procedures regarding Violations during Organizing Campaigns: Effective §10(j) Remedies for Unlawful Discharges in Organizing Campaigns (GC Memorandum 10-07); Effective Remedies in Organizing Campaigns (GC Memorandum 11-01)

Employees' right to engage in organizing activity among themselves and to decide whether to be represented is at the core of rights protected by the Act. The directives embodied in GC Memoranda 10-07 and 11-01 are designed to insure that the Agency protects this right by providing swift and effective remedies for violations calculated to “nip-in-the-bud” employees' organizing activities before they can bear fruit. As the cases described in GC 11-01 demonstrate, this initiative is aimed only at serious violations: discharge and other retaliation against employee activists, threats of discharge, closure and other adverse consequences if employees support unionization, interrogation and surveillance of union activities, as well as the solicitation of grievances and promise or grant of benefits.

Two consequences of such violations are well-recognized. First, they affect not only the individual victim of the violation but the entire workforce. When activist employees are discharged, the remaining employees are deprived of their leadership. In addition, these violations send a message to all employees that they too risk retaliation by supporting the organizing effort. Second, time is of the essence in countering these effects. With the passage of time, discharged employees become unavailable for reinstatement and support for the organizing campaign dissolves so that an ultimate Board order is ineffective to restore the status quo or safeguard the employees' rights.

My initiatives are designed to counter these serious consequences by assuring that discharges are promptly remedied and by including in the relief sought remedies that ameliorate the impact of the violations.

Neither of these memoranda represents a sharp departure from prior Agency practice. Past General Counsels have used the §10(j) program as an essential strategy for effectively enforcing the Act. Moreover, as the attached chart shows, my initiatives embody a targeted approach, not a blunderbuss. Between October 1, 2010, when the §10(j) initiative under GC 10-07 began, and January 31, 2011, Regional Offices submitted 28 nip-in-the-bud cases to the Injunction Litigation Branch in headquarters. This represents a tiny fraction of the more than 7000 charges filed in that time frame. At the same time, we were able to promptly decide the need for interim relief and obtain suitable remedies where warranted: By January 31, we had decided that §10(j) was not warranted in nine cases, obtained a district court order in one case, and settled 12 cases.

Similarly, the initiative regarding effective remedies in nip-in-the-bud cases stems from traditional remedial law. The touchstone for determining the appropriate remedy in any case is to determine what relief is necessary to restore the conditions that existed before the violations occurred. GC 11-01 is premised on the principle, discussed above, that the impact of nip-in-the-bud violations is not confined to the individual victim of the violation but resounds among all employees.

Thus, to restore the conditions that existed before the violations occurred requires more than making whole the individual victim with backpay and reinstatement. The remedy must include action to erase the adverse impact of the violations among all employees. GC 11-01 recognizes that the Board's traditional notice posting is inadequate in this respect in serious nip-in-the-bud violations. The Memorandum directs Regional Offices to evaluate the impact of the violations in each case and provides the legal analysis for determining the specific circumstances that warrant a reading remedy or – in cases involving disruption to employee/union communications – access to company bulletin boards or to employee names and addresses. Moreover, Regions are not authorized to seek more significant access remedies without authorization on a case-by-case basis by the Division of Advice in headquarters.

Contrary to the contentions of some witnesses, these initiatives do not expend additional Agency resources. The best practices for §10(j) caseprocessing outlined in GC 10-07 streamline the §10(j) authorization process and eliminate duplicative written work. The remedial investigation into the impact of nip-in-the-bud violations required by GC 11-01 is the same investigation that Board agents have been conducting for the past 15 years as part of their analysis of the need for §10(j) relief in all nip-in-the-bud cases. In sum, these remedies are carefully targeted to rectify the impact that "nip-in-the-bud" violations have on fundamental employee rights. Their use remains exceedingly rare when you consider how many charges are brought to the Agency's attention.

Use of Default Language in Informal Settlement Agreements (GC Memorandum 11-04)

This initiative is an effort to obtain more effective means of restraining recidivist violators of the Act without unnecessary expenditure of resources by the Agency. The Agency has an active settlement program that resolves complaints before litigation in over 90% of meritorious cases. The most common kind of settlement is the "informal settlement" in which the respondent agrees to explicit undertakings to remedy the violations alleged. Absent default language in such a settlement, the Agency's only recourse in the event of breach is to revoke the settlement and reinstitute litigation. The default provision provides that if the respondent breaches the settlement agreement, it will be deemed to have admitted the allegations and it consents to entry of a Board order and enforcing court judgment. It imposes no additional burden on a respondent that fulfills its obligations under the settlement. Last year, my predecessor began discussions about a similar default language proposal with the ABA's Committee on Practice and Procedure before the NLRB; likewise I consulted with that Committee before I implemented this initiative.

Contrary to the testimony of some witnesses, there is no reason to believe that this initiative will discourage settlement or lead to additional litigation. As the Memorandum explains, use of default language has been a longstanding practice in five Regional Offices and their settlement and litigation success rates are consistent with national standards.

Allegations of Misconduct in Indiana Case

Finally, I wish to respond to concerns raised during the hearing by Representative Rokita of Indiana. A constituent of Mr. Rokita had alleged misconduct by a NLRB Board agent. After the hearing, my office contacted the NLRB Regional Director for Region 25 in Indianapolis, who specifically inquired of his entire staff about the allegations. No one was familiar with any such incident. I have asked Mr. Rokita for further information about his constituent's claims and will certainly follow up when I receive that information.

Further, I have consistently stated in my public speaking engagements, in addition to my meetings with the Agency's Regional Directors, that I encourage any member of the public to bring to my attention any complaint or concern about his/her dealings with any Regional personnel, and I will personally review the matter.

Again, I appreciate the opportunity to supplement the record of the hearing and I hope that this letter will be helpful to the Subcommittee as it continues its important work.

Sincerely,

Lafe E. Solomon
Acting General Counsel

Enclosures

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11- 05

January 20, 2011

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Guideline Memorandum Concerning Deferral to Arbitral
Awards and Grievance Settlements in Section 8(a)(1)
and (3) cases

I. Introduction

In Memorandum OM 10-13(CH) "Casehandling Regarding Application of Spielberg/Olin standards," issued under former General Counsel Meisburg on November 3, 2009, we recognized that "a new approach to cases involving arbitral deference may be warranted," particularly given certain recent opinions of the Supreme Court and the Court of Appeals for the D.C Circuit. Regions were instructed to submit post-arbitral deferral cases to the Division of Advice to provide the basis for a case-by-case review in order to develop that new approach. Based on our consideration of these cases and the underlying legal issues, we will urge the Board to modify its approach in post-arbitral deferral cases to give greater weight to safeguarding employees' statutory rights in Section 8(a)(1) and (3) cases, and to apply a new framework in all such cases requiring post-arbitral review. This memorandum explains that framework and the reasons for adopting it as well as guidance on handling cases that implicate these issues.

II. The Statutory Scheme of the NLRA Requires a Balance between Protecting Individual Rights and Encouraging Private Dispute Resolution within Collective Bargaining

Congress charged the National Labor Relations Board with the responsibility of protecting the Section 7 right of employees to engage in concerted activity for mutual aid and protection. Sections 8(a)(1) and (3) of the NLRA make it an unfair labor practice for an employer to discriminate against or otherwise interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. Section 10(a) of the NLRA empowers the Board "to prevent any person from engaging in any unfair labor practice" and further provides that the Board's powers "shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or

otherwise . . ."¹ (Emphasis added.) Thus, the Board has a statutory mandate under Section 10(a) to protect individual rights and protect employees from being discharged or otherwise discriminated against in retaliation for their protected activities, and that mandate cannot be waived by private agreement or dispute resolution arrangement.

At the same time, Section 1 of the NLRA and Section 203(d) of the Labor Management Relations Act favor collective bargaining and the private resolution of labor disputes through the processes agreed upon by the employer and the employees' exclusive representative. Section 203(d) provides that "[f]inal adjustment by a method agreed upon by the parties is declared to be the desirable method for settlement of grievance disputes arising over the application or interpretation of an existing collective-bargaining agreement." (Emphasis added). Thus, there is a potential conflict, or at least a tension, between the statutory policies protecting individual rights and the Board's enforcement of the Act, and the policy encouraging collectively-bargained dispute resolution.

To reconcile the different emphases of these statutory policies, "the Board has considerable discretion to . . . decline to exercise its authority over alleged unfair labor practices if to do so will serve the fundamental aims of the Act" to foster collective bargaining.² As is evident from the language in Section 10(a) itself, however, the Board is not required to stay its hand just because an employer and a union representing its employees have resolved a dispute through an agreed-upon grievance arbitration process.³

¹ As the D.C. Circuit has recognized, Section 10(a) "is intended to make it clear that although other agencies may be established by code, agreement, or law to handle labor disputes, such other agencies can never divest the National Labor Relations Board of jurisdiction which it would otherwise have." Hammontree v. NLRB, 925 F.2d 1486, 1492 (D.C. Cir. 1991) (en banc) (quoting Staff of Senate Comm. on Education and Labor, 74th Cong., 1st Sess., Comparison of S. 2926 (73d Congress) and S. 1958 (74th Congress) at 3 (Comm. Print 1935) (emphasis supplied by the court)).

² International Harvester Co., 138 NLRB 923, 926 (1962), affd. sub. nom. Ramsey v. NLRB, 327 F.2d 784 (7th Cir. 1964).

³ Spielberg Mfg. Co., 112 NLRB 1080, 1081-1082 (1955), citing NLRB v. Walt Disney Productions, 146 F.2d 44 (9th Cir. 1944), cert. denied 324 U.S. 877 (1945).

III. Supreme Court Precedent in Non-NLRA Individual Rights Cases Allows Private Parties to Waive Access to a Statutory Forum in Favor of Arbitration Only if the Arbitrator Decides the Statutory Issue

An important source of guidance for striking an appropriate balance between the protection of employees' statutory rights and giving effect to arbitration awards is how the Supreme Court envisions the role of arbitrators deciding statutory rights in cases where federal courts have jurisdiction to decide those statutory rights. In the context of Title VII and other individual rights cases, the Court allows parties to waive their use of the statutorily-established forum, i.e., the courts, where such waivers are consistent with applicable law, but has required that an arbitrator must resolve the rights at issue consistent with the applicable statutory principles. Thus, in Gilmer,⁴ the Court held that employees can waive the judicial forum for resolving a substantive right, i.e., a right guaranteed under a statute, but they cannot prospectively waive the substantive right itself. In Pyett,⁵ the Court held that a union, as well, can waive employees' rights to a particular forum, as long as the waiver is expressed in clear and unmistakable terms, but the Court emphasized that such a waiver is enforceable only if the collective-bargaining agreement gives the arbitrator the authority to decide the statutory issue.

Thus, the Court made it clear that, for an arbitration agreement's waiver of access to a statutory forum to be enforceable, the collective-bargaining agreement must give an arbitrator the authority to decide the statutory issue, and the arbitrator must in fact do so.⁶ The Court further highlighted this requirement by noting that judicial review of arbitration awards, while limited, enables courts to "ensure that arbitrators comply with the requirements of the statute."⁷ Thus, the Court clarified that it would cede jurisdiction to arbitrators only if the arbitrator is authorized to decide the statutory issue, and does so consistent with applicable statutory principles.

⁴ Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).

⁵ 14 Penn Plaza, LLC v. Steven Pyett, 129 S. Ct. 1456, 1469-1471 (2009).

⁶ Pyett, 129 S.Ct. at 1469-1471.

⁷ Id., 129 S.Ct. at 1471 fn. 10, citing Shearson/American Express Inc. v. McMahon, 482 U.S. 220, 232 (1987).

To be sure, the Pyett/Gilmer line of cases is merely instructive to the Board as an indication of the Supreme Court's view of the role of arbitration in resolving statutory rights -- it does not directly control the parameters of the Board's deferral policy. For, as discussed above, the Board's policy is an exercise of discretion in choosing to stay its hand, rather than being ousted of jurisdiction as are the courts -- the NLRA expressly provides in Section 10(a) that the Board does not lose jurisdiction even if private parties agree that it should.⁸ Nevertheless, we believe the principles articulated by the Court have applicability under the NLRA statutory scheme.

IV. Olin's Standards for Deferral Do Not Adequately Protect Employees' Statutory Rights; Therefore, We Will Urge the Board to Change its Framework for Post-Arbitral Deferral

Viewed against this backdrop, the Board's current post-arbitral deferral policy is distinctly at odds with that which prevails in other areas of employment law. The Court clearly envisions that employees will receive full consideration of their statutory rights in arbitration; both Pyett and Gilmer emphasize that no waiver of statutory rights is entailed in having those rights considered by an arbitrator. The only difference at issue is whether an arbitrator or a judge applies the statute.⁹

Although, as discussed above, the Board's deferral policy is one of discretion rather than an ouster of jurisdiction, this difference only heightens the Board's obligation to ensure the protection of employees' statutory rights prior to exercising its discretion to defer to an arbitrator's award, rather than providing an even lower standard of protection of statutory rights, as does the current deferral framework. As the Board has recently reiterated in a different context, "[a]s an administrative agency establishing rules to govern a particular field of law (within the limits of the statute it administers), the

⁸ See also, e.g., Bill's Electric, Inc., 350 NLRB 292, 296 (2007) (mandatory arbitration policy violated the Act, as it would reasonably be read as substantially restricting, if not totally prohibiting, employees' access to the Board's processes); U-Haul Co. of California, 347 NLRB 375, 377-378 and fn. 11 (2006), enfd. mem. 255 F. Appx 527 (D.C. Cir. 2007) (same).

⁹ Pyett, 129 S.Ct. at 1469; Gilmer, 500 U.S. at 26.

Board has a different role than the courts, operating 'on a wider and fuller scale' that 'differentiates . . . the administrative from the judicial process.'"¹⁰ The Board's "wider and fuller" role should cause the Board to more zealously guard its mandate to protect statutory rights, in contrast to the courts, whose jurisdiction over statutory claims is more limited.

In contrast to the Court's vision of ensuring the actual arbitral consideration of the rights afforded by Title VII and other employment statutes, the Board's Olin¹¹ standards for accepting an arbitral award as the resolution of NLRA rights -- that the contract and statutory issues were "factually parallel" and the arbitrator was "presented generally with the facts relevant to resolving the unfair labor practice" -- do not require such consideration. In addition, the Board's Olin standards tolerate substantive outcomes from arbitrators that differ significantly from those that the Board itself would reach if it considered the matter de novo. Such outcomes can result in the denial of substantive Section 7 rights -- if the overly deferential Olin standards are met, the Board may dismiss the administrative charge even if the statutory issue has never been considered.

Viewed solely under NLRA principles, this result has long struck some courts as at least in need of further explanation and justification by the Board.¹² Some have found an actual abdication of the Board's statutory responsibilities.¹³ In the intervening years, the

¹⁰ Kentucky River Medical Center, 356 NLRB No. 8, slip op. at 2-3 (2010), citing NLRB v. Seven-Up Bottling Co. of Miami, Inc., 344 U.S. 344, 349-350 (1953).

¹¹ Olin Corp., 268 NLRB 573, 573-574 (1984).

¹² See Darr v. NLRB, 801 F.2d 1404 (D.C. Cir. 1986).

¹³ See Taylor v. NLRB, 786 F.2d 1516, 1521-22 (11th Cir. 1986) ("By presuming, until proven otherwise, that all arbitration proceedings confront and decide every possible unfair labor practice issue, Olin Corp. gives away too much of the Board's responsibility under the NLRA."). See also Banyard v. NLRB, 505 F.2d 342, 347 (D.C. Cir. 1974) (the arbitral tribunal must have clearly decided the unfair labor practice issue on which the Board is later urged to give deference); Stephenson v. NLRB, 550 F.2d 535, 538 and n. 4 (9th Cir. 1977) ("Merely because the arbitrator is presented with a problem which involves both contractual and unfair labor practice elements does not necessarily mean that he will adequately consider the statutory issue . . . The "clearly decided" requisite is designed to enable

development of more demanding standards for the arbitration of statutory employment rights, spurred by Gilmer, has only served to heighten the need for the Board to provide a more convincing explanation to the courts and to the public for its apparent lesser valuation of NLRA rights than is the norm for statutory employment rights. This need for further explanation and justification is accentuated where Olin deferral is granted even though the collectively-bargained grievance arbitration procedures do not expressly authorize the arbitrator to resolve statutory NLRA claims or require that the arbitrator apply statutory principles, as is often the case.

We note that these considerations only apply to cases alleging violations of employee rights arising under Section 8(a)(1) and 8(a)(3) of the Act, not to cases solely alleging violations of Section 8(a)(5). In bargaining cases, as the Board has recognized, the "[r]esolution of the ultimate issue . . . [does] not rest solely on interpretation of the statute, but turn[s] on contract interpretation."¹⁴ In such cases, given the close identity of the statutory rights and contract interpretation issues, the current deferential Olin standards adequately safeguard the statutory enforcement scheme.

Accordingly, we have decided to urge the Board to adopt a new approach. Specifically, in Section 8(a)(1) and 8(a)(3) statutory rights cases, the Board should no longer defer to an arbitral resolution unless it is shown that the statutory rights have adequately been considered by the arbitrator. This includes not only cases involving Section 8(a)(1) and 8(a)(3) discipline and discharge, but also all other cases involving Section 8(a)(1) conduct that is subject to challenge under a contractual grievance provision.

Further, we will urge the Board to change Olin's allocation of the burden of proof for deferral. We believe that the party urging deferral should have the burden of showing that the deferral standards articulated above have been met. This will ensure that the statutory issues have indeed been considered by the arbitrator, as well as encourage parties seeking deferral to establish an evidentiary record that will give the Board a sounder basis for reviewing arbitral awards and deciding whether to defer. Thus, the

the Board and the courts to fairly test the standards applied by the arbitrator against those required by the Act").

¹⁴ Mt. Sinai Hospital, 331 NLRB 895, 898 (2000), enfd. mem. 8 Fed. Appx. 111 (2d Cir. 2001).

party urging deferral must demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If the party urging deferral makes that showing, the Board should, as now, defer unless the award is clearly repugnant to the Act. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's decision or award is not susceptible to an interpretation consistent with the Act. Such a framework would provide greater protection of employees' statutory rights while, at the same time, furthering the policy of peaceful resolution of labor disputes through collective bargaining.¹⁵

This is not a novel approach. Prior to Olin, the Board, with widespread contemporary court approval, required consideration of the statutory issue as a condition for deferral and placed the burden of persuasion on the party seeking deferral.¹⁶ Thus, as early as 1963,

¹⁵ We note that this approach would also directly respond to the D.C. Circuit's challenge to the Board to explain the theory underlying its deferral policy (see, e.g., Darr v. NLRB, 801 F.2d at 1408-1409; Plumbers & Pipefitters Local Union No. 520 v. NLRB, 955 F.2d 744, 755-757 (D.C. Cir. 1992)), as well as to that court's "contractual waiver" approach to Board deferral cases, which does not so much balance the two competing statutory goals of the NLRA as hold that one completely trumps the other (see, e.g., American Freight System, Inc. v. NLRB, 722 F.2d 828, 832-833 (D.C. Cir. 1983); Plumbers & Pipefitters Local Union No. 520, 955 F.2d at 755-756; Titanium Metals Corp. v. NLRB, 392 F.3d 439, 448-449 (D.C. Cir. 2004)).

¹⁶ See, e.g., Bloom v. NLRB, 603 F.2d 1015, 1020 (D.C. Cir. 1979) ("If the record contains substantial and definite indications that the unfair labor practice issue and its supporting evidence were expressly presented to the arbitration panel, and the panel's decision reflects its reliance on that evidence, then the Board and a court can determine whether the panel clearly decided the statutory issue"); Pioneer Finishing Corp. v. NLRB, 667 F.2d 199, 202-203 (1st Cir. 1981) ("Where the arbitrator has no duty to consider the statutory issues, it would undermine the purpose of the Act to require the Board to defer merely on the speculation that he must have considered an employee's rights under the statute"); NLRB v. Magnetics Intern., Inc., 699 F.2d 806, 811 (6th Cir. 1983) ("we will examine the arbitrator's award itself and the degree of congruence

the Board held that the party urging deferral must show that the unfair labor practice issue was presented to and acted upon by the arbitrator.¹⁷ That is, the Board would consider an unfair labor practice issue resolved only if the statutory issue was actually litigated and decided in the arbitration proceeding.¹⁸ While the Board deviated from this policy for a period,¹⁹ it subsequently reinstated the requirement that the party seeking deferral show that the statutory issue was "presented to and considered" by the arbitrator.²⁰ The Board explained that acting otherwise "derogates the [] important purpose of protecting employees in the exercise of their rights under Section 7 of the Act," and had been criticized "as an unwarranted extension of the Spielberg doctrine and an impermissible delegation of the Board's exclusive jurisdiction."²¹

Returning to a requirement that statutory issues be considered as a condition for deferral to an arbitral award would also require revising the standards for deferral to pre-arbitral grievance settlements. Thus, the Olin deferral standard was the express basis for the Board's decisions in

between the award and the charges brought under the statute . . . any doubts regarding the propriety of deferral will be resolved against the party urging deferral"); Servair, Inc. v. NLRB, 726 F.2d 1435, 1441 (9th Cir. 1984) ("The arbitrator's determination . . . in no way disposes of the statutory issue . . . Thus, we hold that the Board properly refused to defer to the arbitrator's decision").

¹⁷ Raytheon Co., 140 NLRB 883, 886-887 (1963), enf. denied on other grounds, 326 F.2d 471 (1st Cir. 1964).

¹⁸ See Yourga Trucking Inc., 197 NLRB 928, 928 (1972); Airco Industrial Gases, 195 NLRB 676, 676-677 (1972).

¹⁹ See Electronic Reproduction Service Corp., 213 NLRB 758, 762-764 (1974).

²⁰ Suburban Motor Freight, Inc., 247 NLRB 146, 146-147 (1980).

²¹ Ibid. See also Professional Porter & Window Cleaning Co., 263 NLRB 136, 137 (1982), enfd. 742 F.2d 1438 (2d Cir. 1983) ("The election to proceed in the contractually created arbitration forum provides no basis, in and of itself, for depriving an alleged discriminatee of the statutorily created forum for adjudication of unfair labor practice charges").

Alpha Beta²² and Postal Service.²³ As a result, these cases similarly provide for deferral to pre-arbitral grievance settlements that lack reference to, or other indication that the parties considered, the statutory issues. It would be inconsistent to continue to defer to pre-arbitral-award grievance settlements that the parties themselves did not intend to resolve the unfair labor practice issues. Instead, we will urge the Board to adopt a rule that gives no effect to a grievance settlement unless the evidence demonstrates that the parties intended to settle the unfair labor practice charge as well as the grievance. If the evidence does so indicate, the Board should apply current non-Board settlement practices and procedures in deciding whether to accept the non-Board settlement, including review under the standards of Independent Stave.²⁴

V. Instructions for Processing Future Cases Involving Deferral to Arbitration

Providing a more thorough post-arbitral review of deferred cases necessitates certain other changes in Regional Office investigation procedures. We recognize that a full investigation and conclusive determination of merit prior to pre-arbitral deferral is not the best use of limited Agency resources. Nonetheless, because substantial time may pass while the arbitration process proceeds when a case is deferred under Collyer and United Technologies,²⁵ investigation of the alleged unfair labor practices at the end of the process is more difficult. To prevent any such difficulties in future cases raising allegations of Section 8(a)(1) and 8(a)(3) that will be deferred under Collyer, particularly as a heightened

²² 273 NLRB 1546, 1547-1548 (1985).

²³ 300 NLRB 196, 198 (1990).

²⁴ Independent Stave Co., 287 NLRB 740, 743 (1987) (the Board will examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risks of litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements).

²⁵ Collyer Insulated Wire, 192 NLRB 837 (1971); United Technologies Corp., 268 NLRB 557 (1984). These instructions also apply to cases deferred under Dubo Mfg. Corp., 142 NLRB 431 (1963).

standard would likely make at least some additional arbitral awards inappropriate for deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their "arguable merit" determination in considering Collyer deferral.²⁶ Only then, if the Region determines there is arguable merit to the charge and the other Collyer requirements are met, should the Region defer the charge.²⁷ If the Region concludes the charge is without merit, of course, it should dismiss the charge, absent withdrawal.

In all pending and future cases where the Region has deferred a charge to arbitration under Collyer, when the arbitral award issues, the Region must review the award to determine whether post-arbitral deferral is appropriate. The Region should determine if the party urging deferral can demonstrate that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue; and (3) the arbitral award is not clearly repugnant to the Act. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.²⁸

VI. Conclusion

To summarize, we will urge the Board to modify its approach in Section 8(a)(1) and (3) post-arbitral deferral cases as follows:

1. The party urging deferral should have the burden of demonstrating that: (1) the contract had the statutory right incorporated in it or the parties presented the statutory

²⁶ At the Region's discretion, it may wish to undertake a more complete investigation before deciding whether to defer.

²⁷ In light of the modified post-arbitral framework proposed herein, Regions should substitute the language of the attached pattern for Collyer deferral letter for that found in the Casehandling Manual Section 10118.5.

²⁸ An exception to this instruction occurs when the arbitral award grants full backpay and reinstatement and the charging party requests withdrawal of the charge. In this situation, as with non-Board settlements discussed above, the request for withdrawal can be approved. If the charging party does not seek withdrawal in this situation, the Region should contact the Division of Advice.

issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue.

2. If the party urging deferral makes that showing, the Board should defer unless the award is clearly repugnant. The award should be considered clearly repugnant if it reached a result that is "palpably wrong," i.e., the arbitrator's award is not susceptible to an interpretation consistent with the Act.

3. The Board should not defer to a pre-arbitral-award grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice issues. Where the evidence demonstrates that the parties intended to settle the unfair labor practice charge, the Board should continue to apply current non-Board settlement practices and procedures, including review under the standards of Independent Stave.

In processing future cases raising allegations of Section 8(a)(1) and 8(a)(3), Regions should proceed as follows:

1. Prior to Collyer deferral, Regions should take affidavits from the Charging Party, and from all witnesses within the control of the Charging Party, before they make their arguable merit determination.

2. If there is arguable merit to the charge, and the other Collyer requirements are met, the Region should defer the charge. If there is not arguable merit, the Region should dismiss, absent withdrawal.

3. When the arbitral award issues, the Region should determine if the party urging deferral has met the burden set forth above to demonstrate that deferral to the arbitrator's award is appropriate. Upon making its determination, the Region should submit the case to the Division of Advice, along with the Region's recommendation as to whether to defer.

Please make this memorandum a subject on the agenda for your next staff meeting. Any questions regarding the implementation of this memorandum should be directed to the Division of Advice.


L.S.

cc: NLRBU
Release to the Public

MEMORANDUM GC 11-05

Collyer Deferral Letter

[Regional Office Letterhead]

[Date letter issues]

Charging Party Legal Rep (or Charging Party if no legal rep)

Charged Party Legal Rep (or Charged Party if no legal rep)

Re: [Case name]
Case [Case number]

Salutation:

The Region has carefully considered the charge alleging that [Charged Party name] violated the National Labor Relations Act. As explained below, I have decided that further proceedings on the charge should be handled in accordance with the deferral policy of the National Labor Relations Board as set forth in *Collyer Insulated Wire*, 192 NLRB 837 (1971) and *United Technologies Corp.*, 268 NLRB 557 (1984). This letter explains that deferral policy, the reasons for my decision to defer, further processing of the charge, and the Charging Party's right to appeal my decision.

Deferral Policy: The Board's deferral policy provides that the Board will postpone making a final determination on a charge when a grievance involving the same issue can be processed under the grievance/arbitration provisions of the applicable contract. This policy is partially based on the preference that the parties use their contractual grievance procedure to achieve a prompt, fair, and effective settlement of their disputes. Therefore, if an employer agrees to waive contractual time limits and process the related grievance through arbitration if necessary, the Board's Regional office will defer the charge.

Decision to Defer: Based on our investigation, I am deferring further proceedings on the charge in this matter to the grievance/arbitration process for the following reasons:

1. The Employer and the (Charging Party name or insert name of the Union if charge filed by an individual) have a contract currently in effect that provides for final and binding arbitration.
2. The [insert description of each issue being deferred] as alleged in the charge (is or are) encompassed by the terms of the contract.
3. The Employer is willing to process a grievance concerning the issues in the charge, and will arbitrate the grievance if necessary. The Employer has also agreed to waive any time limitations in order to ensure that the arbitrator addresses the merits of the dispute.
4. Since the issues in the charge appear to be covered by provisions of the contract, it is likely that the issues may be resolved through the grievance/arbitration procedure.

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

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

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

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

Monitoring the Dispute: Approximately every 90 days, the Regional office will ask the parties about the status of this dispute to determine if the dispute has been resolved and if continued deferral is appropriate. However, at any time a party may present evidence and request dismissal of the charge, continued deferral of the charge, or issuance of a complaint.

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

Review of Arbitrator's Award or Settlement: If the grievance is arbitrated, the Charging Party may ask the Board to review the arbitrator's award. The request must be in writing and addressed to me. Under current Board law, the request should analyze whether the arbitration process was fair and regular, whether the unfair labor practice allegations in the charge were considered by the arbitrator, and whether the award is consistent with the Act. Further guidance on this review is provided in *Spielberg Manufacturing Company*, 112 NLRB 1080 (1955) and *Olin Corp.*, 268 NLRB 573 (1984). These Board decisions are available on our website, www.nlr.gov. However, the current standard for review may change. The General Counsel's position is that the Board should modify its approach in Section 8(a)(1) and (3) cases and should not defer to an award unless the party urging deferral demonstrates that: (1) that the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) that the arbitrator correctly enunciated the applicable statutory principles, and applied them in deciding the issue. The General Counsel is also taking the position that the Board should not defer to a pre-arbitral-award grievance settlement in Section 8(a)(1) and (3) cases unless the parties intended the settlement to also resolve unfair labor practice issues.

Note: SAME APPEAL LANGUAGE as now.

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 10-07

September 30, 2010

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Effective Section 10(j) Remedies for Unlawful Discharges in
Organizing Campaigns

An important priority during my time as Acting General Counsel will be to ensure that effective remedies are achieved as quickly as possible when employees are unlawfully discharged or victims of other serious unfair labor practices because of union organizing at their workplaces. When an employer commits such unfair labor practices, it "nips in the bud" all of the employees' efforts to engage in the core Section 7 right to self-organization.

Discriminatory discharges are among the most serious nip-in-the-bud violations of the Act. An unremedied discharge sends to other employees the message that they too risk retaliation by exercising their Section 7 rights. As one court has characterized employees' reaction, "no other worker in his right mind would participate in a union campaign in this plant after having observed that other workers who had previously attempted to exercise rights protected by the Act have been discharged and must wait for three years to have their rights vindicated." *Silverman v. Whittall & Shon, Inc.*, 1986 WL 15735, 125 LRRM 2152 (S.D.N.Y. 1986). In addition, the continued absence from the workplace of unlawfully discharged union leaders means not only that the negative message from the unfair labor practices persists but also that the remaining employees are deprived of the leadership of active and vocal union supporters. And with the passage of time, the discharged employees are likely to be unavailable for, or no longer desire, reinstatement when ordered by the Board. Given all of these consequences, employee resumption of union organizing is unlikely, and the ultimate Board order is ineffective to protect rights guaranteed by the Act.

Over the years, the Agency has developed a variety of very effective strategies for minimizing these consequences. First, we have focused on prompt investigation of "nip-in-the-bud" cases and prompt settlement of meritorious charges. Such settlements are a timely and highly effective remedy. In addition, in some of the meritorious nip-in-the-bud cases which did not settle, the Board authorized Section 10(j) proceedings and we obtained injunctions. Like settlements, these Section 10(j) injunctions have provided a substantial and relatively swift remedy by requiring employers to offer interim reinstatement to unlawfully discharged employees pending the Board's order.

My goal is to give all unlawful discharges in organizing cases priority action and a speedy remedy. For years the Agency has been committed to a vigorous Section 10(j) injunction program as a highly effective tool for achieving meaningful real time remedies. As Acting General Counsel, I am committed to continue and enhance this important program for nip-in-the-bud cases. In addition, I am committed to the most expeditious administrative litigation possible for such cases. The program outlined below has been developed to streamline the processing of nip-in-the-bud cases involving discharges to assure that the passage of time does not undercut our ability to provide effective remedies in these cases.

This program covers all stages of case processing—from identification of cases as potential Section 10(j) cases by Regional Offices through Board authorization and litigation of Section 10(j) cases to trial and decision of the merits cases. This program has been developed with invaluable input from all offices of the Agency, especially from the field. I intend to continually monitor whether the program is successful in achieving effective and timely remedies in organizing cases and to see how these priorities actually function in the context of the day-to-day work of your offices. In consultation with you, I will evaluate what, if any, modifications are needed.

Set forth below is what I consider the optimal timeline for processing nip-in-the-bud cases and additional procedures to facilitate these streamlined procedures. The timeline and procedures should be considered as best practices by all branches and regional offices in handling these cases.

Optimal Timeline for Processing Nip-in-the-bud Discharge Cases

- Potential Section 10(j) organizing campaign discharge cases should be identified as soon as possible after the filing of the charge and tracked by the Region until their resolution. In addition, it is critically important that Regions identify such cases in CATS, and subsequently in NxGen, by adding “discharge organizing campaign” in Notes, which will permit reporting on the number and handling of these cases.
- Where possible, the lead affidavit should be taken within 7 calendar days from filing of charge in all nip-in-the-bud discharge cases.
- Regions should attempt to obtain all of the charging party’s evidence within 14 calendar days from the filing of the charge.
- If charging party’s evidence points to a *prima facie* case on the merits and suggests the need for injunctive relief, the Region should notify the charged party in writing that the Region is seriously considering the need for Section 10(j) relief and request that a position statement on that issue

be submitted to the Regional Office within 7 calendar days after the written notification. This letter can be combined with the letter putting the charged party on notice of the allegations raised by the charge and should generally be sent within 21 days from the filing of the charge.

- A Regional Director will normally make a determination on the merits of the case within 49 calendar days from the filing of the charge. If the decision is to issue complaint, the decision with respect to the need for Section 10(j) relief should be made at the same time.
- Regions will endeavor to quickly issue complaints in these nip-in-the-bud discharge cases and to set prompt administrative hearings. When estimating the length of a trial for purposes of trial schedules, Regional Attorneys should allow sufficient time to finish a trial and to avoid the possibility of a continuance. If Regions encounter any problems with obtaining early and continuous hearing dates, they should immediately contact Operations Management.
- Regions must submit to the Injunction Litigation Branch (ILB) all meritorious 8(a)(3) discharge nip-in-the-bud cases, including those currently pending in Regions and those pending before an administrative law judge, that do not settle. I will personally review and decide whether Section 10(j) authorization should be sought in all such cases. Neither discriminatees' lack of desire for interim reinstatement nor a union's abandonment of its organizing campaign are, in themselves, grounds to decline to seek Section 10(j) relief. A union's abandonment of an organizing campaign is itself evidence of chill and does not remove the negative message that discharges have on employee statutory rights. And a court order offering interim reinstatement may cause the resumption of employee interest in organizing with the previous or a new union, whether or not the offer is accepted.
- Regions may use the Expedited Hearing Procedures (GC Memorandum 94-17 and OM Memorandum 06-60) in lieu of immediately seeking Section 10(j) authorization if a non-cooperating respondent has raised a significant *Wright Line* or economic defense or if proceeding to the administrative hearing would seriously facilitate settlement. Expedited hearings in such cases should be scheduled not later than 28 calendar days after issuance of complaint. If the Region is unable to obtain a 28-day hearing from the Division of Judges, please immediately contact Operations Management.
- A short form memorandum regarding Section 10(j) relief in nip-in-the-bud cases should be submitted to ILB. Absent unusual circumstances, this memorandum should be submitted to ILB not later than 7 calendar days from the merit determination or close of an expedited hearing. Regions

will also submit to ILB the parties' position statements, if any, and party representative information.

- ILB will decide all nip-in-the-bud Section 10(j) cases within 2 business days after receipt of the Region's memorandum and will notify the Region as to whether it agrees that Section 10(j) relief is warranted. If ILB has questions for the Region before it is able to decide the Section 10(j) request, it will seek this information as soon as possible after reviewing the case.
- In these cases, ILB will prepare a 1-2 page cover memorandum, addressing briefly only relevant new facts obtained from the Region and issues not addressed by the Region that might be of interest to the Board. ILB will send this memorandum to the Acting General Counsel within 7 calendar days after receiving the last information it needs from the Regional Office. ILB will also forward a copy to the Region.
- I will review and decide the Section 10(j) case, and if I agree, I will sign the memorandum requesting Section 10(j) authorization within 2 business days of receipt from ILB. Upon my approval, ILB will submit the Section 10(j) request to the Board and notify the Region.
- Within 10 business days after receiving notice from the ILB that it agrees Section 10(j) relief is warranted in these nip-in-the-bud cases, the Region will draft its Memorandum of Points and Authorities and Proposed Order and send it to ILB for review. Within 3 business days of receipt, ILB will complete its review, make substantive comments and provide additional/different arguments, case support, and any modifications to the order and return the papers to the Region for filing with the court if the Board so authorizes.
- Regions will file papers with the District Court within 2 business days from notification that the Board has authorized Section 10(j) relief or receipt from ILB of its review of draft court papers, whichever is later. As in the past, if the Region believes that the time for filing should be postponed for good reason, such as settlement discussions, it should consult with ILB regarding whether additional time for filing should be allowed.

Additional Best Practice Procedures to Facilitate Timely Processing of Nip-in-the-bud Discharge Cases:

- When it is clear that documentary evidence or the testimony of neutral witnesses is needed during an investigation, the Region should make a request for the documents or witnesses and if it is not forthcoming, investigative subpoenas should be issued. Regions should not wait for the decision-making agenda to issue necessary subpoenas.

- Regions are encouraged to assign more than one agent, when needed, to investigate and prepare Section 10(j) cases involving nip-in-the-bud discharges.
- “Just and proper evidence” should be taken at the same time in the investigative process as obtaining the evidence on the merits of the charge.
- Because multiple charges are filed as new events unfold, the time for making a Regional 10(j) determination may become protracted. Consistent with OM 01-33, Regions should focus on the core allegations for which Section 10(j) is needed in organizing campaign discharge cases. By proceeding with the Section 10(j) case before opening the administrative hearing, including using affidavits rather than the administrative transcript, the Region may complete its investigation of later-filed non-10(j) charges and avoid *Jefferson Chemical* problems while at the same time seeking Section 10(j) relief on the core violations.
- When considering whether Section 10(j) relief is appropriate, the Region should inform the parties that the Region is prepared to seek Section 10(j) authorization seeking reinstatement of discharged employees. These conversations should be documented in the investigative file.
- To avoid adjournments and postponements, when scheduling the administrative hearing, the Region should liberally estimate the number of days required for the case to be heard.
- Once before an administrative law judge, the Region should oppose any request for postponement or extensions of time for filing documents. If a postponement is granted, the Region should contact ILB to evaluate whether a special appeal contesting the postponement should be filed with the Board.
- Regions generally should consult with ILB if Regions desire to use the administrative record instead of affidavits to try the Section 10(j) case. However, if a Region is confident that the administrative record will close within 2-3 weeks after receiving Board authorization, the Region may independently decide to try the case on the administrative record and move the court to do so when filing its Section 10(j) petition. The Region should notify ILB of its decision to do so.

The key to success of this program is the free flow of information and communication between the Region and ILB throughout the process. Regions should not hesitate to contact ILB for advice and assistance at all phases of their Section 10(j) work.

These cases can drain resources in the field. As soon as you identify a Section 10(j) case where the adequacy of your resources is an issue, please notify your Deputy or AGC in Operations Management and assistance will be provided. In addition, in evaluating your staffing needs overall, if you have an active Section 10(j) program which you believe has not been sufficiently factored in to your staffing, please consult with your Deputy or AGC. I also ask that you advise your local Practice and Procedure Committees of this program and request their full cooperation in expediting these very important cases.

I trust that you will embrace this critical program with the same high level of enthusiasm and commitment with which you perform all of your duties so that, together, we can enhance our ability to effectuate the Agency's mission.



L.S.

cc: NLRBU
NLRBPA
Release to the Public

MEMORANDUM GC 10-07

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-01

December 20, 2010

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Effective Remedies in Organizing Campaigns

I. Introduction

The protection of employee free choice regarding unionization is a keystone of the Agency's mission, and I am committed to making the principle of employee free choice meaningful. Accordingly, as Acting General Counsel I have placed a priority on ensuring that the Agency protects employee freedom of choice with regard to unionization by obtaining effective remedies for employers' unlawful conduct during union organizing campaigns. In Memorandum GC 10-07, I outlined my commitment to seek Section 10(j) injunctive relief as a quick and effective remedy for an employer's serious unlawful conduct during union organizing campaigns. But, to fully ensure that the Agency protects employee freedom of choice with regard to unionization, we must seek remedies that enhance the effectiveness of Section 10(j) and Board relief.

In Memorandum GC 10-07, I announced an initiative to seek 10(j) relief in all discriminatory discharges during organizing campaigns (so-called "nip-in-the-bud" cases) because they have a severe impact on employees' Section 7 rights. In such cases, the discharges are often accompanied by other serious unfair labor practices such as threats, solicitation of grievances, promises or grants of benefits, interrogations and surveillance.¹ These additional unfair labor practices

¹ See, e.g., Jewish Home for the Elderly of Fairfield County, 343 NLRB 1069 (2004) (where employer discharged an employee one day before an election, it also threatened job loss and plant closure through its chairman of its board of directors, threatened employees with arrest, created impression of surveillance, videotaped employees, interrogated employees, promised better benefits, increased wages, solicited employees to repudiate the union and revoke authorization cards, prohibited employees from discussing the union but allowed them to discuss other non-work subjects, prohibited off-duty employees access to its facility to talk to coworkers, and restricted the locations of employees' breaks to deny employees from discussing wages, benefits, and terms and conditions with fellow employees); Blockbuster Pavilion, 331 NLRB 1274 (2000) (in addition to refusing pro-union employees work, employer threatened discharge for union activity, threatened to burn its facility before allowing a union

also have a serious impact on employee free choice, as they inhibit employees from engaging in union activity and dry up channels of communication between employees. Thus, in order to provide an effective remedy in these cases, it is just as necessary to remove that impact as it is to remove the impact caused by an unlawful discharge.²

In many of these cases, the impact is inherent in the nature of the unfair labor practice. "Hallmark" violations such as discharging employees and threats of job loss and plant closing, for example, "can only serve to reinforce employees' fear that they will lose employment if they persist in union activity."³ No reasonable employee would engage in any protected activity after witnessing a discharge of a fellow employee for similar conduct; and just as chilled from repeating such activity is the discharged employee, himself, who is now unemployed because he exercised his statutory rights.⁴ Furthermore, threats of plant closure or job loss severely and equally affect all employees in the plant.⁵ Faced with a threat of loss of work, employees will abandon unionization efforts and effectively relinquish their free choice.

to represent its employees, and interrogated employees); United States Service Industries, 319 NLRB 231 (1995), enfd. 107 F.3d 923 (D.C. Cir. 1997) (employer discharged ten employees, refused to reinstate unfair labor practice strikers, threatened employees that their union activities would result in discharge, interrogated and surveilled employees, prohibited employees from discussing the union at worksites, and awarded bonuses to non-union employees).

² See Federated Logistics, 340 NLRB 255, 256-257, enfd. 400 F.3d 920 (D.C. Cir. 2005) (unfair labor practices during organizational campaigns can jeopardize the possibility that an election will accurately reflect the employees' free choice); Fieldcrest Cannon, Inc., 318 NLRB 470, 473 (1995), enfd. in relevant part 97 F.3d 65, 74 (4th Cir. 1996).

³ Consec Security, 325 NLRB 453, 454 (1998), enfd. 185 F.3d 862 (3d Cir. 1999). See also Federated Logistics, 340 NLRB at 257 (threats of plant shutdown "serve as an insidious reminder to employees that every time they come to work that efforts on their part to improve their working conditions may not only be futile but may result in the complete loss of their livelihoods").

⁴ Eddyleon Chocolate Co., 301 NLRB 887, 891 (1991) (unlawful discharges affect remaining employees who reasonably fear that they too will lose employment if union activity persists).

⁵ Spring Industries, 332 NLRB 40, 41 (2000). Compare Crown Bolt, Inc., 343 NLRB 776, 777-779 (2004) (overruling Spring Industries to the extent it held that the Board would presume widespread dissemination of plant closure threats absent evidence to the contrary, while still agreeing that plant closure threats are "a grave matter" and "highly coercive of employee rights").

Similarly, an employer's promise or grant of benefits also has a devastating impact on employee free choice because "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged."⁶ Employees are less inclined to exercise their free choice if they know that they will gain benefits by not supporting a union and conversely, that they will lose benefits if they do support a union.

The serious effect of other, non-hallmark violations can not be overlooked. Thus, for example, an employer's solicitation of grievances chills employee unionization efforts because it demonstrates both that employees' efforts to unionize are unnecessary and that the employer will only improve working conditions as long as the workplace remains union-free.⁷ In either case, an employer's sudden solicitude towards employees' needs—especially where they previously were ignored—demonstrates to employees the extent to which an employer is willing to go to avoid unionization.

Interrogations and surveillance also have an inhibiting effect on employee free choice. Interrogations have a "natural tendency to instill in the minds of employees fear of discrimination on the basis of information the employer has obtained."⁸ Likewise, surveillance or the impression of surveillance inhibits employees' lawful participation in activities by highlighting "that the employer is anxious to find out about union activity which the employees wish to conceal from him to avoid retaliation."⁹ If an employer engages in interrogation or surveillance, employees will be less likely to engage in protected activity and express their free

⁶ NLRB v. Exchange Parts Co., 375 U.S. 405, 409 (1964) ("The danger inherent in well-timed increases in benefits is the suggestion of a fist inside the velvet glove"); Evergreen America Corp., 348 NLRB 178, 180 (2006) (unlawful grants of significant benefits "have a particularly longlasting effect on employees and are difficult to remedy by traditional means. . ."), citing Gerig's Dump Trucking, 320 NLRB 1017, 1018 (1996), *enfd.* 137 F.3d 936 (7th Cir. 1998).

⁷ Center Service System Division, 345 NLRB 729, 730 (2005), *enfd.* in relevant part, 482 F.3d 425 (6th Cir. 2007) (solicitation of grievances influences employee choice during an organizational campaign because it raises inferences that the employer is promising to remedy those grievances); Alamo Rent-A-Car, 336 NLRB 1155, 1155 (2001) (employer solicited grievances "in order to blunt the employees' enthusiasm for, or at least perceived need for, the Union").

⁸ NLRB v. West Coast Casket Co., 205 F.2d 902, 904 (9th Cir. 1953).

⁹ Lundy Packing Co., 223 NLRB 139, 147 (1976), *enfd.* in relevant part 549 F.2d 300 (4th Cir. 1977); Hendrix Mfg. Co. v. NLRB, 321 F.2d 100, 104 n.7 (5th Cir. 1963).

choice because of concern that the employer is trying to learn about their views on unionization and that an employee's actions, either by what he says to the employer, or how he behaves around the workplace, will likely be used to affect his job security or result in economic reprisal.

Finally, any employer conduct that interferes with employees' ability to communicate between themselves and with a union has a damaging impact on employee free choice.¹⁰ Employees must be able to discuss the advantages and disadvantages of organization together and lend each other support and encouragement—such full discussion lies at the very heart of organizational rights guaranteed by the Act.¹¹ If an employer unlawfully limits employees' opportunities to discuss unionization, employees are unable to assert their statutory rights and talk freely about working conditions and organizing.¹²

The coercive effect of any of this conduct is often magnified by the involvement of high ranking officials,¹³ the swiftness of an employer's response to a union campaign,¹⁴ and the proximity to a union's demand for recognition or the filing of a representation petition.¹⁵

¹⁰ Republic Aviation v. NLRB, 324 U.S. 793, 803 (1945) (such rules are "an unreasonable impediment to self-organization").

¹¹ Central Hardware Co. v. NLRB, 407 U.S. 539, 543 (1972) (the right of self-organization depends in some measure on the ability of employees to learn the advantages and disadvantages of self-organizations from others).

¹² See NLRB v. Magnavox Co., 415 U.S. 322, 325 (1974) ("The place of work is a place uniquely appropriate for dissemination of views" by employees).

¹³ NLRB v. Anchorage Times Publishing Co., 637 F.2d 1359, 1369-1370 (1981) (noting that impact of unfair labor practices is augmented by participation of upper management). See also Excel Case Ready, 334 NLRB at 5 (involvement of upper managers "exacerbates the natural fear of employees that they will lose employment if they persist in their union activities," and is "likely to have a lasting impact not easily eradicated by the mere passage of time or the Board's usual remedies"), quoting Garney Morris, Inc., 313 NLRB 101, 103 (1993), enfd. 47 F.3d 1161 (3d Cir. 1995); Consec Security, 325 NLRB at 454-455 ("When the antiunion message is so clearly communicated by the words and deeds of the highest levels of management, it is highly coercive and unlikely to be forgotten").

¹⁴ See General Fabrications Corp., 328 NLRB 1114, 1115 (1999), enfd. 222 F.3d 218 (6th Cir. 2000) ("impact of [employer's unlawful conduct] was magnified by its proximity to the onset of the Union's organizational effort"); United States Service Industries, 319 NLRB at 232 (employer's "swift and widespread action each time its employees have attempted to enlist the aid of the Union [was] aimed at ensuring that employees think twice before doing so again"); Bakers of Paris, 288 NLRB 991, 992 (1998), enfd. 929 F.2d 1427 (9th Cir. 1991) (effect of

Because the impact of these unfair labor practices during organizing campaigns is so severe, I want to ensure that, in addition to swiftly remedying unlawful discharges, the impact of these ancillary unfair labor practices is removed as well. In order to remove the impact, we must tailor remedies to recreate an atmosphere that allows employees to fully utilize their statutory right to exercise their free choice. Therefore, in addition to seeking 10(j) reinstatement in all cases involving a discharge during an organizing campaign, Regions should also consider whether to seek additional remedies to remove the impact of the discharge(s), as well as the other Section 8(a)(1) violations. I believe that, in such cases, we have an obligation to seek remedies that are designed to eliminate these coercive and inhibitive effects and restore an atmosphere in which employees can freely exercise their Section 7 rights.

In all organizing cases, the remedial touchstone should be prompt and effective relief to best restore the status quo and recreate an atmosphere in which employees will feel free to exercise their Section 7 right to make a free choice regarding unionization. The Board has broad discretionary authority to fashion remedies that will best effectuate the purposes of the Act and are tailored, as much as possible, to undo the harm created by unfair labor practices.¹⁶ Implicit in this statement of the Board's authority is the obligation to articulate why additional remedies are necessary.¹⁷ The rationale for each of

unfair labor practices increases when violations begin when employer has knowledge of union campaign).

¹⁵ Consec Security, 325 NLRB at 454, citing Electro-Voice, Inc., 320 NLRB 1094, 1095 (1996) and Astro Printing Services, 300 NLRB 1028, 1029 (1990). See also Homer D. Bronson Co., 349 NLRB 512, 515, 549 (2007), enfd. 273 Fed. Appx. 32 (2d Cir. 2008) (employer's conduct was coercive enough to warrant additional remedies where it committed several unfair labor practices within a week of the union filing a petition).

¹⁶ J.H. Rutter Rex Mfg. Co., 396 U.S. 258, 260-263 (1969). See also Sure-Tan, Inc. v. NLRB, 467 U.S. 883, 898 (1984); Ishikawa Gasket America, Inc., 337 NLRB 175, 176 (2001), enfd. 354 F.3d 534 (6th Cir. 2004) (Board may impose additional remedies "where required by the particular circumstances of a case"); Excel Case Ready, 334 NLRB at 5 (Board has broad discretion to fashion a just remedy to fit the circumstances of each case it decides).

¹⁷ See, e.g., Chinese Daily News, 346 NLRB 906, 909 (2006) ("extraordinary" notice-reading remedy not appropriate, because "neither the General Counsel nor the dissent have offered any evidence to show that the Board's traditional remedies are insufficient" to remedy multiple violations, including threats of job loss, where violations happened four years prior and any "lingering effects" were "not at all clear"); Register Guard, 344 NLRB 1142, 1146 n.16 (notwithstanding multiple 8(a)(1) violations, including a hallmark unit-wide wage increase, "the

these remedies is provided below. In arguing for such remedies, Regions should articulate the lasting or inhibitive coercive impact inherent in the violations alleged, as explained above, use additional evidence adduced, where available, to demonstrate the actual impact of the violations and, as shown below, explain how the remedy sought will remove that impact.

II. Appropriate Remedies to Seek

In nip-in-the-bud organizing cases, the remedial goal should be to recreate an atmosphere free from the effects of an employer's unfair labor practices. The Board's cease-and-desist and notice posting remedies announce to employees, who have been subjected to interference, restraint, and coercion with respect to their right to select a bargaining representative, that they have a protected right to engage in such activity free from unlawful reprisal. Similarly, the reinstatement and backpay remedies aim to "make whole" an affected employee. But because unlawful discharges and other violations during an organizing drive have a lasting or particularly inhibitive effect on the exercise of Section 7 rights and on the Board's ability to conduct a fair election, we must do more to counteract the impact of that unlawful conduct. GC 10-07 provides that when a Region determines that a case involving a nip-in-the-bud discharge has merit, it should submit the case for consideration of 10(j) relief. In addition, Regions are hereby authorized, at the same time, to include in their Complaint any of the remedies listed below that are appropriate to remedy the discharge itself, as well as serious ancillary unfair labor practices. Finally, Regions should include in their 10(j) submissions a recommendation regarding seeking in Section 10(j) proceedings any of these remedies included in their Complaint.

1. Notice Reading – Appropriate in nip-in-the-bud cases

Notice-reading remedies generally require that a responsible management official read the notice to assembled employees or, at the respondent's option, have a Board Agent read the notice in the presence of a responsible management official. The public reading of a notice has been recognized as an "effective but moderate way to let in a warming wind of information and, more important, reassurance."¹⁸ By imposing such a remedy, the Board can assure

Charging Party has not shown a basis for imposing" a notice-reading remedy); First Legal Support Services, LLC, 342 NLRB 350, 350 n.6 (2004) (additional remedies not warranted, notwithstanding multiple violations, including repeated threats of discharge and plant closure as well as the actual discharge of two union supporters, where "[n]either the General Counsel nor our dissenting colleague has shown that traditional remedies are so deficient here to warrant imposing" additional remedies).

¹⁸ United States Service Industries, 319 NLRB at 232 quoting J.P. Stevens & Co., v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969). See also Concrete Form Walls, Inc., 346 NLRB 831, 841 n.3 (2006) (Member Schaumber, dissenting in part) (notice-

the respondent's "minimal acknowledgment of the obligations that have been imposed by the law. . . . The employees are entitled to at least that much assurance that their organizational rights will be respected in the future."¹⁹ A notice reading will also ensure that the important information set forth in the notice is disseminated to all employees, including those who do not consult the employer's bulletin boards. A reading will also allow all employees to take in all of the notice, as opposed to hurriedly scanning the posting, under the scrutiny of others.²⁰

In addition to ensuring that the notice's content reaches all the employees, a personal reading places on the Board's notice "the imprimatur of the person most responsible" and allows employees to see that the respondent and its officers are bound by the Act's requirements.²¹ For example, where an employer discharged a union supporter or made threats of plant closure, hearing the Board's cease-and-desist language read will better serve to allay the employees' fear that union activity at work will be met with reprisal. Furthermore, where a high ranking manager personally committed some of the violations, hearing that manager read the notice, or seeing him present while it is read, will "dispel the atmosphere of intimidation he created" and best assure employees that their rights will be respected.²² Finally, a notice-reading remedy is more effective at remedying violations during an organizing drive than a traditional notice posting because of its heightened psychological impact on employees; "[f]or an employer to stand before her assembled employees and orally read the notice can convey a sense of sincerity and commitment that no mere posting can achieve."²³

reading remedy "gives teeth to other notice provisions" that the respondent must also announce).

¹⁹ Federated Logistics, 340 NLRB at 258 n.11. See also United States Service Industries, 319 NLRB at 232 (reading allows employees to gain assurance from a high level employer representative that they view "as the personification of the Company" that an employer will respect their rights).

²⁰ Regions should specifically seek language in an Order that the notice should be read to the widest possible audience. See, e.g., Vincent/Metro Trucking, LLC, 355 NLRB No.50, slip op. at 2 (2010).

²¹ Loray Corp., 184 NLRB 557, 558 (1970).

²² Three Sisters Sportswear Co., 312 NLRB 853, 853 (1993), enfd. mem 55 F.3d 684 (D.C. Cir. 1995).

²³ Teeter, Fair Notice: Assuring Victims of Unfair Labor Practices that their Rights will be Respected, 63 UMKC L. Rev 1, 11 (Fall, 1994).

2. Access Remedies – Appropriate in cases where there is an adverse impact on employee/union communication

The full exercise by employees of their Section 7 rights requires that employees be fully informed not only concerning those rights, but also concerning the advantages and disadvantages of selecting a particular labor organization, or any labor organization, as their bargaining representative. Where an employer unlawfully interferes with communications between employees, or between employees and a union, the impact of that interference requires a remedy that will ensure free and open communication. Allowing union access to the employer's bulletin boards and providing the union with the names and addresses of employees will restore employee/union communication and assist the employees in hearing the union's message without fear of retaliation.²⁴ These access remedies assure the employees that they can learn about unionization and can contact union representatives in an atmosphere free of the restraint or coercion generated by an employer's violations.²⁵

a. Access to bulletin boards

An order requiring an employer to permit access to its bulletin boards will broaden the opportunity for employee/union communication.²⁶ Union access to bulletin boards permits employees to see, at the workplace, that open displays of union information are acceptable, and will better thaw the chilling impact of the violations than the bare recitation of rights in a standard notice posting.²⁷ Access to bulletin boards is the least intrusive of access remedies, and it "serves to

²⁴ Teamsters Local 115 v. NLRB, 640 F.2d 392, 399 (D.C. Cir. 1981), enfg. 242 NLRB 1057 (1979). See also United States Service Industries, 319 NLRB at 232, quoting United Dairy Farmers Cooperative Assn., 242 NLRB 1026, 1029 (1979), enfd. in relevant part 633 F.2d 1054 (3d Cir. 1980).

²⁵ See Jonbil, Inc., 332 NLRB 652, 652 (2000); United States Service Industries, 319 NLRB at 232.

²⁶ Where an employer customarily uses electronic means, such as an electronic bulletin board, e-mail, or intranet postings to communicate with employees, Regions should submit the case to the Division of Advice on whether to seek a remedy including union access to those electronic means of communication. See J. Picini Flooring, 356 NLRB No. 9 (2010) (electronic notice posting appropriate where employer regularly utilized electronic bulletin board to communicate with employees).

²⁷ Excel Case Ready, 334 NLRB at 5 (bulletin-board access remedy provides employees with "reassurance that they can learn about the benefits of union representation, and can enlist the aid of union representatives, if they desire to do so, without fear [of retaliation by the employer]").

reduce the obstacles to free union-employee communication” that were created by the employer’s coercive conduct, and reassures the employees that the union has a “legitimate role to play in their decision whether to seek union representation.”²⁸

b. Employee names and addresses

A names-and-addresses remedy typically requires the employer to provide the union with an updated list of employees’ names and addresses, for a longer and earlier time period than would be required under Excelsior Underwear.²⁹ If an employer’s unlawful conduct during an organizing campaign disrupts Section 7 rights and election conditions, the union must restart its organizing campaign and employees will have reason to fear discussing unionization in the workplace because of the employer’s past conduct.³⁰ “To neutralize the effect of the Respondent’s face-to-face restraint and coercion, it is necessary that the employees have ready access to union organizers and other officials who can explain to them the Union’s point of view with respect to organizational activities.”³¹ The names-and-addresses remedy “attempts to level a playing field that has been tilted against the employees’ organizational rights” by the employer’s unfair labor practices and enables the union to contact all the employees outside the work environment free from management’s watchful

²⁸ Blockbuster Pavilion, 331 NLRB at 1276. See also J.P. Stevens & Co. v. NLRB, 388 F.2d 896, 906 (2d Cir. 1967) (union access to bulletin boards appropriate to offset the company’s use of bulletin boards in coercive campaign against the union and to “dissipate the fear in the atmosphere within the Company’s plants generated by its anti-union campaign”); John Singer, Inc., 197 NLRB 88, 90 (1972) (union access to bulletin boards necessary because additional forms of communication were needed to allow the union to reclaim allegiance lost as a result of the company’s unlawful conduct).

²⁹ Excelsior Underwear Inc., 156 NLRB 1236 (1966).

³⁰ The Board has expressly rejected the argument that a names-and-addresses remedy is unnecessary because the union will obtain an Excelsior list of names and addresses in the event an election is scheduled. See, e.g., Federated Logistics, 340 NLRB at 256-258; Blockbuster Pavilion, 331 NLRB at 1275. Providing names and addresses shortly before the election, as with the Excelsior list, is insufficient. Rather, a remedial provision of names and addresses for a longer and earlier time period is designed to restore “the conditions that are a necessary prelude to a free and fair election.” Blockbuster Pavilion, 331 NLRB at 1275.

³¹ Heck’s, Inc., 191 NLRB 886, 887 (1971), enfd. as amended 476 F.2d 546 (D.C. Cir. 1973).

eye.³² Thus, this remedy is necessary because it facilitates communication between the union and employees outside the employer's domain, and therefore, "insulated from discriminatory reprisal."³³

III. Instructions to Regions for Investigating and Litigating These Cases

In addition to submitting 8(a)(3) nip-in-the-bud cases for 10(j) relief pursuant to Memorandum GC 10-07, Regions should seek a notice-reading remedy in all such cases and should consider seeking a notice-reading remedy where an employer has committed serious Section 8(a)(1) violations. Hallmark violations such as threats of discharge and plant closure, and promises or grants of benefits, and other serious violations such as solicitation of grievances, high-level or widely disseminated interrogations, and surveillance or impression of surveillance have a pronounced impact on employee free choice. A notice reading remedy will effectively assure employees that their rights will be respected.

When the employer's unfair labor practices interfere with communications between employees, or between employees and a union,³⁴ Regions should also seek union access to bulletin boards and employee names and addresses.

Regions are authorized to plead these remedies in their Complaint. In addition, Regions should include in their recommendation regarding 10(j) relief whether they would seek on an interim basis the remedies included in their Complaint. A combination of these remedies, as part of our 10(j) relief, will ensure that employees' Section 7 rights are adequately protected and that their ability to exercise free choice regarding unionization is promptly restored.

If a Region determines that an employer's unfair labor practices have had such a severe impact on employee/union communication that bulletin board access and names and addresses are insufficient to permit a fair election, it should submit the case to the Division of Advice with a recommendation as to why additional remedies are warranted, including: granting a union access to nonwork areas during employees' nonwork time; giving a union notice of, and equal time and facilities for the union to respond to, any address made by the company regarding the issue of representation; and affording the union the right to deliver a speech to employees at an appropriate time prior to any Board election. These remedies may be warranted where an employer makes multiple

³² Blockbuster Pavilion, 331 NLRB at 1275.

³³ Id. at 1275 n.16, citing J.P. Stevens & Co. v. NLRB, 417 F.2d at 541. See also Excel Case Ready, 334 NLRB at 5.

³⁴ See Jewish Home for the Elderly of Fairfield County, 343 NLRB at 1069.

unlawful captive audience speeches or where the employer is a recidivist and has shown a proclivity to violate the Act.³⁵

In order to secure a notice reading or any access remedies in Section 10(j) and unfair labor practice proceedings, Regions need to articulate why they are necessary. Regions should be prepared to argue that these remedies are needed both because of the impact on employee free choice inherent from the unfair labor practices themselves and, where available, the evidence that demonstrates that impact in a particular case. Thus, although the impact of these unfair labor practices on employee free choice may be inferred from the nature of the violations, Regions should also investigate for evidence to establish actual impact. The evidence that is currently collected during a 10(j) "just and proper" investigation will typically demonstrate the effects of an employer's unfair labor practices on employee free choice. Such evidence will also, therefore, bolster the need for these remedies by providing concrete evidence of impact upon employees.

³⁵For cases where these remedies were concurrently granted, see, e.g., Avondale Industries, 329 NLRB at 1068 (nonwork access, equal time, and a 30 minute pre-election speech ordered where employer committed 141 unfair labor practices including over 30 discriminatory discharges); Fieldcrest Cannon, Inc., 318 NLRB at 473, 490-491 (nonwork access, equal time, and a 30 minute pre-election speech appropriate because managers gave numerous unlawful captive audience speeches); Texas Super Foods, 303 NLRB 209, 209 (1991) (nonwork access, equal time, and a 30 minute pre-election speech ordered to "provide the proper atmosphere for holding a fourth election" after the employer "blatantly disregarded" the Board's finding that it violated the Act); Monfort of Colorado, 298 NLRB 73, 86 (1990), enfd. in rel. part, 965 F.2d 1538, 1548 (10th Cir. 1992), citing Monfort of Colorado, 284 NLRB 1429, 1429-1430, 1479 (1987), enfd. sub. nom. Food & Commercial Workers v. NLRB, 852 F.2d 1344 (D.C. Cir. 1988) (nonwork access, equal time, and a 30 minute pre-election speech appropriate because the large number of incidents that occurred, the many supervisors involved, the personal involvement of the employer president, and the premeditated nature of the employer's violations demonstrated its proclivity to violate the Act); S.E. Nichols, Inc., 284 NLRB 556, 559-560 (1987), enfd. in rel. part, 862 F.2d 952, 960-963 (2d Cir. 1998), cert. denied, 490 U.S. 1108 (1989) (nonwork access, equal time, and a 30 minute pre-election speech necessary where employer was a recidivist who "continued to engage in an obdurate flouting of the Act"). For cases where only one of the remedies was granted, see, e.g., United States Service Industries, 319 NLRB at 231 (union access to nonwork areas during employees' nonwork time necessary because it was the third Board case documenting the employer's unlawful response to its employees' organizing efforts); Pennant Foods Co., 352 NLRB 451, 472-473 (2008) (equal time remedy necessary for third rerun election because the employer violated formal settlement).

In addition to articulating how the impact of the violations supports the need for these remedies, Regions should also articulate, based on the discussion above, how those remedies will remove the effects of the unlawful conduct and restore an atmosphere free of coercion where employees can exercise a free and informed choice.

In summary, I believe that these remedies will further the important goal of ensuring employee freedom of choice with regard to unionization and restore the status quo where an employer has committed serious unfair labor practices in response to an organizing campaign. The Board and courts have recognized these remedies as important tools for restoring the right of employees to make a free and informed choice regarding unionization, and I am committed to seek them in fulfillment of my obligation to protect those rights under the Act.



L.S.

Interim Report on the §10(j) Initiative regarding Organizing Campaign Discharges

The initiative, outlined in GC Memo 10-07 (September 30, 2010), was launched to ensure that the Board obtains timely, meaningful remedies in so-called “nip-in-the-bud” cases – when, during a union organizing campaign at a workplace, employees are unlawfully discharged or subjected to other serious unfair labor practices designed to nip the protected activity in the bud before it bears fruit. The Memorandum sets out best practices for processing all the stages of such unfair labor practice cases so as to assure that the Agency promptly decides whether charges have merit and, in cases of unlawful discharge, the discharge is promptly remedied through settlement or §10(j) district court litigation in an attempt to quickly return the employee to work and negate the detrimental impact that the employer’s conduct had on employees at that facility.

Of the 157 nip-in-the-bud charges filed since the program began on October 1, 79 charges were resolved by January 31, i.e. 57 were found to be non-meritorious and 22 were found to have merit. Of those charges having merit, 12 were fully resolved by January 31. The average case processing time from filing to resolution was 61 days.

Since the initiative began, Regional Offices have submitted recommendations concerning whether to seek § 10(j) injunctive relief in 28 nip-in-the-bud cases, including 3 cases where the charge was filed after the initiative began. Of these 3 cases, one settled before ILB’s decision, one settled after Board authorization and one was not considered to warrant seeking § 10(j) interim relief. The Agency has obtained settlements in 22 nip-in-the-bud cases, including cases where the charge was filed before October 1, 2010 and a Region had submitted the matter to the Injunction Litigation Branch for §10(j) authorization. As a result of these settlements, 42 discharged employees were offered reinstatement, of whom 19 accepted the offers and 23 waived reinstatement; and, in total, they received \$354,978 in backpay.

In addition, a district court ordered interim reinstatement of an additional two discriminatees.

The tables below display case processing data for the first four months of the initiative October 1, 2010- January 1, 2011:

- (A) Regional processing of nip in the bud charges filed in the first four months of the initiative
- (B) Injunction Litigation Branch processing of all nip in the bud §10(j) recommendations from Regional Offices (*this table includes cases based on charges filed with Regional Offices before October 1, in which the investigation was completed and the case submitted to the ILB on or after October 1*)

**A. Regional Processing of Nip-in-the-Bud Charges
Filed 10/1/10-1/31/11**

# charges filed - all allegations		7,348			
“nip-in-the-bud” charges filed		157			
Merit determination	Pending		78		
	No merit		57		
	Merit		22		
Resolution of merit cases					
	settlement pre-complaint			10	
	complaint issued			12	
Regional §10(j) Consideration					
	§10(j) consideration pending				4
	Expedited administrative hearing				5
	Submitted to ILB				3
ILB/GC §10(j) consideration	Submissions pending in ILB				0
	Settled before ILB decision				1
	No §10(j) at this time				1
	Board authorization sought				1
Board authorization	GC requests authorized				1
Litigation	Settled post-authorization, pre-petition				1

**B. ILB Processing of Nip-in-the-Bud §10(j) Recommendations
Submitted to ILB 10/1/10-1/31/11; Charges Filed Any Time before 1/31/11**

# cases submitted			28				
ILB/GC determination							
	Submissions pending in ILB			2			
	Settled before ILB decision			5			
	No §10(j) at this time			9			
	Board Authorization sought			12			
Board Authorization							
	Requests pending				2		
	Requests authorized				10		
Litigation							
	petition not yet filed					1	
	settled post-authorization, pre-petition					5	
	petitions filed					4	
		settled post-petition, pre-decision					2
		injunction granted					1
		petitions pending					1

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11- 04

January 12, 2011

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Revised Casehandling Instructions Regarding the Use of Default
Language in Informal Settlement Agreements and Compliance Settlement
Agreements

The 2002 Best Practices Compliance Case Report, as set forth in GC Memorandum 02-04, recommended that Regions include default language in informal settlement agreements when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations. In OM 05-96, "Casehandling Instructions Regarding Use Of Default Language in Settlement Agreements," dated September 16, 2005, revised default language was set forth to address some concerns raised by then Chairman Battista in *Great Northwest Builders, LLC*, 344 NLRB 969 (2005).

Our experience is that the Board routinely has enforced these provisions when ruling on motions for summary judgment filed by counsel for the General Counsel when there has been a breach of the settlement agreement. Operations-Management recently surveyed all Regions about their use of default provisions in settlement agreements. This survey showed that five Regions routinely propose, and three of those Regions regularly insist upon, inclusion of default language in all informal settlement agreements. With a settlement goal of 95%, these five Regions achieved settlement rates in FY 2009 of 96.9, 98.3, 95.6, 96.5 and 93 percent, respectively, and in FY 2010 of 100, 96.2, 94.2, 91.6 and 95.1 percent, respectively. These Regions also achieved litigation "win rates" in FY 2009 of 100, 75, 83.3, 90 and 93.3 percent, respectively, compared to a national rate in FY 2009 of 89.9 percent, and achieved litigation "win rates" in FY 2010 of 100, 100, 87.0, 87.5 and 100 percent, respectively, compared to the national rate in FY 2010 of 91.4 percent. These statistics demonstrate that the Regions' policy on including default language in settlement agreements does not adversely impact on either their settlement rates or the success they enjoy in litigating cases they cannot settle.

Based on this experience and the input from our Regional Directors, I have decided to expand the use of default language. There is a potential for considerable savings of resources and avoidance of delays in the event of a breach of the settlement agreement in requiring the inclusion of default provisions in such agreements and enforcing such provisions in a summary proceeding in the event of a breach.

Accordingly, Regions are hereby instructed to routinely include default language in all informal settlement agreements and all compliance settlement agreements.¹

Regional Office experience under outstanding GC guidelines demonstrates that default language is an effective and appropriate means to ensure that a charged party/respondent will comply with the affirmative provisions of the settlement agreement. Since the default language simply requires a charged party/respondent to honor the commitments it made in the settlement agreement, it is a reasonable requirement that ensures that the Agency will not be required to litigate a settled issue. In many cases, the default language will have been agreed to by a charged party/respondent only after the Regional Office has expended government resources to prepare for an administrative hearing. Failure to abide by the terms of a settlement that does not contain default language would require that the government incur the expense of preparing again for the administrative hearing and delays the provision of remedial relief. Therefore, to avoid duplicative expenses and delay, it is especially appropriate to include summary default language in informal settlement agreements.

With respect to compliance settlements, such agreements are usually concluded only after the entry of a Board Order or Court judgment.² At that stage of the proceeding, the arguments are even more compelling for default language in the settlement to avoid any further delays in the provision of remedial relief.

Therefore, language such as that set forth below should be included in all settlement agreements to meet these concerns:

The Charged Party/Respondent agrees that in case of non-compliance with any of the terms of this Settlement Agreement by the Charged Party/Respondent, and after 14 days notice from the Regional Director of the National Labor Relations Board of such non-compliance without remedy by the Charged Party/Respondent, the Regional Director will [issue/reissue] the [complaint/compliance specification] previously issued on [date] in the instant case(s). Thereafter, the General Counsel may file a motion for summary judgment with the Board on the allegations of the [complaint/compliance specification]. The Charged Party/Respondent understands and agrees that the allegations of the aforementioned [complaint/compliance specification] will be deemed admitted and its Answer to such [complaint/compliance specification] will be considered withdrawn. The only issue that may be raised before the Board is whether

¹ Regions should alternatively consider utilizing "confessions of judgment" in cases involving backpay installment plans. See OM 09-58, "Confessions of Judgment," dated April 10, 2009. In addition, Regions are reminded that in any settlement providing for installment payments, absent extraordinary circumstances, the Region should obtain some type of security from the respondent. See Casehandling Manual (Part III) – Compliance Proceedings, Section 10592.12.

² Regions are reminded of the outstanding directions regarding the consolidation, in appropriate circumstances, of compliance matters with the initial complaint. See, e.g., Casehandling Manual (Part III) – Compliance Proceedings, Sections 10506.2(c), 10508.3 and 10646.3.

the Charged Party /Respondent defaulted on the terms of this Settlement Agreement. The Board may then, without necessity of trial or any other proceeding, find all allegations of the [complaint/compliance specification] to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the Charged Party/Respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the U.S. Court of Appeals Judgment may be entered enforcing the Board order ex parte.

While in most cases the complaint will have already issued, in situations where the complaint has not issued, the default language should provide that the Regional Director will issue complaint on all allegations of the charge(s) in the instant case(s) that were found to have merit and list all the allegations and any specific remedial relief sought and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

If the compliance specification has not issued in a compliance case, the default language should provide that the Regional Director will issue a compliance specification and list all liquidated backpay or other remedial provisions and should provide that by signing the settlement agreement, the Charged Party/Respondent waives any right to file an Answer.

Filing Motions for Default Judgment

When filing a motion seeking a default judgment with the Board, it is critically important that the Region should explicitly detail in its motion for default judgment the precise remedial relief that the Region wishes the Board to provide in its order. Similarly, in such a case, to obtain enforceable remedies, it is equally important to consider this issue when drafting the language of the settlement agreement and to detail any remedial acts or requirements that respondent is expected to undertake or with which it is expected to comply.

If a Region is seeking a default judgment based on a charged party/respondent committing an unfair labor practice in violation of the cease and desist provisions of the settlement, the Region should issue a complaint on the new unfair labor practice and seek to consolidate this hearing with its motion to the Board for a default judgment.³ If the Region prevails in showing that a new ULP was committed and that this violation breached the terms of the prior settlement agreement, the Region would seek to have the Board issue a default judgment on the prior settlement as well as remedying the new unfair labor practice.

³ When consolidating the Motion for Default Judgment with the hearing on the new unfair labor practice, the Region should not ask the Judge to rule on this Motion. Rather, the Region should request that the Judge refer the Motion for Default Judgment to the Board when the Judge issues a decision on the new alleged unfair labor practice.

Revisions to the ULP and Compliance Casehandling Manuals will be prepared to reflect the contents of this memorandum. If you have any questions regarding this memorandum, please contact your Assistant General Counsel.



L.S.

cc: NLRBU
NLRBPA
Release to the Public

MEMORANDUM GC 11- 04