SUBSTANTIVE ADDITIONS TO THE 2026 NLRB ALJ BENCH BOOK

CHAPTER 3. PLEADINGS

§ 3–100 General Principles

Under Section 10(b) of the Act, the General Counsel cannot issue a complaint unless a charge has been filed…***Burnett Specialists v. Cowen***, 140 F.4th 686, 690 (5th Cir. 2025); ***IUOE, Loc. 39 v. NLRB***, 155 F.4th 1023, 1038 n. 3 (9th Cir. 2025).

§ 3–200 Complaint

United Nat. Foods, Inc. v. NLRB, 138 F.4th 937, 948–950 (5th Cir. 2025) (Acting General Counsel's decision to withdraw complaint, after respondent filed a motion for summary judgment but before the Board had taken any action on the motion, was an unreviewable act of prosecutorial discretion).

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

Vermont Info. Processing, Inc. v. NLRB, No. 24-1360, **—** F.4th **—**, 2026 WL 1470238 (D.C. Cir. May 26, 2026), where the complaint alleged that three employees were fired for engaging in concerted activities by "creating and disseminating a spreadsheet where employees could view and share salary information," and the ALJ found the three were unlawfully terminated for their instant messaging chats about the spreadsheet and about the termination of a coworker who was the spreadsheet's originator. In its decision, the Board clarified that "the relevant protected concerted activity that these employees engaged in and for which Respondent discharged them is their online chat communications about the salary spreadsheet, workplace conditions, and frustration of [their coworker's] recent discharge." ***Vermont Info. Processing Inc.***, 373 NLRB No. 131, slip op. at 1 n. 5 (2024). On appeal, respondent argued that the Board "impermissibly found a violation based on uncharged conduct." In denying enforcement regarding the three discharges, and remanding the matter back to the Board, the DC Circuit held that the ALJ's findings were appropriate, as they were closely connected to the complaint allegations, because the chats were inextricably linked to the employees' roles in creating and disseminating the spreadsheet. ***Vermont Info. Processing, Inc.***, 2026 WL 1470238, at *6. However, the DC Circuit held that the Board inappropriately further enlarged the relevant conduct to include online chat communications about workplace conditions, which "stretched the charged conduct beyond its breaking point," as "workplace conditions is a far reaching category that can encompass anything from salaries to cafeteria options to interpersonal dynamics." Id. at *7.

<u>Violations based on unalleged conduct</u>.

For cases finding violations based on unalleged conduct, see ***ExxonMobil Research & Engineering Co., Inc. v. NLRB***, 132 F.4th 337, 351 (5th Cir. 2025) (Board's finding a violation based upon a new theory met the *Pergament* two part standard as it stemmed from the same nucleus of operative facts as the ALJ's original finding and the matter was fully litigated).

§ 3–500 Withdrawal or Dismissal

Withdrawal of complaint. Under Section 102.18 of the Board's Rules, the Regional Director retains discretion to withdraw all or a portion of the complaint *sua sponte* at any time before the hearing, subject to review by the General Counsel but not by the Board or its ALJs…***Rieth-Riley Constr. Co. v. Kerwin*,** No. 24–1690, 2025 WL 1304812 at *3 (6th Cir. May 6, 2025) (district court properly dismissed lawsuit challenging the Regional Director's decision, before the hearing occurred, to withdraw certain complaint allegations, as "the Regional Director had the 'unreviewable discretion' to withdraw the complaint at that time.").

§ 3–600 Answer to Complaint

Late Answer. ***Jireh Plumbing, LLC**,* 374 NLRB No. 74, slip op. at 1–2 (2026) (Board grants default judgment as respondent's arguments did not constitute good cause for its failure to file a timely answer).

§ 3–620 Affirmative Defenses

Hiran Mgmt., Inc. v. NLRB, 157 F.4th 719, 724 (5th Cir. 2025) (affirmative defense raised for the first time in a posthearing brief is waived).

§ 3–720 Background Evidence

Evidence may be admitted concerning events outside the 10(b) period if the evidence is used only as background and not to prove a time-barred unfair labor practice…For example, evidence outside the 10(b) period may be admitted and considered in evaluating whether an employer had animus and an unlawful motive for disciplining an employee for union or protected activity…***Compañia Cervecera De Puerto Rico***, 373 NLRB No. 47, slip op. at 12–13 (2026).

CHAPTER 6. APPEARANCES AT HEARING

§ 6–620 Authority to Admonish or Reprimand Counsel

Section 102.177(b) of the Board's Rules also authorizes judges and the Board to "admonish or reprimand, after due notice, any person who engages in misconduct at a hearing"…***Space Expl. Techs. Corp. v. NLRB***, 151 F.4th 761, 775 (5th Cir. 2025).

CHAPTER 8. SUBPOENAS

§ 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. ***Kellermeyer Bergensons Services*, LLC,** 1-CA-341903, unpub. Board order issued Feb. 6, 2026 (2026 WL 575708) at 1, n. 2 (holding, with respect to investigatory subpoenas, that the respondent is not required to produce the same documents it already voluntarily provided to the General Counsel, but it must accurately describe the documents that were previously provided, identify to which

subpoena paragraph(s) they are responsive, state whether those documents constitute all the documents being subpoenaed, and provide all of the subpoenaed information).

§ 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), enf. denied **—** F.4th **—**, 2026 WL 1045720 (5th Cir. 2026).

§ 8–720 Failure to Produce Documents

Additional adverse inference unnecessary. See… ***Compañia Cervecera de Puerto Rico, Inc. v. NLRB***, 150 F.4th 601, 613 (D.C. Cir. 2025) (no requirement that the Board draw an adverse inference where "the party has otherwise presented sufficient evidence of violations").

§ 8–730 Failure to Preserve Evidence (Litigation Holds and Spoliation)

With respect to electronically stored information (ESI), FRCP 37(e), as amended in 2015, specifically states that where ESI is lost due to a party's failure to take reasonable steps to preserve it, and cannot be restored or replaced through additional discovery, the court may presume that the lost ESI was unfavorable to the party "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation"…See also ***Hoffer v. Tellone***, 128 F.4th 433 (2d Cir. 2025).

CHAPTER 9. SETTLEMENTS

§ 9–430 Informal and Non-Board Settlements

See also ***Permobil Inc.***, 374 NLRB No. 32 (2026) (rejecting non-Board settlement where General Counsel opposed it and agreement failed to provide a remedy to all of the employees who were subjected to an unlawful employment agreement).

§ 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. See, e.g., ***Village Plumbing and Heating NY, Inc.***, 374 NLRB No. 96 (2026) (denying the General Counsel's motion for default judgment because the parties' conflicting representations created a genuine issue of material fact as to whether a settlement agreement had been breached).

CHAPTER 10. MOTIONS AND SPECIAL APPEALS

§ 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.*, 13**–CA–305908, unpub. Board order issued March 25, 2026 (– WL –) (granting respondent's special appeal from ALJ's ruling denying respondent's request that hearing be conducted in person and finding no compelling circumstances for video hearing based on the number of witnesses who would have to travel, the nature of their testimony, and the fact that many of the issues could be litigated with documentary evidence).

CHAPTER 11. SEQUESTRATION OF WITNESSES

§ 11–210 Conferring with Counsel

Party witnesses. The judge likewise has discretion to instruct party witnesses not to confer with counsel during a short recess between direct and cross-examinations…***United States v. Garcia***, No. 24-11052, 2025 WL 286602, at *5–6 (11th Cir. 2025).

While a complete overnight conferral ban is improper, in ***Villarreal v. Texas***, 607 U.S. ----, 146 S.Ct. 756 (2026), the Supreme Court found proper a sequestration order that prohibited the lawyer for a defendant witness from "managing" the witness's testimony during an overnight recess. The Court noted that while a defendant has a constitutional right to consult with counsel during an overnight recess about trial matters (such as strategy, plea bargains, etc.), a sequestration order that prohibits consultation about the testimony itself ("testimony for its own sake" or "testimony qua testimony") is proper, as such discussions threaten to shape the witness's testimony and undermine the trial's search for truth.

§ 11–400 Who Should and Should Not Be Separated

Counsel who is also a witness.

Nord Hodges v. Albritton, No. 8:24-CV-879-CEH-UAM, 2025 WL 1531291, at *2 (M.D. Fla. May 28, 2025) (in bench trial, judge exempted plaintiff's lead counsel from sequestration, but ordered him to testify first in order to alleviate any risk that the testimony would be influenced by hearing other witnesses, and prohibited him from examining any witnesses who would testify to facts that potentially overlapped with his testimony).

§ 11–500 Violation of Sequestration Order

If disregard of a sequestration order is revealed before a witness is called to testify, under FRE 615 that witness may be barred from testifying…***United States v. Holmes***, 137 F.4th 734, 740 (8th Cir. 2025), reh'g denied, No. 24-1140, 2025 WL 1923662 (8th Cir. July 14, 2025) (where defendant relayed trial testimony to his father and provided him advice "as to what information he needed to convey at the stand," court did not abuse its discretion by excluding father's testimony to remedy the sequestration order violation).

CHAPTER 12. THE HEARING RECORD

§ 12–400 Taking Testimony by Videoconference

Zamora v. Ljubica Contractors LLC, No. 18-CV-419-VSB, 2025 WL 2494271 (S.D.N.Y. Aug. 29, 2025) (witness's "inability to lawfully enter the United States constitutes good cause in a compelling circumstance.").

§ 12–500 Remote Hearings by Videoconference During the COVID-19 Pandemic

On May 11, 2023, the U.S. Department of Health and Human Services ended the COVID-19 Public Health Emergency. ***Allan v. Minnesota Dep't of Hum. Servs.***, 127 F.4th 717, 719 (8th Cir. 2025), cert. denied, 146 S. Ct. 94 (2025). The Board has made it clear that the COVID-19 pandemic "no longer constitutes compelling circumstances to justify holding fully remote hearings." ***Starbucks Corp.***, 13-CA-305908, unpub. Board order issued March 25, 2026.

And, in ***Starbucks Corp.***, 13-CA-305908, above, after the Region had scheduled a video hearing, respondent appealed the ALJ's denial of its motion for an in-person hearing. The Board found that the judge abused his discretion by finding that a video hearing was appropriate based upon the number of witnesses who needed to travel, the nature of their testimony, the issues in the case, and the belief that much of the case could be litigated by documentary evidence. Because the scheduled hearing date had passed, the Board remanded the matter to the Region "to set a new hearing date and arrange for an in-person hearing."

CHAPTER 13. BOARD PRECEDENT AND RELITIGATION OF ISSUES

§ 13–600 Res Judicata and Collateral Estoppel

General Counsel's dismissal of a charge.

Dodd v. Int'l Longshoremen's Ass'n Loc. 1475, No. 24-13050, 2025 WL 2328439, at *4–6 (11th Cir. Aug. 13, 2025) (dismissal of charge by Regional Director, and the General Counsel's denying the appeal of the dismissal, cannot form the basis of collateral estoppel in duty of fair representation lawsuit).

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 approved by the Ninth Circuit in ***Macy's, Inc. v. NLRB***, 155 F.4th 1023 (9th Cir. 2025) (holding that the Board's revision of its definition of "make-whole" relief to expressly include direct and foreseeable pecuniary harms suffered by affected employees furthered the policy of the Act and was not an abuse of discretion), rehearing en banc denied therein, cert. denied --- S.Ct. ----, 2026 WL 1717973 (Mem) (June 15, 2026). In

contrast, the *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). It likewise was rejected by the Sixth Circuit in ***NLRB v. Starbucks Corp***., 159 F.4th 155 (6th Cir. 2025) (same). And it was rejected by the Fifth Circuit in ***Hiran Management, Inc. v. NLRB***, 157 F.4th 719 (5th Cir. 2025) (same). Nonetheless, 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.

Unemployment compensation.

Red Roof Plus San Antonio Downtown-Riverwalk, 374 NLRB No. 98, slip op. at 1 n. 2 (2026) (rejecting respondent's argument that backpay award to discriminatee should have been reduced by direct payments it made to her to receive a reduced Texas state unemployment insurance tax rate).

CHAPTER 16. EVIDENCE [BY FRE RULE NUMBER]

§ 16–100 Federal Rules Apply "So Far as Practicable"

Appellate courts likewise will review an ALJ's evidentiary rulings only for abuse of discretion and will require prejudice to set them aside. See e.g., ***CenturyTel of Montana, Inc. v. NLRB***, 164 F.4th 110, 118 (D.C. Cir. 2026)…

§ 16–103.1 Timing of Objections

In ***Culp v. Remington of Montrose Golf Club, LLC***, 133 F.4th 968 (10th Cir. 2025), a Title VII sexual harassment and retaliation case, the Tenth Circuit discussed the interplay between FRE 103(a)'s timeliness requirement and trial court authority over evidentiary objections. The court emphasized that to preserve an objection, a party must "timely object[] or move[] to strike" with specificity—but this case also illustrates that the consequence of an untimely or insufficiently specific objection is a shift to plain error review on appeal, not a categorical bar to the trial court's own exercise of discretion.

Some circuits recognize a co-party preservation doctrine finding that a proper objection or offer of proof by one party (sometimes referred to as a "vicarious objection") will act to preserve the question for review on appeal when raised by a co-party aligned in interest. See, e.g., ***United States v. McGuire***, 163 F.4th 882, 896 (5th Cir. 2025) ("It is sufficient, in a case with multiple defendants, for one party to object on behalf of all.").

§ 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 ground for the objection, unless it is apparent from the context. ***United States v. Pires***, 138 F.4th 649, 665 (1st Cir. 2025) ("a 'lack of specificity bars the party aggrieved by the admission of the evidence from raising more particularized points for the first time on appeal'") (citation omitted).

But see ***United States v. Pires***, above at 664 (objection not preserved by motion in limine where trial judge's ruling on motion is "preliminary, conditional or 'tentative,'" and thereby "invites" the offer of the evidence at trial).

§ 16–402.1 Parol Evidence

Evidence outside or extrinsic to an agreement is inadmissible to vary or contradict its clear and unambiguous terms…***Xerox Corp. v. Local 14A, Workers United***, 128 F.4th 93, 102 (2d Cir. 2025) (CBA "is not ambiguous unless, after applying established rules of interpretation, it remains reasonably susceptible to at least two reasonable but conflicting meanings");

§ 16–402.4 Evidence of Presettlement Conduct

Under well-established Board law, "in general, evidence involved in a settled case may properly be considered as background evidence in determining the motive or objective of a respondent in activities occurring either before or after the settlement."…***Compañia Cervecera de Puerto Rico v. NLRB***, 150 F.4th 601, 612 (D.C. Cir. 2025) (finding Board properly considered employer's presettlement unilateral schedule change as background evidence of union animus), enforcing 373 NLRB No. 47, slip op. at 12–13 (2024).

§ 16–402.5 Evidence Affecting Remedy

<u>Discriminatee misconduct/after-acquired evidence</u>.

Misconduct before discharge or refusal to hire.

Miller Plastic Products Inc v. NLRB, 141 F.4th 492 (3d Cir. 2025) (finding that judge did not err by precluding respondent from eliciting after-acquired evidence at merits hearing).

<u>Undocumented workers</u>.

Note that the ***Hoffman Plastic*** decision has been limited by several courts to preclude backpay awards for work not performed, while not impacting the award of damages, such as pension and welfare benefit fund contributions, for work actually performed. See, e.g., <u>***N. Atl. Carpenters Cent. Collection Agency v. Bos. Carpentry LLC***</u>, 766 F.Supp.3d 291, 294 (D. Mass. 2025) (permitting recovery of contested contributions to health and welfare funds for hours of work already performed).

§ 16–704 Opinion on an Ultimate Issue

In the employment discrimination context, federal courts distinguish between permissible opinions about an employer's discriminatory motive and impermissible legal conclusions such as directly opining that a defendant "violated anti-discrimination laws." See ***Houston v. Smith***, No. 24-CV-00934, 2025 WL 2662960, slip op. at 7 (D. Colo. Sept. 17, 2025) (citing cases).

Rule 704 does not override Rule 702's gatekeeping requirements, and ultimate-issue testimony that does not otherwise satisfy Rule 702 requirements for expert testimony remains excludable. ***Houston v. Smith***, above, slip op. at 6.

§ 16–803.2 Excited Utterance

The rationale underlying the exception is that "excitement suspends the declarant's powers of reflection and fabrication, consequently minimizing the possibility that utterance will be influenced by self-interest and therefore rendered unreliable." ***United States v. Medina***, 155 F.4th 11, 18 (1st Cir. 2025).

§ 16–803.6 Regularly Conducted Activity: Business Records

These foundational requirements may be met by "a custodian or another qualified witness"; thus, the witness is only required to be familiar with the record and understand the system used to prepare it; they do not need to be the person who created or maintained the record. See, e.g., ***Metzinger v. United States***, 178 Fed. Cl. 781, 787 (2025).

Personnel documents…A supervisor's ad hoc "desk notes" regarding an employee may fail to qualify as business records, particularly where they were not created with the kind of regularity or routine which gives business records their inherent reliability. See, e.g., ***Murphy v. Caterpillar Inc.***, 140 F.4th 900 (7th Cir. 2025) (supervisor's personal "desk notes" inadmissible where they were unaccompanied by testimony from supervisor that they were drafted in the ordinary course of business, there was no evidence that supervisor regularly took similar notes on other employees, that they were relied upon by anyone else or that he was under a duty to record the notes accurately).

Electronically stored information.

United States v. Conde, 134 F.4th 82 (2d Cir. 2025) (finding electronically stored data qualifies as a "record" under Rules 101(b)(4) and 803(6) even where there are no "conventional words or figures written on paper"). Under the business records exception, in the context of electronically stored data, "the 'business record' is the datum itself, not the format in which it is printed or displayed." ***United States v. Mhana***, No. 24-4488, 2026 WL 1291534 (4th Cir. May 12, 2026).

See also ***Metzinger v. United States***, above at 788 (admitting under 803(6) payroll compilation records regularly made by employer submitted with a declaration by a payroll supervisor).

§ 16–901.2 Audio and Video Recordings

Defects in Recording. Recordings may be of less than perfect quality, with some words or passages being garbled or inaudible. However, unless the defects are so substantial that they render the entire recording untrustworthy, any defects go to weight not admissibility. See, e.g., ***Thomas v. Touchstone Behavioral Health***, 774 F.Supp.3d 1179, 1199–1200 (D. Ariz. 2025) (11 instances of "indiscernible" audio contained within 46 pages of transcripts "not so substantial that the audio recordings, or the transcripts, are untrustworthy").

§ 16–901.3 Electronically Stored Information (ESI)

See, e.g., ***United States v. Allen***, 159 F.4th 625, 634 (9th Cir. 2025) (content of social media postings authenticated by Facebook profile that contained photograph matching defendant's appearance, as well as his birthday and cell phone number); ***United States v. Midder***, 139 F.4th 649 (8th Cir. 2025) (social media accounts authenticated as defendant's where data extracted from phone had stored autofill information with defendant's name, address and credit

card, as well as autofill contact information for defendant's online persona, the Facebook profile of which matched defendant's birth date).

So-called "strings" of electronic communications, such as emails, texts and direct messages, present special authentication problems. FRE 901(a) requires that, at a minimum, the proponent of such evidence must demonstrate that the proffered string is what it purports to be—a complete and unaltered representation of the exchange. Typically, this is accomplished by an authenticating witness testifying that the emails completely and accurately represent the exchange in question. However, courts will reject message strings that appear on their face to be not "sufficiently complete, sequential, and accurate." Thus, a string with identifiable gaps (e.g., one that opens mid-thought or that forensic analysis shows is missing sequential messages) may fail to satisfy this standard as a representation of a full conversation. See, e.g., ***Arnold v. Huntington Ingalls Inc***., No. 2:22-CV-384, 2025 WL 1540946, slip op. at *3 (E.D. Va. May 30, 2025) (in employment discrimination case, rejecting text message string that opened with message "I[']m not telling anyone").

§ 16–902.2 Electronically Stored Information (ESI)

Sworn certification pursuant to Rule 902(11) by a social media platform's record custodian may satisfy the requirements for self-authentication of online postings as business records of the platform. See, e.g., ***United States v. Spila***, 136 F.4th 1296, 1307–1308 (11th Cir. 2025) (upholding admission of Google-certified emails as self-authenticating business records under FRE 902(11)). However, citing the potential for social media accounts to be falsified or accessed by an impostor, courts more often find that a certification from a social media platform alone is insufficient to establish authenticity, instead requiring that the substantive content of such postings be separately authenticated via circumstantial evidence (under Rule 901(a)) linking a particular person to the social media account at issue. ***United States v. Allen***, 159 F.4th 625, 633–634 (9th Cir. 2025) (Rule 902(11)/803(6) certification self-authenticated only "technical" aspects of defendant's Facebook records; "substantive attributes" of the records separately authenticated through circumstantial evidence). See also ***United States v. Azure***, 164 F.4th 688 (8th Cir. 2026) (district court properly admitted Facebook posts based on circumstantial evidence linking defendant to Facebook account).

§ 16–1003 Admissibility of Duplicates

In the employment context, FRE 1003 has been applied to a *qui tam* plaintiff's audio recordings of workplace meetings. In ***United States ex rel. Thomas v. Touchstone Behavioral Health***, 774 F.Supp.3d 1179, 1200 (D. Ariz. 2025), the plaintiff had recorded meetings on his company-issued iPhone and the original recordings were lost when he returned the company device to his employer. The court admitted under FRE 1003 "clippings" of the recordings made by the plaintiff (which had been edited for file size at the beginning and end of each recording), based on the plaintiff's declaration attesting to the recordings' accuracy and the lack of bad faith in the loss of the originals.