SUBSTANTIVE ADDITIONS TO THE 2025 NLRB ALJ BENCH BOOK

CHAPTER 1. MODEL STATEMENTS, ORDERS, AND OATHS

§ 1–300 Sequestration Order

A full discussion of Board precedent with respect to separating, excluding, or sequestering witnesses is set forth in **CHAPTER 11**, Sequestration of Witnesses. As discussed there, the *Greyhound* model order is generally consistent with FRE 615. In light of more recent amendments to that rule, however, the judge should consider adding a statement to the model order making clear that excluded witnesses also may not access hearing testimony (at least not of witnesses for the same side) in any other manner. See **§ 11–200**, Scope of Sequestration Order.

CHAPTER 2. THE TRIAL JUDGE

§ 2–300 Duties and Powers of Trial Judge

To call, examine, and cross-examine witnesses and to introduce documentary and other evidence (Sec. 102.35(a)(11)). This section corresponds to FRE 614 and has generally been applied consistently therewith. See ***Starbucks Corp***., 374 NLRB No. 9, slip op. at 1 n. 1 (2024) (a judge may interrupt or question witnesses in order to clarify testimony).

CHAPTER 3. PLEADINGS

§ 3–220 Adequacy of Complaint

Starbucks Corp., 373 NLRB No. 53, slip op. at 2 n. 7 (2024) ("[M]inor factual discrepancies [in the undisputed evidence] from what was alleged in the complaint as to the location of where a violation occurred do not create a due-process issue.").

§ 3–340 De Facto Amendment—Unpleaded But Fully Litigated

Both parts of the *Pergament* test must be satisfied; if a matter is not closely connected to any of the complaint allegations, a violation cannot be found regardless of whether it was fully litigated. See ***List Industries, Inc.***, 373 NLRB No. 146, slip op. at 2 n. 5 (2024) (finding it unnecessary to consider whether employer's unalleged maintenance of an overbroad distribution policy was fully litigated, as it was not closely connected to any of the complaint allegations).

§ 3–840 Deferral to Grievance Arbitration

Inextricably intertwined or related allegations. Allegations that are inextricably intertwined or related to an alleged unlawful workplace rule should not be deferred. See ***Intertape Polymer Corp***., 373 NLRB No. 82, slip op. at 3 (2024) (complaint allegations that employer unlawfully removed a letter posted by an employee on a bulletin board and disciplined him for posting the letter were inappropriate for deferral because they were inextricably intertwined with the complaint allegation that the employer's rule prohibiting unauthorized posting was unlawful).

CHAPTER 4. FILING AND SERVICE OF DOCUMENTS

§ 4–100 Filing of Documents

See also ***Starbucks Coffee Co. v. NLRB*****,** No. 24-1123, 2025 WL 1135120, at *2-3 (D.C. Cir. April 17, 2025) (unpub.) (finding the Board did not abuse its discretion when it declined to accept exceptions filed 24 minutes late due to computer issues); ***NLRB v. Tri-County Electric Cooperative***, No. 21-60887, 2023 WL 5040960, at *2 (5th Cir. 2023) (unpub.) (same, where exceptions were filed 30 minutes late due to error in identifying the proper time zone of the receiving office).

§ 4–400 Proof of Service

Where service of documents is permitted by regular mail, the failure of the postal service to return the documents is sufficient to establish actual receipt. See, e.g., ***California Truck Driving Academy, LLC***, 373 NLRB No. 95, slip op. at 1 n. 1 (2024).

§ 4–600 Efforts to Frustrate Service

"It is well settled that a respondent's failure or refusal to accept certified mail or to provide for appropriate service cannot serve to defeat the purposes of the Act." ***Frontline Security Services***, 367 NLRB No. 131, slip op. at 1 n. 1 (2019). Thus, in ***California Truck Driving Academy,*** above, the Board issued a default judgment against the respondent for failing to file an answer because, "even assuming" the General Counsel's "multiple efforts to serve the Respondent by a variety of methods" failed, "those failures support the conclusion that the Respondent itself failed to provide for appropriate service as our case law demonstrates." See also ***Apex Electrical Services***, 356 NLRB No. 172, slip op. at 1 n. 3 (2011) (issuing default judgment with respect to compliance specification).

CHAPTER 8. SUBPOENAS

§ 8–230 Ruling on Petition to Revoke

Section 102.31(b) of the Board's Rules states that "[t]he Administrative Law Judge or the Board, as the case may be, will make a simple statement of procedural or other grounds for the ruling on the petition to revoke." It is within the judge's discretion whether to issue the ruling orally on the record or in writing. ***Woodford Reserve Distillery***, 373 NLRB No. 145, slip op. at 1 n. 2 (2024).

§ 8–330 Burdensomeness of Production

Documents previously provided. The General Counsel may sometimes subpoena documents for hearing, even though they were already received from the respondent during the investigation, for purposes of authentication. See **§ 16–901.5**, Documents Obtained From Opposing Party, below. A stipulation as to authenticity may resolve the matter. Cf. ***Meharry Medical College***, 10-CA-314858, unpub. Board order issued Sep. 17, 2024 (2024 WL 4229692) at 1 n. 2.

§ 8–350 Possession or Control

The subpoenaed party is required to conduct "a reasonable and diligent search" for all requested evidence within its possession or control, and to "affirmatively" represent to the subpoenaing party if no responsive evidence exists. ***Micross Components***, 01-CA-323838, unpub. Board order issued June 6, 2024 (2024 WL 2880096), at 1 n. 3; ***Consolidated Waste Services Corp***., 12–CA–192990, unpub. Board order issued May 24, 2018 (2018 WL 2387581, 2018 NLRB LEXIS 759), at 1 n. 2 (investigative subpoena).

For example, an employer may be required to produce information that is within the same corporate organization. ***Cascades Containerboard***, above (drawing adverse inference from respondent's failure to substantiate that it either searched its own records or sought unsuccessfully to obtain them from its parent corporation, the holding company, or some other part of the respondent's organization).

An employer may likewise be required in certain circumstances to request subpoenaed information that is not in its possession or control from subcontractors or vendors. If the request is denied, the employer must affirmatively represent this fact. See ***KMAC, Inc***., 18–CA–185912, unpub. Board order issued Dec. 22, 2017 (2017 NLRB LEXIS 651, 2017 WL 6555202), at 1 n. 2 (subcontractors).

§ 8–455 Identity of Union Supporters (Authorization Cards)

The Board has applied the same rule to other types of materials that might reveal protected employee conduct. See ***Starbucks Corp***., 373 NLRB No. 101, slip op. at 7 (2024) (finding that employer violated 8(a)(1) by serving two employees with subpoenas seeking information about employees' union activities, including their recordings of meetings about their union organizing, communications between employees, and related documents).

§ 8–465 Mediator's Privilege

A party may not compel a mediator to testify in Board proceedings. ***Success Village Apartments, Inc.***, 347 NLRB 1065 (2006); ***NLRB v. Joseph Macaluso, Inc.***, 618 F.2d 51 (9th Cir. 1980). Thus, a subpoena requiring a mediator to testify must be quashed.

§ 8–720 Failure to Produce Documents

Imposing evidentiary sanctions.

1) Draw an adverse inference.

See also ***Starbucks Corp***., 374 NLRB No. 8, slip op. at 5–6 (2024). There, the respondent refused to produce certain documents in response to the General Counsel's subpoena or submit them to the ALJ for in camera inspection to evaluate its privilege claims. The Board drew an adverse inference and credited testimony of the GC's witnesses, but it did so based on the respondent's failure to *introduce* the documents. In support, the Board cited, e.g., ***Community Hospitals of Central California v. NLRB***, 335 F.3d 1079, 1086–1087 (D.C. Cir. 2003) (observing that the ALJ "would have been justified in drawing the adverse inference [that unproduced subpoenaed documents would have been unfavorable to the employer] . . . even if no subpoena had been issued"); and ***Auto Workers v. NLRB***, 459 F.2d 1329, 1338–1339 (D.C.

Cir. 1972) ("[W]hile the adverse inference rule in no way depends upon the existence of a subpoena . . . the willingness of a party to defy a subpoena in order to suppress the evidence strengthens the force of the preexisting inference . . . . [T]he rule does not deprive the suppressing party of [its] constitutional right to an enforcement hearing on the subpoena, since [it] is not required to produce the evidence in question. Rather, the tribunal simply utilizes the commonsense inference that if the evidence would do the suppressing party any good, [it] would readily produce it.").

§ 8–800 Enforcement of Subpoenas on Behalf of Private Party

Nor is the GC required to initiate enforcement proceedings where the subpoena is incapable of being enforced. See ***Champ Corp.***, 291 NLRB 803 (1988) (respondent was not prejudiced by the GC's failure to seek enforcement of respondent's subpoena duces tecum on the charging party union as the evidence showed that the subpoenaed documents were unavailable through no fault of the union), enfd. 933 F.2d 688 (9th Cir. 1990).

CHAPTER 9. SETTLEMENTS

§ 9–430 Informal and Non-Board Settlements

See also ***Blue Fox Heating and Cooling LLC***, 25–CA–297685, unpub. Order issued December 31, 2024 (2024 WL 5262300), at 1 n. 1 (affirming the ALJ's approval of a non-Board settlement notwithstanding the absence of default language); ***Amazon.com Services, LLC***, 09–CA–298870, unpub. Board order issued April 18, 2024 (2024 WL 1701258), at 1 n. 1 (finding that the ALJ did not abuse his discretion by approving a non-Board settlement after the hearing opened that provided 100 percent backpay and an additional 50 percent front pay to the alleged discriminatee).

§ 9–440 Settlement by Consent Order

A trial judge may also be asked by a respondent to approve a settlement by "consent order"—that is, a unilateral settlement offered by the respondent but not agreed to by either the General Counsel or the charging party. In ***Hospital Metropolitano Rio Piedras***, 373 NLRB No. 89 (2024), the Board overruled precedent and eliminated a trial judge's authority to approve consent orders. The Board reasoned that Section 102.35(a)(7) of its rules appears to prohibit consent orders. That section authorizes the Board's administrative law judges to "[h]old conferences for the settlement or simplification of the issues by consent of the parties, *but not to adjust cases*" (emphasis added). The Board also found that its longstanding practice of approving consent orders created administrative challenges and inefficiencies, interfered with the General Counsel's statutory prosecutorial authority, and failed to effectuate the policies of the Act. The Board's ruling applied to all pending and future cases.

Nevertheless, the Board's previous decisions approving consent orders under the *Independent Stave* four-factor analysis may provide guidance in evaluating settlements where either the General Counsel or a charging party objects. The following are some examples.

§ 9–900 Default Judgment for Noncompliance with Settlement

If the respondent's response raises a genuine issue of material fact regarding the alleged noncompliance, the parties are entitled to a hearing on the disputed issue(s) before an ALJ.

Star Garden Enterprise, 373 NLRB No. 76 (2024) (denying the General Counsel's motion for default judgment based on respondent's alleged noncompliance with a settlement, where a genuine issue of material fact existed over whether respondent reopened its business operations as required in the settlement); and ***Indy Core***, 373 NLRB No. 70 (2024) (same, where factual dispute existed over whether respondent's response to information requests complied with the settlement agreement).

However, if the respondent's response fails to raise any such material factual issue, it is appropriate to rule on the General Counsel's motion for default judgment without a hearing. ***American Backflow & Fire Prevention*****,** 373 NLRB No. 71 (2024) (granting GC's motion for default judgment where settlement agreement required respondent to recognize and bargain with the union and respondent admittedly withdrew recognition from it without proffering any factual basis for lawfully doing so). See also ***Bristol Manor Health Care Center***, 360 NLRB 38 (2013) (respondent's contention that certain requested information had been provided to the union as required by the settlement did not raise a material factual issue because respondent did not directly deny that certain other information had still not been provided); and ***Rogan Bros. Sanitation, Inc***., 357 NLRB 1655 (2011) (respondent's contention that its general manager lacked authority to enter into the settlement and was coerced into signing it by the Board agent did not raise a material factual issue because the respondent had ratified the agreement by its subsequent conduct and the Board agent's alleged statements simply informed the manager of the Board's processes and the possible consequences of refusing to settle).

CHAPTER 10. MOTIONS AND SPECIAL APPEALS

§ 10–100 Motions In Limine

Judges have authority to rule on motions in limine seeking to limit the issues or evidence to be litigated or presented at a hearing. See, e.g., ***Trader Joe's East***, 02–CA–306679, unpub. Board order issued June 24, 2024 (2024 WL 3160636) (ALJ did not abuse his discretion in denying respondent's motion in limine seeking to exclude the restoration remedy sought by the General Counsel).

§ 10–300 Motions for Summary Judgment or Default Judgment

Summary judgment is warranted only if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. See, e.g., ***Brooklyn 181 Hospitality, LLC***, 373 NLRB No. 125 (2024) (granting General Counsel's motion); ***Amazon.Com Services, LLC***, 373 NLRB No. 40 (2024) (granting GC's motion and denying respondent's cross-motion).

§ 10–600 Interlocutory Special Appeals from Judges' Rulings

Section 102.26 of the Board's Rules permits a party to file a request to the Board for "special permission to appeal" ALJ rulings or orders on motions. The request must be filed "in writing promptly and within such time as not to delay the proceeding." See ***Starbucks Corp.***, 373 NLRB No. 87 (2024) (denying respondent's special appeal from ALJ's ruling granting the General Counsel's request to present just-and-proper evidence during the unfair labor practice hearing where respondent did not file the request for 7 weeks after the ruling); ***Alivio Medical Center, Inc.***, 13–CA–300158, unpub. Board order issued September 30, 2024 (2024 WL

4357867*)* (denying respondent's special appeal from ALJ's ruling revoking subpoenas where respondent waited approximately 5 months to file its appeal request).

CHAPTER 11. SEQUESTRATION OF WITNESSES

§ 11–100 In General

Federal Rule of Evidence 615(a) requires a judge, "at a party's request," to "order witnesses excluded from the courtroom so that they cannot hear other witnesses' testimony," subject to certain exceptions. The judge may also do so sua sponte. In addition, under FRE 615(b), the judge "may" (1) "prohibit disclosure of trial testimony" to excluded witnesses, and (2) "prohibit witnesses from accessing trial testimony."

§ 11–200 Scope of Sequestration Order

The model sequestration order in the Board's 1995 *Greyhound Lines* decision is set forth in **§ 1–300**, above.

Consistent with the 2023 amendment to FRE 615(b), the ALJ may also prohibit excluded witnesses from accessing hearing testimony (at least of witnesses for the same side) in any other manner. As stated in the Advisory Committee Notes, "the rule gives the court discretion to determine what requirements, if any, are appropriate in a particular case to protect against the risk that witnesses excluded from the courtroom will obtain trial testimony." For example, a court could prohibit witnesses from monitoring trials that are being streamed or have been posted online. **Goode and Wellborne, Courtroom Handbook of Federal Evidence, Rule 615** (April 2024 Update). The Board has not yet addressed the limits of an ALJ's discretion in fashioning such an order.

CHAPTER 12. THE HEARING RECORD

§ 12–500 Holding Remote Hearings by Videoconference

Since the end of the federal COVID-19 Public Health Emergency in May 2023, the Board has also made clear that certain other circumstances are not sufficiently compelling to justify directing a remote hearing over a respondent's objection. For example, in ***Hudson Institute of Process Research***, 373 NLRB No. 11 (2024), the Region scheduled a video hearing because witnesses were scattered all over the country and an in-person hearing would cause unnecessary expense and inconvenience. The respondent objected and filed a motion to hold the hearing in person. The ALJ granted the motion, finding that expense and inconvenience alone were not sufficient compelling circumstances for a full video hearing. The General Counsel thereafter filed a special appeal, but the Board found that the GC failed to show that the judge's ruling was an abuse of discretion.

Similarly, in ***Amazon.com Services LLC***, 12–CA–308502, unpub. Board order issued May 7, 2024 (2024 WL 2049869), the Region scheduled a Zoom hearing primarily because the charging party/discriminatee had moved from Florida, where the alleged violation occurred, to New York. The respondent objected and filed a motion to hold the hearing in person in Florida. The ALJ denied the motion, but the Board subsequently granted the respondent's special appeal. The Board found that "the judge abused his discretion in denying the Respondent's

motion in the absence of good cause based on compelling circumstances justifying holding a hearing via videoconference over a party's objection."

§ 12–800 The Hearing Transcript

See also ***Machinists District Lodge 160***, 373 NLRB No. 39 (2024), where the Board denied the respondent union's request to remand the case and direct the reporting service to provide the tape backup to the parties, as the errors were "inadvertent and harmless" and did not impede the Board's ability to decide the case or justify delaying the proceeding.

CHAPTER 13. BOARD PRECEDENT AND RELITIGATION OF ISSUES

§ 13–200 ALJ Decisions Adopted in the Absence of Exceptions

Cases involving different parties. When the Board has adopted all or even a portion of a judge's decision to which no exceptions have been filed, that decision or portion is not binding precedent in other cases involving other parties. See**,** e.g., ***Starbucks Corp.,*** 373 NLRB No. 44, slip op. at 1 n. 3 (2024); ***Colorado Symphony Assoc***., 366 NLRB No. 122, slip op. at 1 n. 3 (2018), enfd. 798 F. Appx. 669 (D.C. Cir. 2020); and ***Carpenters Local 370 (Eastern Contractors Assn.),*** 332 NLRB 174, 175 n. 2 (2000), and cases cited there.

§ 13–600 Res Judicata and Collateral Estoppel

Relitigating ULP case issues in another ULP case. With respect to issues in an unfair labor practice proceeding that were litigated and decided in a prior unfair labor practice proceeding, see ***Starbucks Reserve Roastery***, 373 NLRB No. 140, slip op. at 3 (2024) (General Counsel was not collaterally estopped from alleging that Starbuck's one-pin rule at its Manhattan Reserve Roastery was unlawful, as the employee dress code at the Roastery was not "virtually identical" to the dress code at Starbuck's basic neighborhood stores involved in the prior litigation).

Relitigating non-NLRB case issues in an NLRB case. With respect to prior non-NLRB case issues, the Board applies the "general rule" that "the Government is not precluded from litigating an issue involving the enforcement of Federal law that a private party has litigated unsuccessfully, when the Government was not a party to the private litigation." ***Precision Industries***, 320 NLRB 661, 663 (1996) (rejecting respondent's argument that the ULP complaint was barred by res judicata because respondent had prevailed in an ERISA suit brought by the charging party union and certain former employees and retirees), enfd. 118 F.3d 585 (8th Cir. 1997).

See also ***Field Bridge Associates***, 306 NLRB 322, 322–323 (1992) (declining to give collateral estoppel effect to state court proceedings that the Board was not a party to), enfd. sub nom. ***Service Employees Local 32B–32J v. NLRB***, 982 F. 2d 845 (2d Cir. 1993)); and ***Roadway Express***, 355 NLRB 197 (2010), enfd. 427 F. Appx. 838 (11th Cir. 2011) (declining in consolidated 8(a)(1) discharge and 8(b)(1)(A) duty of fair representation case to give collateral estoppel effect to alleged discriminatee's unsuccessful hybrid Sec. 301/duty of fair representation claim against the employer and union as the General Counsel was not a party to the federal court lawsuit or in privity with the alleged discriminatee and the court dismissed the duty of fair representation claim on the ground that the discriminatee waived it rather than on the merits).

§ 13–700 Judicial Estoppel

It is unclear whether or when judicial estoppel applies in NLRB proceedings. In ***Precision Industries,*** 320 NLRB at 663, the Board "assum[ed] arguendo" that the doctrine is applicable to Board proceedings but found that prior age and race discrimination charges filed with the EEOC by several discriminatees did not judicially estop the General Counsel from asserting that the failure to hire them was based on antiunion animus. The Board noted that neither the GC nor the charging party union was a party in the EEOC proceeding, and that, "in any event," there was "nothing inconsistent in alleging race or age discrimination in one forum and discrimination based on union membership in another," as the discriminatees "may have believed in good faith that the Respondent had more than one illegal motive for declining to hire them."

CHAPTER 14. SUPPLEMENTAL OR RELATED PROCEEDINGS

§ 14–150 Specific Remedial Issues

Direct or foreseeable harms. ***Thryv, Inc***., 372 NLRB No. 22 (2022), enf. denied in part on other grounds 102 F.4th 727 (5th Cir. 2024).

The Board's *Thryv* remedy was rejected by the Third Circuit in ***NLRB v. Starbucks Corp***., 125 F.4th 78 (3d Cir. 2024) (holding that the remedy exceeded the Board's authority under the NLRA), denying enf. in part of 372 NLRB No. 50 (2023), reconsideration denied 372 NLRB No. 102 (2023). However, the Board's decision in *Thryv* remains valid precedent under the Board's nonacquiescence policy unless and until it is overruled by the Supreme Court or the Board itself. See ***Airgas USA, LLC***, 373 NLRB No. 102, slip op. at 1 n. 2 (2024). See also **§ 13–100**, Board Precedent, above.

Identity of impacted employees. The identity of, and amounts owed to, similarly situated employees impacted by a violation may be determined at the compliance stage. A common example is where it is alleged and found that an employer made discriminatory and/or unilateral changes in terms and conditions of employment that would have affected employees generally. See ***Grand Rapids Press***, 325 NLRB 915, 915–916 (1998) (employers changed their referral systems for hiring substitute employees in violation of Section 8(a)(3) and (5)), enfd. 208 F.3d 214 (6th Cir. 2000); and ***Livingston Pipe & Tube***, 303 NLRB 873 n. 4 (1991), enfd. 987 F.2d 422 (7th Cir. 1993) (employer unilaterally implemented a revised absenteeism and tardiness program in violation of Section 8(a)(5)). For other examples, see ***Tec-Cast, Inc.***, 372 NLRB No. 90, slip op. at 1 n. 2 (2023) (employer failed to engage in effects-bargaining); and ***Governed United Security Professionals***, 373 NLRB No. 66, slip op. at 1 n. 4 (2024) (union failed to honor employees' requests to revoke their dues-checkoff authorizations following deauthorization vote).

CHAPTER 16. EVIDENCE

§ 16–103.2 Specificity of Objections

Pursuant to FRE 103(a)(1)(B), objections must also be sufficiently specific to alert the judge and the offering party to the grounds for the objections, unless it is apparent from the context. ***United States v. Gomez-Norena***, 908 F.2d 497, 500 (9th Cir.1990) (an objection only preserves the specific ground or grounds named).

For a Board case considering this requirement, see ***Starbucks Corp***., 373 NLRB No. 90, slip op. at 2 n. 11 (2024). In that case, the respondent, during its opening statement, characterized a specific recording as lacking a chain of custody but failed to state this specific ground for objection when the General Counsel later proffered it. The Board found that the respondent's failure to do so reasonably led the judge and the GC to believe respondent was satisfied that the chain of custody had been established.

Compare ***Werner v. Upjohn Co., Inc***., 628 F.2d 848, 853 (4th Cir. 1980) (specific ground for objection was not required where objecting party had filed a pre-trial motion in limine with supporting memoranda asking that the evidence be suppressed).

§ 16–107 FRE 107. Illustrative Aids

(a) Permitted Uses. The court may allow a party to present an illustrative aid to help the trier of fact understand the evidence or argument if the aid's utility in assisting comprehension is not substantially outweighed by the danger of unfair prejudice, confusing the issues, misleading the jury, undue delay, or wasting time.

. . .

(c) Record. When practicable, an illustrative aid used at trial must be entered into the record.

(**d) Summaries of Voluminous Materials Admitted as Evidence.** A summary, chart, or calculation admitted as evidence to prove the content of voluminous admissible evidence is governed by Rule 1006.

FRE 107 provides standards for the use of "illustrative aids." As explained in the 2024 Advisory Committee Notes, an illustrative aid is any presentation (e.g., drawings, photos, diagrams, video depictions, charts, graphs, and computer simulations) offered for the narrow purpose of assisting the trier of fact in understanding evidence or argument, rather than as substantive evidence or to demonstrate how an event occurred. The rule also distinguishes summaries used as an illustrative aid from summaries offered to prove the contents of voluminous admissible evidence, which continue to be governed by FRE 1006. See **§ 16–1006**, below.

§ 16–201 FRE 201. Judicial Notice of Adjudicative Facts

The following are examples where an ALJ or the Board took judicial notice.

The NLRB's own proceedings. *See* ***Starbucks***, 373 NLRB No. 135, slip op. at 30 n. 7 (2024) (Regional Director's Decision and Direction of Election in related representation proceeding).

Federal and state agency and court materials. See ***Starbucks***, 373 NLRB No. 135, slip op. at 29 n. 3 (respondent's annual report Form 10(k), with exhibits, filed with Securities and Exchange Commission); ***Longmont United Hospital***, 373 NLRB No. 97, slip op. at 10 n. 3 (2024) (respondent's federal court filing contesting the validity of charging party union's certification); ***Red Rock Casino Resort Spa***, 373 NLRB No. 67, slip op. at 74 (2024) (10(j) injunction requiring respondent to recognize and bargain with charging party union).

Other information on the internet. Courts have also taken judicial notice of publicly available social media posts, news articles, and other writings on websites when the parties do not dispute the authenticity of the documents… Cf. ***Int'l Assoc. of Machinists and Aerospace Workers, District Lodge No. 160***, 373 NLRB No. 39, slip op. at 1 n. 2 (2024) (refusing to take judicial notice of, and rejecting as uncorroborated hearsay, a news report about collective-bargaining negotiations offered for the truth of the facts reported).

§ 16–402.2 Evidence of Animus and Unlawful Motive

Events over 6 months before the alleged unlawful conduct (background evidence). It is well established that evidence of events occurring more than 6 months before the charge may be considered as background to shed light on a respondent's motivation for conduct within the Section 10(b) limitations period. See, e.g., ***Compañia Cervecera de Puerto Rico***, 373 NLRB No. 47, slip op. at 12–13 (2024).

§ 16–402.3 Evidence of Coercion

The Board applies an objective standard or test in evaluating alleged violations of Section 8(a)(1); specifically, whether the employer's conduct would tend to coerce a reasonable employee.

…

However, it is proper to consider the "surrounding circumstances" to determine whether "objectively reasonable employees *in the position of the [particular employees involved]* would be coerced." ***Russell Reid Waste Hauling & Disposal Service Co.***, 373 NLRB No. 51, slip op. at 3 (2024). See also ***Westwood Health Care Center***, 330 NLRB 935, 940 n. 17 (2000) (it is not improper to consider the "full context" in which the particular incident in question occurred by "taking into account events or statements that occurred before and after [the incident] that may throw light on its significance").

§ 16–402.5 Evidence Affecting Remedy

Identity of impacted employees. The Board in some circumstances has held that the identity of impacted employees can be determined at the compliance stage. See, e.g., ***Tec-Cast, Inc.***, 372 NLRB No. 90, slip op. at 1 n. 2 (2023) (identity of, and amounts owed to, employees impacted by an effects-bargaining violation); and ***Spike Enterprise, Inc***., above (number and identity of unfair labor practice strikers covered by the Board's remedial order).

Failure to introduce recording. The unexplained failure of a party to introduce an existing recording of an event into evidence (e.g. the meeting or conversation where a supervisor made an alleged unlawful threat) may support an adverse inference that it would not support the party's version of the event. See ***Gallup, Inc***., 349 NLRB 1213, 1299–1300 (2007) (drawing adverse inference against General Counsel).

§ 16–611.5 Failure to Call Witness: Adverse Inference

Current managers, supervisor, officers, or agents. The so-called "missing witness" rule is most often applied to a party's current managers, supervisors, officers, or agents. With respect to

employers, see, e.g., ***Starbucks Corp.***, 374 NLRB No. 8, slip op. at 5, 9 (2024) (making adverse inference against the employer for failing to call its current manager to testify).

Other persons who would favor the party. The rule has also been applied to other witnesses who would reasonably be expected to favor a party. See, e.g., ***Equinox Holding, Inc***., 364 NLRB 1519 n. 1 (2016) (adverse inference was warranted where employer failed to corroborate manager's hearsay testimony by calling the employees who allegedly reported the objectionable preelection conduct to him).

§ 16–613 FRE 613. Witness's Prior Statement

FRE 613 states:

…

(b) Extrinsic Evidence of a Prior Inconsistent Statement. Unless the court orders otherwise, extrinsic evidence of a witness's prior inconsistent statement may not be admitted until after the witness is given an opportunity to explain or deny the statement and an adverse party is given an opportunity to examine the witness about it. This subdivision (b) does not apply to an opposing party's statement under Rule 801(d)(2).

…

However, unless the judge orders otherwise, subsection (b) requires that the witness be given an opportunity to explain or deny the statement, and that the opposing party be afforded an opportunity to examine the witness about it, before extrinsic evidence of the inconsistent statement is admitted into evidence. As indicated in the Advisory Committee Notes to the 2024 rule amendments, the judge has discretion to delay the opportunity to explain or deny, or even dispense with the requirement altogether. Examples include where the failure to afford the prior opportunity was inadvertent and the witness may be afforded a subsequent opportunity, or where a prior opportunity was impossible because the statement was not discovered until after the witness testified.

§ 16–613.1 Jencks Statements

Limitations apply to copies in possession of others. A respondent likewise may not subpoena the affidavits from the witnesses themselves; indeed, the Board has held that an employer violates Section 8(a)(1) of the Act by serving employees with subpoenas seeking the affidavits and other related communications and documents they gave to the General Counsel. The Board considers such requests to be inherently coercive and unlawful. See ***Starbucks Corp.,*** 373 NLRB No. 101, slip op. at 6–7 (2024).

§ 16–801 FRE 801. Definitions; Exclusions from Hearsay

FRE 801 states [added text below]:

If a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party.

§ 16–801.3 Admission or Statement by Opposing Party

Statements by party's predecessor-in-interest. The final sentence in 801(d)(2) provides that, if a party's claim, defense, or potential liability is directly derived from a declarant or the declarant's principal, a statement that would be admissible against the declarant or the principal under this rule is also admissible against the party. As indicated in the Advisory Committee Notes to the 2024 rule amendments, this means that when a party stands in the shoes of a declarant or the declarant's principal— such as a successor whose potential liability is derived from the predecessor—hearsay statements made by the declarant or principal are admissible against the party.

§ 16–802.2 Double hearsay

Double hearsay is inadmissible unless both parts satisfy the requirements for admission under the Federal Rules or Board decisions.

…

Cf. ***Starbucks Corp***., 373 NLRB No. 105, slip op. at 1 n. 4 (2024) (purported "double hearsay" statements were actually a party admission not barred by the hearsay rule).

§ 16–804.1 Declarant Unavailable

To establish that a witness is unavailable to testify for medical reasons pursuant to FRE 804(d)(4), there must be "a clear showing that the [witness] is . . . so seriously ill that the taking of oral testimony posed a threat to the witness'[s] health." ***Sparks Restaurant***, 373 NLRB No. 129, slip op. at 1 n. 5 (2024) (internal quotation marks and citation omitted). In that case, the Board found that the ALJ did not abuse his discretion in finding an alleged discriminatee unavailable to testify by videoconference based on an in-camera review of a letter from the discriminatee's physician, despite the respondent's photographic evidence of the witness interacting with patrons and coworkers in the workplace. The Board found that the physician's letter was sufficient to establish unavailability, citing ***Finizie v. Principi***, 69 Fed. Appx. 571, 573–574 (3d Cir. 2003) (confidential medical affidavit may establish unavailability); and ***Bastani v. AFGE, AFL-CIO***, 70 F.4th 563, 569, 570 (D.C. Cir. 2023) (unavailable witness was not required to appear via videoconference). It also found that the photographs did not contradict the letter, as testifying in a hearing involved a "radically different environment," citing, e.g., ***U.S. v. Mallory***, 902 F.3d 584, 590–591 (6th Cir. 2018) (witness's limited public appearances were "hardly the pressure-filled hours [he] would likely endure in giving trial testimony").

§ 16–901.2 Audio and Video Recordings

Like other evidence, pursuant to FRE 901(b)(1), tape recordings may be authenticated by presenting testimony of a witness with knowledge that supports a finding that the recording is what the party claims it is. See ***Starbucks Corp***., 373 NLRB No. 90, slip op. at 2 (2024);

…

The following are some issues that have arisen with respect to recordings:

Incomplete/partial recording. The incompleteness of a recording will not necessarily render it inadmissible; it is the objecting party's burden to demonstrate that it is prejudiced by the absence of particular evidence in the recording. See ***Starbucks Corp.***, above, slip op. at 2–3 (upholding judge's admission of a recording that included only five minutes of a meeting where the opposing party failed to show that the missing portion contained exculpatory evidence not otherwise admitted through other sources); and ***Superior Emerald Park Landfill, LLC***, 340 NLRB 449, 452 (2003) (admitting incomplete recording and transcript of meeting where "no evidence was presented that the transcribed portions of the meeting left out any conversations that would have constituted [an] affirmative defense . . . [or] that any missing portion of the meeting involved statements that would materially affect the result in [the] case").

…

Edited recording. Any editing of the recording must be explained by someone with knowledge of the editing. See ***Medite of New Mexico, Inc.***, 314 NLRB 1145, 1146 n. 7 (1994) (excluding an edited videotape taken by a guard because the guard did not do the editing and could not describe what was edited), enfd. 72 F.3d 780, 787 (10th Cir. 1995). Compare ***Starbucks Corp***., above, slip op. at 2 (admitting a "cropped" recording of a meeting where witness testified that she cropped it to just the relevant five minutes because the full recording was too large to send by email, and that she later lost access to the full recording when her phone was accidentally damaged).

§ 16–901.4 Signatures/Union Authorization Cards

There are several alternative ways that union authorization cards and other hand-signed documents may be authenticated. They may be authenticated by the signers themselves; by a witness who observed the signing; or by the person who solicited the signatures and received them back, even if the solicitor did not actually observe the signing. See, with respect to authorization cards, ***Garten Trucking LC***, 373 NLRB No. 94, slip op. at 4 (2024).

§ 16–1004 FRE 1004. Admissibility of Other Evidence of Content

A party attempting to introduce secondary evidence to prove the content of an original must meet one of the FRE 1004's exceptions to the "best evidence" rule. Where a party claims that the original was "lost" or "destroyed" under subsection (a) of the rule, proof of loss typically involves testimony that a reasonable effort was undertaken to locate the original. Where a party claims the original was destroyed as part of a regular control program, such destruction (while technically intentional) will satisfy Rule 1004(a), in the absence of convincing evidence of bad faith. **Mueller & Kirkpatrick, 5 Federal Evidence § 10:27** (4th ed. Aug. 2023 Update).

§ 16–1006 FRE 1006. Summaries to Prove Content

FRE 1006 states:

(a) Summaries of Voluminous Materials Admissible as Evidence. The court may admit as evidence a summary, chart, or calculation offered to prove the content of voluminous admissible writings, recordings, or photographs that cannot be conveniently examined in court, whether or not they have been introduced into evidence.

(b) Procedures. The proponent must make the underlying originals or duplicates available for examination or copying, or both, by other parties at a reasonable time and place. And the court may order the proponent to produce them in court.

(c) Illustrative Aids Not Covered. A summary, chart, or calculation that functions only as an illustrative aid is governed by Rule 107.

Under FRE 1006, summaries of voluminous documents may be admitted as proof of the documents' contents. As indicated in the Advisory Committee Notes to the 2024 amendments to the rule, such summaries are admissible under subsection (a) regardless of whether the underlying documents have or have not been admitted, in whole or in part, into evidence. However, under subsection (b), the underlying documents must be made available to the other parties at a reasonable time and place.

In evaluating its admissibility and/or probative weight of such summaries, the judge should carefully consider the circumstances under which the summary was prepared and whether it reflects the author's partisan subjective view or interpretation of the underlying information. As stated in the Advisory Committee Notes, a summary must "pass the balancing test of Rule 403," and the probative value of a summary that is inaccurate or argumentative "may be substantially outweighed by the risk of unfair prejudice or confusion." See also ***Monfort of Colorado***, 298 NLRB 73, 82 n. 37 (1990), enforced in part 965 F.2d 1538 (10th Cir. 1992).