10250–10452 FORMAL PROCEEDINGS

10250 Further Investigation

Prior to issuance of complaint, any actions specified by the Regional Office determination should be carried out. In the absence of contrary instructions, precomplaint re-interviews of witnesses are not necessary. An exception may be made where the case depends entirely on the credibility of one or more witnesses whose testimony is contradicted by other witnesses. In such situations, re-interview of such witnesses with respect to factual conflicts may be prudent. Sec. 10064.

10252 Settlement Attempts

The Board agent assigned to make initial settlement efforts should notify the charged party and the charging party of the Regional Office determination before complaint. The Board agent should encourage voluntary agreement and should offer to assist in arriving at a satisfactory settlement that will effectuate the purposes of the Act. Even if initially unsuccessful, the Regional Office should pursue further settlement efforts consistent with the policies and procedures in Sec. 10126.2. With respect to the type of settlement to be sought, see Sec. 10124.

10254 Cases Involving Monetary Remedy

After Regional Office determination to issue complaint, the Regional Office should ensure that the file contains a list of the names, addresses, and social security numbers of the alleged discriminatees. In preparing this list, information previously gathered during the course of the investigation will be vital.

At the time complaint issues, a copy of the complaint, along with the list of alleged discriminatees' information, should be sent to the compliance officer who is responsible for furnishing each alleged discriminatee with the following NLRB forms:

NLRB-4288 Information on Backpay for Employees

NLRB-4685 Notification of Change of Address

NLRB-5224 Claimant Expenses and Search for Work Report

NLRB-5230 Interim Earnings Report

Each alleged discriminatee should be asked to fill in Form NLRB-5224 and return it to the compliance officer. The compliance officer must make certain that such forms are received from each alleged discriminatee and placed in the case file for future use. Additionally, the compliance officer should request formally at this time that each alleged

discriminatee maintain records of interim earnings/expenses and search for work and submit that information to the compliance officer on a regular basis. The compliance officer is responsible for receiving this information from each alleged discriminatee and for placing the information in the case file for future use.

10256 Administrative Considerations

In the scheduling of unfair labor practice hearings, the Regional Office should consider a number of factors including those discussed below.

10256.1 Procurement of Hearing Date

The Regional Office should obtain hearing dates from the appropriate office of the Division of Judges, noting the Impact Analysis category of the case. In seeking hearing dates, the Region should consider the Impact Analysis category of the case to be heard and should attempt to space the trial dates to allow a single judge to handle two or more trials. For additional considerations concerning administrative matters related to trials, see OM 98-75.

Some Regional Offices may choose to set several cases for hearing on a "calendar call" basis, i.e., at the same place, date, and hour. This is generally feasible where the cases are ready for hearing at or about the same time, where they are to be tried in the same area and where each will probably not consume more than 4 days of hearing. The request to the Division of Judges should specify that there will be a calendar call and should give the probable duration of each case. The parties in each case should be informed that this is a calendar call.

10256.2 Estimated Length of Hearing

Concurrent with the request for hearing date, the Regional Office must submit to the Division of Judges an estimate of the length of hearing. Estimates given to the Division of Judges should not merely be based on a cursory examination of the pleadings. Rather, Regional Offices should strive for accurate estimates, based on how many witnesses will be called and the estimated length of their testimony and cross-examination. Likewise, trial attorneys should discuss this matter with respondents' attorneys during initial pretrial conversations. Regional Offices should advise the Division of Judges of any change in the estimate as soon as possible.

If the Regional Office is unable to secure such detailed information from the respondent, in making its estimate the Regional Office's experience with a particular counsel and the number and nature of subpoenas that have been requested by respondent could help shape the Regional Office's estimate.

10256.3 Hearing Date for Summary Judgment Cases

Whenever a Motion for Summary Judgment is filed in a case scheduled for hearing before an Administrative Law Judge, the Regional Office should request the Division of Judges to withdraw the hearing date from its calendar.

10256.4 Hearing Space

Whenever possible, the Regional Office hearing room should be used. When hearings are held in the Regional Office, the hearing rooms and judge's chambers should be equipped with at least the following items:

Regional Hearing Rooms

- Judge's bench and chair
- U.S. Flag
- NLRB seal
- Container with water and paper cups

Judge's Chambers

- Desk and chair
- Coat rack or hook
- Telephone and telephone directories

If the Regional Office does not have a designated judge's chambers, a room should, if feasible, be made available with these accouterments.

When hearings are held outside the Regional Office, they should, to the extent possible, be held in Federal, State, or municipal courtrooms. Efforts should be made to obtain the most properly equipped and maintained facilities, thereby contributing to the formality and dignity of the proceedings.

If, however, space proves inadequate or the accommodations are poor, the trial attorney should notify the official responsible for securing hearing rooms and, if possible, seek the location and availability of more suitable hearing space.

At the hearing, the conduct of the parties should be dignified, both on and off the record. All participants should treat building property with appropriate care. Special effort should be made to prevent incidents that might jeopardize future use of courtrooms or other space secured for the hearing. Thus, all building rules unique to that facility must be observed. Moreover, smoking should not be permitted while the hearing is in session.

10256.5 Division of Judges' e-Room

After securing a hearing date from the Division of Judges, a Regional Office should place the relevant case documents, including complaints, answers, underlying charge(s) and related documents, and a Litigation Participation Notification sheet into an e-Room database which is accessible by the Division of Judges, Records Management,

and Operations. See OM Memo 07-48. All such documents received in paper form must be scanned into electronic form and all documents must be named in accordance with the standardized storage and naming convention protocols. See OM Memos 05-62 and 08-33.

10260-10283 THE COMPLAINT AND MOTION FOR SUMMARY JUDGMENT

10260 Generally

Issuance of a complaint follows a determination on behalf of the General Counsel that formal proceedings on certain matters alleged in the charge should be instituted. A complaint must be well founded in all respects since it constitutes the exercise of the General Counsel's final authority. Sec. 3(d) of the Act.

The preparation of the complaint begins, as a practical matter, after Regional Office determination to issue complaint, absent settlement. Sec. 10126.2. Ideally, the complaint should normally be ready for issuance within a few days of the decision to issue. The final draft should be carefully reviewed before being signed by the Regional Director. Generally, the likelihood of settlement, the nature of the allegations and other circumstances will determine the timing of complaint issuance. However, complaints alleging violations of Sections 8(b)(4)(A), (B), or (C), 8(b)(7), 8(e), or 8(b)(4)(D), which involve 10(1) injunctive relief, should be issued promptly, normally within 5 days of the date on which such injunctive relief is first sought. Sec. 102.96, Rules and Regulations.

The form, contents, and service of complaint and related matters are discussed in Secs. 10262–10270.

10262 Complaint Drafter's Responsibility

The Board agent assigned to draft the complaint must carefully review the file and the Regional Office determination document to ensure that the decision is fully supported by the evidence in the file. In addition, the Board agent must carefully draft the complaint to incorporate necessary pleadings to support the Regional Office's determination, including any special affirmative remedies. The Board agent should bring to the attention of supervision any concerns about the scope of the pleadings.

10264 Content of Complaint

10264.1 Conformity of Charges and Complaints

Critical variances between the allegations of the charge and the allegations of the complaint will require appropriate amendments. Normally, the complaint should conform to all allegations of the last amended charge that have not been disposed of by other means. Although occasionally the complaint may have to be broader than the charge, the Regional Office should normally seek an amended charge to cover all complaint allegations, including discrete categories of independent 8(a)(1) violations. In any event, the charge must be broad enough, as a matter of law, to support the allegations of the complaint. Sec. 10062.5.

10264.2 Particularity of Complaint

The allegations of the complaint should be sufficiently detailed to enable the parties to understand the offenses charged and the issues to be met. The complaint should be sufficiently specific to defend against a Motion for a Bill of Particulars. Sec. 10292.1. For example:

- An 8(a)(1) or 8(b)(1)(A) allegation should specify the names of offending supervisors or union agents, with the dates and locations of each incident.

- The location of each incident should be described as specifically as possible, consistent with the need to protect the identity of the witnesses.

- The names of the alleged discriminatees and dates of the underlying acts should be set forth.

- The complaint allegations should set forth a general legal description of the type of alleged violations rather than attempting to quote, for instance, exact language used in an allegedly unlawful statement.

- Complaint allegations should sufficiently set forth separate and alternative theories of a violation. See OM Memo 07-84.

However, certain matters need not appear in the complaint, either because of the nature of the issue or because the Regional Office lacks specific knowledge. For example:

- Where the names of certain alleged discriminatees are unknown at the time of complaint issuance, they may be described as "others presently unknown to the undersigned." (Of course, whenever the names become known, they should be added by amendment.)

- Names of employees alleged to be the objects of 8(a)(1) or 8(b)(1)(A) conduct who are not entitled to specific individual relief should not appear in the complaint.

- Conduct relied upon as background material to which no unfair labor practice finding will be sought should not be alleged.

Careful drafting of the complaint or amendment, when such becomes necessary in the interest of accuracy or clarification, avoids many problems during trial and time-consuming briefs and arguments. The failure to properly draft or amend complaints can result in the loss of substantive rights. *McKenzie Engineering Co.*, 326 NLRB 473

(1998); *NLRB v. H. P. Townsend Mfg. Co*., 101 F.3d 292 (2d Cir. 1996), denying enf. 317 NLRB 1169 (1995).

10264.3 Correct Respondent(s)

The legally correct name of the respondent(s) must be used in the charge and complaint. Accordingly, Regional Offices should be alert to the circumstances described below to ensure that all appropriate respondents are named.

(a) *Derivative Liability:* Whenever the Region learns that unnamed parties (such as an alter ego, successor, individual, or trustee in bankruptcy) should be alleged in the complaint as derivatively liable for remedying the alleged unfair labor practices, an amendment to the charge should be sought to reflect derivative liability and the complaint should so allege. Secs. 10054.2(c) and 10062 and Compliance Manual, Sec. 10596.

(b) *Sole Proprietorships and Partnerships:* All complaints issued against sole proprietorships or partnerships must include in the caption and in the jurisdictional pleadings all responsible individuals. (For example, in the case of a sole proprietorship, John C. Jones, d/b/a Jones Plumbing, or, in the case of a partnership, John C. Jones and Brendan L. Jones, d/b/a Jones Plumbing.) Additionally, the Regional Office should ensure that Board Orders include the correct caption, in full, and that the "order" section specify by name the individual owners who are personally liable for compliance. Where recommended orders do not fully and accurately set forth all responsible individuals, a motion should be filed with the Administrative Law Judge for the necessary corrections. Likewise, an appropriate motion should be made to the Board if its Order presents the same omission.

(c) *Labor Organizations:* In view of the wide variety of structural relationships within labor organizations, the Regional Office should ensure that the proper labor organization is named. Thus, it may be necessary to distinguish between internationals, districts, locals, district councils, and/or joint ventures.

10264.4 Additional Parties

In drafting complaints, the Regional Office should be aware of the following circumstances in which it may be necessary to name additional parties in the caption of the complaint and serve such parties with all formal documents:

(a) *Parties in Interest:* Where the remedy sought would affect an entity not otherwise set forth in the complaint, that entity should be named as a party in interest. Examples include:

- A party to a collective-bargaining agreement
- A party to a subcontract
- A party to an allegedly unlawful bargaining relationship
- An allegedly assisted or dominated labor organization or a labor organization involved in a jurisdictional dispute

(b) *Necessary Parties in CB Cases:* In the event a remedy is sought against an employer seeking reinstatement of an employee in the context of a CB complaint where no charge is filed against the employer, the employer must be named a party in interest and a prayer for remedial relief requesting reinstatement must be set forth in the complaint. *Teamsters Local 227 (American Bakeries)*, 236 NLRB 656 (1978).

10264.5 Naming Attorneys in the Complaint

Clearance from the Division of Operations-Management must be sought before naming an attorney in a complaint as a party respondent, an agent of the respondent in general, an agent of the respondent in the commission of unfair labor practices, or for any other purpose. See Sec. 11752.

10266 Remedies and Circumstances Pled in Complaint

10266.1 Specific Remedies

When the remedy sought is in addition to that traditionally granted for the violations alleged, the complaint should contain a separate request for specific remedial relief in order to provide respondent adequate notice. See Secs. 10131, 10407.1, and 10410. Such a request should specifically reserve the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy.

10266.2 Strike Situations

In cases involving an unfair labor practice accompanied by a strike allegedly in protest thereof, the Regional Office should determine the nature of the strike. If the evidence supports a finding of an unfair labor practice strike, the Regional Office should allege such status in the complaint and seek an open-ended order requiring the reinstatement, on application, of all qualified striking employees.

Notwithstanding the above, the Regional Director has discretion not to plead and litigate the nature of the strike in a test of certification case where summary judgment is otherwise appropriate. Sec. 10282.1.

10266.3 Unlawful Fees, Dues, or Assessments

In cases where initiation fees, dues, or assessments are alleged to have been unlawfully collected, the complaint should describe the specific contract, arrangement, or practice by which the collections were made. An employer or union allegedly involved in such collection, but not named as a respondent, should be named as a party in interest in the complaint.

10266.4 Electronic Notice Posting

In certain cases, it may be appropriate to seek electronic notice posting in addition to traditional posting where the charged party customarily communicates with its employees or members electronically and/or where a charged party utilized its e-mail or intranet system in committing an unfair labor practice. OM Memo 06-82 and Sec. 10132.4(b).

10266.5 First Contract Bargaining Cases

In order to directly and effectively address the serious consequences of bad-faith bargaining and other violations during first contract negotiations and to restore the pre-violation conditions and relative positions of the parties, Regional Offices should consult GC Memos 06-05 and 07-08 and Sec. 10131.4 for remedies which should be sought and specifically pled where appropriate.

10266.6 Compound Interest on Board Monetary Remedies

In order to pursue the General Counsel's position that the Board should adopt a policy that incorporating quarterly compound interest on backpay and other monetary awards is necessary to fulfill the Act's remedial provisions of "make whole" relief, Regional Offices should follow the procedures set forth in GC Memo 07-07 in all future cases in which a monetary award is sought.

Thus, Regional Offices should plead a remedy of quarterly compounded interest in all such complaints and incorporate the model arguments in post-hearing briefs to the Administrative Law Judge and to the Board.

10266.7 Consolidating Compliance Issues

In appropriate circumstances, when consolidation will facilitate full resolution of a dispute, the Regional Director may consolidate compliance proceedings with underlying unfair labor practice proceedings. See Sec. 102.54(b) of the Board's Rules and Regulations and Secs. 10508.3 and 10646.3 of the Compliance Manual.

10268 Form and Service of Complaint

10268.1 Form of Complaint

The complaint is a formal document issued for the General Counsel by the Regional Director. Bearing the case caption, it sets forth the facts underlying the assertion of jurisdiction and the facts relating to the alleged violations by the respondent(s). The National Labor Relations Board Pleadings Manual-Complaint Forms, provides guidance in drafting complaints.

Where appropriate the complaint should contain a prayer for relief. Indeed, the complaint should set forth the requested remedy whenever any other than a routine remedy is sought. Where the Regional Office's determination of the need for a special remedy arises only after issuance of complaint, the respondent should receive prompt notification and the complaint should be amended.

10268.2 Notice of Hearing and Answer Requirement

The Notice of Hearing and answer requirement are set forth at the end of the complaint. Generally, the date of the hearing is set forth in the Notice of Hearing. After the last numbered allegation, and any prayer for a special remedy, will appear the following:

NOTICE OF HEARING

PLEASE TAKE NOTICE THAT on [date**], 20__, at [**hour and place**] and on consecutive days thereafter until concluded, a hearing will be conducted before an Administrative Law Judge of the National Labor Relations Board. At the hearing, Respondent and any other party to this proceeding have the right to appear and present testimony regarding the allegations in this [**consolidated**] complaint. The procedures to be followed at the hearing are described in the attached Form NLRB-4668. The procedure to request a postponement of the hearing is described in the attached Form NLRB-4338.**

ANSWER REQUIREMENT

Respondent is notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, it must file an answer to the [consolidated**] complaint. The answer must be received by this office on or before [**set forth date 14 days from issuance, unless that date is a holiday**]. Respondent should file an original and four copies of the answer with this office and serve a copy of the answer on each of the other parties. The answer may <u>not</u> be filed by facsimile transmission. If no answer is filed, the Board may find, pursuant to a Motion for Summary Judgment, that the allegations in the [**consolidated**] complaint are true.**

Following issuance of the Complaint and Notice of Hearing, any scheduling changes should be set forth in a separate Order Rescheduling Hearing.

If the Regional Office anticipates it will file a Motion for Summary Judgment, the Complaint and Notice of Hearing, should set forth that a hearing, if necessary, will be conducted at a time and date to be determined in the future.

10268.3 Attachments and Related Instructions

Copies of the charge or amended charges should not be attached to the complaint since the facts of filing and of service are recited in the complaint. One copy of Form NLRB-4668 should be attached to each copy of the Complaint and Notice of Hearing served on the parties.

Orders consolidating cases may be separately issued or, with appropriate change of title, may be incorporated into the Complaint and Notice of Hearing.

Accompanying the Complaint and original Notice of Hearing, but not as an attachment thereto, should be Form NLRB-4338, that gives (a) notice that it is still possible to settle the matter by agreement; (b) instructions for requesting postponements (Sec. 10294); and (c) names and addresses of all parties served.

10268.4 Service of Complaint

The Complaint and Notice of Hearing should be served by certified mail, as soon as possible prior to the hearing but, in any case, at least 14 days before the date set for hearing. Secs. 102.15 and 102.113(a), Rules and Regulations.

Before complaint issues, the Regional Office should prepare the Hearing and Service Sheet, Form NLRB-857, which should list the names and addresses of all persons to be served. The Regional Office is responsible for the accuracy of the list which must include the representatives or attorneys of represented parties. Sec. 10058.

The Regional Office should serve the complaint on respondent and all additional parties as set forth in Secs. 10264.3 and 10264.4. In addition, the Regional Office may serve the complaint on any other entity which may have a relationship to the dispute underlying the proceedings (e.g., persons involved in a 8(b)(4)(A) case other than the respondent and the charging party).

10270 Postcomplaint Action

After issuance of complaint, the trial attorney, with appropriate supervision, will be responsible for:

- Continuation of settlement efforts
- Preparation of the General Counsel's pretrial motions and any opposition to the pretrial motions of other parties
- Preparation of the case for trial
- Trial of the case as the representative of the General Counsel
- Presenting oral argument to the Administrative Law Judge where appropriate

- Preparation and filing of a brief with the Administrative Law Judge where appropriate and

- Filing with the Board exceptions to and/or a brief in support of the Administrative Law Judge's decision, where appropriate

The trial attorney should be aware of and call to the attention of the Regional Office any circumstances that might have an effect on the case (e.g., the unavailability of witnesses or the discovery of new evidence or of legal theories not previously considered). If new developments warrant, the trial attorney should initiate appropriate Regional Office action, through established office procedures.

10274 Amendments to Complaint

A complaint may be amended at any time prior to issuance of an order by the Board. Sec. 102.17, Rules and Regulations.

10274.1 Prehearing

Prior to the opening of the hearing, the Regional Director may amend the complaint. The new document should constitute an "amendment to" complaint, unless the amendment changes are extensive in scope, in which case an "amended complaint" should set forth all allegations. Where appropriate (e.g., where the opening of the hearing is imminent and no party will be prejudiced thereby), the parties may be served with notice that at the hearing a motion to amend the complaint will be made. The notice should contain details of the contemplated motion. In addition, the Region should promptly advise respondent of the intention to move to amend the complaint at the hearing.

With respect to continuances necessitated by prehearing amendments, see Sec. 10294.

10274.2 At Hearing

During the hearing, a complaint may be amended on motion made to and granted by the Administrative Law Judge. Unlike prehearing amended complaints, which must be in writing and signed by the Regional Director, a motion for an "amendment to" complaint may be written or stated orally on the record. Counsel for the General Counsel may move to admit the amendment to complaint at hearing either orally or in writing. In determining whether to move to amend a complaint at the hearing, one factor to consider is whether a continuance will likely be required. Secs. 10406 and 10406.2.

(a) *Strike Situations:* The nature of a strike has significance for remedial issues. Accordingly, where the Regional Office has determined that a strike was an unfair labor practice strike, counsel for the General Counsel must move to amend the complaint by the inclusion of relevant allegations. The amendment may be either during the hearing or after its close. If the Administrative Law Judge denies the motion, special permission to

appeal to the Board should be considered, rather than filing an exception to the ALJ's decision. Sec. 10404.

(b) *Based on Amended Charge:* If an attempt to amend a complaint is based to any extent on an amended charge filed at a hearing, a copy of the amended charge should be served on each party, the original and one copy should be introduced into the record and, if not otherwise docketed, copies forwarded to the Regional Office for docketing.

10274.3 After Hearing

Prior to issuance of decision by the Administrative Law Judge, any amendment should be submitted to the ALJ, in writing, as part of a motion to amend. After issuance of the ALJ's decision, any motion to amend should be submitted to the Board.

10274.4 Parties Derivatively Liable for Remedy

When events subsequent to the issuance of complaint disclose the existence of an alter ego, successor, individual, trustee in bankruptcy, or other party which should be alleged as derivatively liable for remedying the alleged unfair labor practices, the complaint (and charge where appropriate) should be amended to allege such derivative liability. See Secs. 10054.2(c), 10062, and 10264.3(a) and Compliance Manual, Sec. 10596. Where a sole proprietorship or partnership is involved, the complaint must include in the case caption and in the jurisdictional pleadings the full names of all individuals liable for compliance.

10274.5 Service

As with original complaints, copies of amendments should be served on the parties. Sec. 10268.4. Service at hearings should be personal and should be noted and acknowledged on the record.

10275 Withdrawal/Dismissal of Complaint

10275.1 Prior to Hearing

A complaint may be withdrawn before the hearing by the Regional Director, with or without any party's motion. If, after issuance of complaint, the Regional Office determines that it should not proceed further, the Regional Office should solicit withdrawal of the charge. If a request for withdrawal of the charge is approved, the complaint should be dismissed by an order that includes approval of the withdrawal request and withdrawal of the Notice of Hearing. Sec. 10276. If the charging party will not withdraw its charge, the complaint should be withdrawn by an order that includes a dismissal of the charge and instructions for appealing the action. But see Sec. 10275.2.

If an informal settlement agreement is entered into by all parties, withdrawal of the complaint is incorporated in the agreement. However, in 10(j) and (l) cases, the standard settlement agreement should be altered to reflect that the complaint is withdrawn upon closing in compliance. Sec. 10146.4. Since a *formal* settlement agreement

provides for a Board Order, the complaint is neither withdrawn nor dismissed. Secs. 10164–10170.

10275.2 At Hearing, Prior to Introduction of Evidence

After a hearing has opened but before any evidence is introduced, the Regional Director has authority to withdraw part or all of a complaint, including over the objection of the charging party, as long as there is "no contention that a legal issue is ripe for adjudication on the parties' pleadings alone." *Sheet Metal Workers Local 28 (American Elgen)*, 306 NLRB 981 (1992). The charging party has a right to appeal the dismissal of the underlying charge to the General Counsel.

10275.3 At Hearing, After Introduction of Evidence, Prior to Transfer to the Board

Once relevant evidence is introduced at a hearing, the Regional Director no longer possesses unreviewable authority under Section 3(d) to withdraw the complaint. At that point, counsel for the General Counsel must move the Administrative Law Judge for permission to withdraw all or part of a complaint. *Sheet Metal Workers Local 28 (American Elgen)*, supra.

The following are some of the circumstances under which a request to withdraw the charge might be made:

- On discovering lack of merit once evidence has been introduced during the hearing, counsel for the General Counsel (after appropriate Regional Office clearance) should make a motion to the Administrative Law Judge to withdraw the complaint. Sec. 10388.3. However, the ALJ may *dismiss* instead of permitting withdrawal.

- If the charging party requests withdrawal of the charge once evidence has been introduced, the request is subject to the consent of the ALJ. Sec. 10276. On approval of the withdrawal, the complaint willl be dismissed by the ALJ. Sec. 102.9, Rules and Regulations.

- After full compliance with the terms of an informal settlement agreement, a motion to withdraw the complaint and to close the hearing should be made.

On the execution of a *formal* settlement agreement at this stage, the complaint is neither withdrawn nor dismissed. Secs. 10164–10170.

10275.4 After Transfer to the Board

If the Regional Office wishes to approve a request for withdrawal of a charge, counsel for the General Counsel must file a motion with the Board. The motion should describe the basis for the withdrawal request and seek to have the case remanded to the Regional Director for approval of the withdrawal. Sec. 10276. The withdrawal request itself need not be forwarded to the Board.

10275.5 Complaint Issued on Headquarters' Authorization

If a complaint was issued on authorization from any division or branch in Headquarters, clearance should be obtained from that division or branch before withdrawal or dismissal of the complaint.

10276 Postcomplaint Attempts to Withdraw Charge; Dismissal of Complaint

A postcomplaint request by the charging party to withdraw the charge should be closely scrutinized, including the extent to which the act is voluntary. If the request is based on a private settlement, the terms should be examined; if the charging party has "lost interest," the case should be reexamined as to its strength (a) without charging party's testimony or (b) with a reluctant charging party's subpoenaed testimony. The request should be denied if, under all the circumstances, the purposes of the Act appear to require the continuation of formal action.

If the request for withdrawal is approved, the complaint will be dismissed by the Regional Director, the Administrative Law Judge or the Board, depending on the stage of the case at the time such request is filed. Sec. 10275 and Sec. 102.9, Rules and Regulations.

10280 Answer

Within 14 days from the service of the complaint, respondent must file an answer, signed by respondent's attorney or representative, or by the respondent if unrepresented, specifically admitting, denying, or explaining each of the facts alleged in the complaint, unless respondent states in its answer that it is without knowledge, thereby operating as a denial. Secs. 102.20–102.22, Rules and Regulations. An answer may be filed electronically at the Agency's website under "Regional, Subregional & Resident Offices." See Sec. 11846.4. However, because of the requirement that an answer be signed, an original and four copies of such answer must also sent to the Regional Office so that it is received no later than three (3) business days after the date of the electronic filing. See OM Memo 07-07 (Revised) dated November 15, 2006.

With respect to answers that lack particulars, see Sec. 10292.2.

10280.1 Allegations Not Denied Deemed Admitted

Pursuant to Section 102.20, Rules and Regulations, complaint allegations shall be deemed to be admitted as true if no answer is filed. Likewise, any allegation not specifically denied or explained in an answer, unless respondent avers in its answer that it is without knowledge, shall be deemed to be admitted as true and shall be so found by the Board, absent good cause to the contrary.

10280.2 Motion to Strike Improper or Deficient Answer

Where respondent has filed an improper or deficient answer, the Region should provide respondent sufficient notice and an opportunity to appropriately amend the answer. If respondent fails to remedy the deficiency, counsel for the General Counsel should file a motion to strike the answer, in whole or in part.

(a) *Improper or Deficient Answer:* An answer may be improper or deficient, where:

- The answer is not signed.
- The asserted denials in the answer have no legitimate basis and appear to be made solely for purposes of delay.
- Scandalous or indecent matter is included in the answer.

(b) *Notice to Attorney or Representative:* Upon receipt of an improper or deficient answer, the Regional Office should send a letter to the attorney or representative providing an explanation of the improper or deficient nature of the answer. The letter, should also assert that the answer, or a portion of the answer, appears to have been filed without good grounds to support it and for purposes of delay citing Sec. 102.21, Rules and Regulations. The letter should further inform the attorney or representative[1] that unless a proper answer is filed within one week of the letter counsel for the General Counsel intends to file a motion with the Administrative Law Judge to strike the answer, or a portion of the answer, as sham and false and requesting that the Administrative Law Judge "proceed as though the answer had not been served." See generally OM Memo 05-55.

(c) *Filing of a Motion to Strike* If respondent does not adequately justify or appropriately amend its answer within the time allowed and persists in contesting the matter without good grounds, counsel for the General Counsel should prepare and file with the Administrative Law Judge a motion to strike the answer, or portion thereof, as sham and false. Such motion should request that the action proceed as though the answer, or that portion of the answer, had not been served.

Generally, if such motion is denied by the Administrative Law Judge, counsel for the General Counsel should request special permission of the Board to appeal. Sec. 10404. If the hearing has opened and the ALJ insists on a presentation of the evidence forthwith, counsel for the General Counsel should proceed with the case, simultaneously pressing the appeal to the Board.

If the motion is granted, counsel for the General Counsel should proceed as if only the unstricken portion of the answer has been filed.

(d) *Special Remedy:* In some cases, it may also be appropriate to contact the Division of Advice regarding the possibility of seeking as a special remedy in the

[1] If the respondent files an answer without the assistance of an attorney or other representative, the Board has generally given such a party more latitude in reviewing the sufficiency of the answer because such a pro se party is generally unfamiliar with the Board's Rules and Regulations and procedures. See, e.g., *S&P Electric*, 340 NLRB 326 (2003); and *A.P.S. Production*, 326 NLRB 1296 (1998). In such circumstances, the Regional Office should provide the pro se party with an explanation of the Board's Rules and Regulations regarding the sufficiency of the answer.

underlying unfair labor practice proceeding that respondent be ordered to pay a portion of the General Counsel's attorney's fees incurred as a result of the filing of an answer without good grounds to support it.

(e) *Referral of Alleged Misconduct:* Immediately after the conclusion of the hearing, the Regional Office should also consider whether it is appropriate to make a referral of alleged misconduct by the attorney or representative with regard to the improper or deficient answer under Sec. 102.177, Rules and Regulations. See Sec. 10058.6.

10280.3 No Answer Filed; Motion for Default Judgment

If an answer has not been filed within the time allowed, counsel for the General Counsel should communicate in writing with respondent's counsel, or with respondent if it is not represented, advising that no answer has been filed in accord with the Rules and Regulations and that if an answer is not filed within a certain period of time (normally not to exceed 1 week from date of written communication), counsel for the General Counsel will file a Motion for Default Judgment with the Board. If an answer is not filed within the applicable deadline, counsel for the General Counsel should file a Motion for Default Judgment with the Board. See *Malik Roofing Corp.*, 338 NLRB 930 (2003).

If, after the filing of a Motion for Default Judgment, an answer is later filed, the Regional Office may successfully continue to seek default judgment, where the answer was untimely with no explanation. See, e.g., *Kenco Electric & Signs,* 325 NLRB 1118 (1998). However, where respondent is proceeding pro se, the Board may be reluctant to grant a Motion for Default Judgment where respondent answers the complaint and responds to the Board's order to show cause. See, e.g., *A.P.S. Production/A. Pimental Steel*, 326 NLRB 1296 (1998).

10280.4 Answer to Amended Complaint

The above procedures also apply to an answer to an amended complaint. However, with respect to amendments made at the hearing, the nature of the amendment will determine whether the Administrative Law Judge provides 14 days for answer to the amendment. Sec. 10406.2 and Sec. 102.23, Rules and Regulations.

10281 Consolidation of Compliance Issues with Motions for Default Judgment

When filing a Motion for Default Judgment (i.e., no answer cases like those described in Section 10280.3), Regional Offices should consolidate the compliance aspect of the case with the underlying liability phase of the case as soon as feasible and, in any case, prior to seeking court enforcement, unless there are compelling reasons for not doing so. Thus, where a respondent is either likely to default, or has defaulted, with respect to an unfair labor practice complaint, Regional Offices should, prior to submitting the case for court enforcement, normally adopt one of the following approaches to expedite the casehandling process:

- Issue a consolidated unfair labor practice complaint and compliance specification at the initiation of proceedings and, following respondent's

failure to answer the consolidated complaint and specification, file a motion seeking a summary Board Order covering both the complaint and the compliance specification.

- Following respondent's failure to answer a complaint, issue the compliance specification and, following respondent's failure to answer the specification, file a motion seeking a summary Board Order covering both the complaint and the compliance specification.
- Following entry of an initial summary Board Order, issue the compliance specification, and following respondent's failure to answer the specifications, file a motion seeking a summary supplemental Board Order.

For a more detailed discussion see OM Memo 07-59.

10282 Motion for Summary Judgment in 8(a)(5) Cases

10282.1 Generally

In technical 8(a)(5) cases (i.e., where respondent is testing a Board certification and/or the proceeding on which it is based and there are no factual issues warranting a hearing), a Motion for Summary Judgment should be filed with the Board. Sec. 10025. In general, if there are factual issues involved, a Motion for Summary Judgment is not appropriate. However, where charging party's allegations include both a technical 8(a)(5) violation and other allegations warranting a hearing, the Regional Director may exercise discretion in appropriate cases to move for summary judgment solely on the technical 8(a)(5) allegations. Under such circumstances, the Regional Office should explicitly reserve the right to litigate the other alleged violations. Such allegations suitable for future litigation include:

- Unilateral changes occurring after the bargaining obligation attaches
- Claims that the 8(a)(5) conduct affects the reinstatement rights of striking employees

See Sec. 10026 generally for a discussion of 8(a)(5) charges and Sec. 10026(b) for avoiding future litigation by entering into a stipulation that is contingent on court enforcement of a Board Order.

10282.2 Regional Procedure

A Motion for Summary Judgment should be filed within 7 days after respondent files its answer in a technical 8(a)(5) case (i.e., respondent is testing the Board certification and/or the proceeding on which it is based).

(a) *Respondent's Answer:* On receipt of respondent's answer to the complaint (or expiration of the time to file an answer), the Regional Director should determine whether to file the motion.

(b) *Motion to Board:* Applications for summary judgment (eight copies each of the motion and attachments) in appropriate 8(a)(5) cases should be addressed directly to the Board and transmitted to the Office of the Executive Secretary. Motions may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

Since all summary judgment motions must be filed no later than 28 days before the scheduled hearing date (Sec. 102.24, Rules and Regulations), if the Regional Office intends to file such a motion it should either issue a Notice of Hearing without hearing date with the complaint or provide enough time to permit the filing of a timely motion.

In all technical 8(a)(5) cases, if the Regional Office anticipates it will file a Motion for Summary Judgment, the Complaint and Notice of Hearing should set forth that a hearing, if necessary, will be conducted at a time and date to be determined in the future. All copies of the motion to transfer case to and continue proceedings before the Board and for summary judgment must be accompanied by copies of the following documents, if any, in the formal file:

- Original charge and amended charge
- Affidavit of service of charge and amended charge
- Complaint, amended Complaint and Notice of Hearing
- Affidavit of service of complaint, amended Complaint and Notice of hearing
- Respondent's answer and amended answer to complaint
- Letter from counsel for the General Counsel to respondent advising of the consequence of not filing answer. Sec. 10280.3.

In the event that the summary judgment proceeding is an 8(a)(5) case involving test of certification, the record should also include copies of the following documents, if any, in the formal "R" case file:

- The petition
- The Regional Director's decision, consent election agreement, or stipulated election agreement
- Any Request for Review of the Regional Director's Decision and the Board's Order regarding the Request for Review
- Any Board Decision following a grant of the Request for Review
- All postelection matters, including:

(a) Objections to election or to conduct thereof

(b) Regional Director's or hearing officer's report and recommendations and proof of service of same

(c) Exceptions to (b), above, and briefs

(d) Supplemental decision, direction, or order, or certification by the Regional Director or the Board.

10283 Other Motions for Summary Judgment

If any party files a timely Motion for Summary Judgment, the Board may deny the motion or issue a Notice to Show Cause why the motion should not be granted.

Once a Notice to Show Cause is issued by the Board, any scheduled hearing will normally be postponed indefinitely. Since Sec. 102.24(b), Rules and Regulations expressly permits any party to file an opposition prior to issuance of the Notice to Show Cause, the Regional Office should file its opposition promptly, even if respondent's motion appears deficient on its face. In any event, all such oppositions must be filed no later than 21 days before the scheduled hearing. It is also advisable for the Regional Office to notify the Office of the Executive Secretary of its intent to file such a motion.

It is not necessary to attach affidavits or other documentary evidence to an opposition or response. A short brief clearly stating the grounds for opposition will normally suffice. Sec. 102.24, Rules and Regulations.

10284–10288 SUBMISSION OF STIPULATED RECORD TO ADMINISTRATIVE LAW JUDGE OR THE BOARD

10284 Stipulated Records

On occasion, the parties (including counsel for the General Counsel) may agree on the facts of a case in which complaint has issued but not on the applicable law, and may desire to bypass the hearing stage and submit a case by stipulation to an Administrative Law Judge or the Board. Sec. 102.35(a)(9), Rules and Regulations. Resort to such procedure is an option when all parties are in agreement and follow the procedures set forth in the above rule. Typically, in stipulated record cases, the facts are not in dispute and the parties wish expedited consideration of what they perceive to be purely legal issues. Examples of the types of cases which may be amenable to this procedure include cases involving new questions of law or policy and cases whose facts have been litigated in ancillary proceedings.

In addition to complying with the procedures set forth in Sec. 102.35(a)(9), Rules and Regulations, the following guidance should be considered:

- A submission by stipulation may go to the ALJ for decision, thereafter following the procedures of all other cases. Alternatively, it may bypass the ALJ entirely and go directly to the Board.

- The submission must include a complaint and an answer; a Notice of Hearing and any orders rescheduling or adjourning the hearing; a stipulation as to the facts; a statement of the issues presented; a short statement (no more than three pages) from each party of its position on the issues; an agreement as to the contents of the record; and an express waiver of those procedures being bypassed. The Complaint and Notice of Hearing in such a case should provide that a hearing, if necessary, will be conducted at a time and date to be determined in the future and, if Complaint and Notice of Hearing has issued with a hearing date, an Order indefinitely postponing the hearing should issue.

- The facts being stipulated must be sufficiently detailed to form the basis for findings. Since conflicting factual versions cannot be resolved in a stipulation, the facts must be agreed on and should ordinarily be set forth in a narrative form. One party may insist on the inclusion of facts that the other party contends are irrelevant. If it is agreed that they are true, they should be included if either party considers them relevant (for this may be the very legal point that the parties are seeking to resolve). The submitting document should, however, recite that the parties do not necessarily concede the relevance of each fact recited and any party urging irrelevance would do so in its brief. Documents or transcripts of other proceedings that the parties desire to be in the record should be incorporated by

reference and attached. The agreed upon stipulation should be signed by all parties, or their representatives, as well as counsel for the General Counsel.

- Either the ALJ or the Board, depending on where the stipulation is submitted, will rule on the appropriateness of accepting the stipulation and, if approved, set the time for filing briefs. Sec. 102.35(a)(9), Rules and Regulations.

10286 Submission to Administrative Law Judge

As described in Sec. 10284, a case may be submitted directly to an Administrative Law Judge without a hearing by detailed stipulation of the parties pursuant to Sec. 102.35(a)(9), Rules and Regulations. See sample Joint Motion and Stipulation of Facts in Sec. 10288 which should be modified for submission to an Administrative Law Judge. Three copies of the stipulation should be sent to the Division of Judges and set forth the stipulation of facts, a statement of the issues presented, and each party's statement of position. Such motions may also be filed electronically at the Agency's website under "Division of Judges." See Sec. 11846.4. If the ALJ approves the stipulation, the ALJ will set a time for the filing of briefs. No further briefs shall be filed except by special leave of the ALJ. At the conclusion of the briefing schedule, the ALJ will decide the case or make other disposition of it. Sec. 102.35(a)(9), Rules and Regulations. On issuance of the ALJ's decision, the procedure outlined in Secs. 10430–10444 should be followed.

10288 Submission to the Board

As described above in Sec. 10284, a case may be submitted directly to the Board by joint motion and stipulation of facts, pursuant to Sec. 102.35(a)(9), Rules and Regulations.

The following may be helpful as suggested language for the opening paragraphs of such motion and stipulation:

JOINT MOTION AND STIPULATION OF FACTS

This is a joint motion by the parties to this case, Respondent, Charging Party and General Counsel, to transfer this case to the Board pursuant to Section 102.35(a)(9) of the Board's Rules and Regulations. The transfer of the case will effectuate the purposes of the Act and avoid unnecessary costs and delay.

If this motion is granted, the parties agree to the following:

1. The record in this case consists of the Charge, the [Consolidated**] Complaint, the Stipulation of Facts, the Statement of Issues Presented and each party's Statement of Position.**

2. This case is submitted directly to the Board for issuance of findings of fact, conclusions of law and an Order.

3. The parties waive a hearing, findings of fact, conclusions of law and order by an Administrative Law Judge.

4. The Board should set a time for the filing of briefs [and oral argument**].**

As set forth in Sec. 10284 and Sec. 102.35(a)(9), Rules and Regulations, the stipulation should set forth the agreed upon facts, a statement of the issues presented, and a short statement, not to exceed 3 pages, of each party's position in the case. Where there is a dispute as to the relevancy of certain facts that are stipulated to be true, the following may be added to the stipulation:

> **This stipulation is made without prejudice to any objection that any party may have as to the relevancy of any facts stated herein.**

Eight copies of the stipulation with all exhibits and attachments should be submitted to the Executive Secretary of the Board. Motions may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

If the Board approves the stipulation, the Board will set a time for the filing of briefs. Answering briefs may be filed within 14 days, or such further period as the Board may allow, from the last date on which an initial brief may be filed. No further briefs shall be filed except by special leave of the Board. At the conclusion of the briefing schedule, the Board will decide the case or make other disposition of it. Sec. 102.35(a)(9), Rules and Regulations. Subsequent action should accord with procedures described in Secs. 10442–10452.

10290–10294 PRETRIAL MOTIONS AND PREHEARING POSTPONEMENTS

10290 Motions

Pretrial requests (or motions) for postponement or extension of time to file answer, to intervene, or to take deposition should be filed with the Regional Director. Sec. 102.24, Rules and Regulations. All other pretrial motions, except Motions for Summary Judgment or Dismissal, are filed with the appropriate Chief or Associate Chief Administrative Law Judge. Motions for Summary Judgment or Dismissal are filed with the Board.

All pretrial motions filed with the Regional Director or an Administrative Law Judge shall include three copies, with an affidavit of service on the parties. All pretrial motions filed with the Board shall include eight copies with an affidavit of service on the parties. Motions and responses thereto shall be filed promptly and within such time as not to delay the proceeding. Pretrial motions may also be filed in the appropriate office electronically at the Agency's website under "Regional, Subregional & Resident Offices," "Division of Judges," or "Board/Office of the Executive Secretary." See Sec. 11846.4.

10290.1 Oppositions

Opposition or other answer to a pretrial motion may be filed with the same number of copies and service as above required.

10290.2 Ruled on by Regional Director

The Regional Director may, and normally should, rule on pretrial motions to extend the time in which to file an answer; to intervene in a matter; to take depositions; or to postpone the opening of the hearing under the circumstances set forth in Secs. 10294.2 and .3. Such rulings should be in writing and a copy served on each of the parties.

10290.3 Ruled on by Administrative Law Judge

A designated Administrative Law Judge shall rule on all prehearing motions, except those specified in Sec. 10290.2 and Motions for Summary Judgment or Dismissal. Sec. 102.24, Rules and Regulations. Such ALJ rulings issued prior to the opening of the hearing shall be in writing, with a copy served on each of the parties.

10290.4 Appeal from Ruling

Such rulings by the Regional Director or the Administrative Law Judge may be appealed directly to the Board only on special permission of the Board, but, if exceptions are taken to a subsequent Order, they will be considered by the Board in reviewing the record. Sec. 10404.

10290.5 Motions and Rulings Thereon Part of Record

Pretrial motions and rulings thereon will be introduced into the record as part of General Counsel's Exhibit 1, *except* for motions to revoke subpoenas and rulings thereon, which become part of the record only on request of the aggrieved party.

10292 Types of Pretrial Motions

10292.1 Bill of Particulars Addressed to Complaint

If a Motion for a Bill of Particulars (seeking specificity regarding the complaint allegations) is filed and if the complaint contains insufficient detail, the Regional Office should furnish the particulars. Sec. 10264.2. If, however, the complaint is sufficiently detailed, the motion should be opposed. In the event of an adverse ruling, the Regional Office should promptly furnish the particulars.

10292.2 Bill of Particulars Addressed to Answer

A Motion for a Bill of Particulars addressed to the answer is rare; however, where an affirmatively pleaded defense lacks sufficient details, counsel for the General Counsel should make such a motion.

10292.3 Where Answer Improper or Deficient or No Answer Filed

Where an answer is improper or deficient or where no answer has been filed, the Regional Office should attempt to resolve the problem. If unsuccessful, a motion to strike or a Motion for Default Judgment, as appropriate, may be filed. See Secs. 10280.2 and .3. In evaluating whether to file such a motion, the Regional Office should not rely on hypertechnicalities and should balance the probability of success against the possibility of undue delay.

For a discussion of answers and related motions see generally Sec. 10280.

10292.4 Pretrial Discovery Devices

The Federal Rules of Civil Procedure providing for compulsory pretrial discovery have been held not applicable to Board proceedings. *NLRB v. Valley Mold Co.*, 530 F.2d 693 (6th Cir. 1976); *Pepsi-Cola Bottling Co.*, 315 NLRB 882 (1994). Any attempt to use such discovery should be resisted. *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214 (1978).

10294 Prehearing Postponements

10294.1 General Policy

Cases set for hearing should be heard on the day set and postponements should be granted only for good cause shown.

Form NLRB-4338, with instructions for requesting postponements and with the names and addresses of the parties appearing thereon, should accompany each notice of hearing.

10294.2 Request

Postponement of the opening date of a hearing is initiated by request (or motion) for postponement by the party seeking it. Such a request should be filed with the Regional Director under the following circumstances:

- Where all parties agree or no party objects
- Where a new charge or charges have been filed which, if meritorious, might be appropriate for consolidation
- Where settlement negotiations are in progress
- Where issues related to the complaint are pending before Advice or Appeals
- Where more than 21 days remain before the scheduled date of hearing. Sec. 102.16, Rules and Regulations.

In all other circumstances, such motions should be filed with the Division of Judges as set forth in Sec. 102.24, Rules and Regulations.

The motion/request should be filed as promptly as practicable and in writing; three copies should be served on the Regional Director or the Division of Judges, as appropriate, with copies served simultaneously on each of the other parties. The request should contain *detailed* cause (i.e., not merely "prior commitments") and should contain suggested date(s) for resetting. The requesting party must ascertain in advance and set forth in the request the positions of all other parties to the proceedings. Where appropriate, the parties may make a joint request.

10294.3 Ruling on Request

Absent extraordinary circumstances, the Regional Director or Division of Judges should rule on the request only after opposing parties have the opportunity of making known their positions.

If the Regional Director grants the request, a new hearing date should be obtained from the Division of Judges. Sec. 10256.1. The Regional Director should then issue an Order, serving a copy on each party.

10294.4 Followup Action

Postponements normally are to a day certain, but may, if demanded by circumstances, be indefinite (sine die), e.g., in the event of a settlement. Further action

with respect to such postponements may include rescheduling by means of formal order or cancellation of the hearing.

10294.5 Request and Ruling Included in Record

Postponement requests, statements of opposition, and rulings thereon should be introduced into the record at the hearing. Sec. 10384.

10294.6 Postponement of Hearings in Emergency Situations

The Regional Director or the Division of Judges, as appropriate, may postpone hearings at the last minute due to unforeseen circumstances. In such circumstances, the Division of Judges should receive prompt notification to avoid unnecessary travel by the Administrative Law Judge assigned to the case.

10310–10320 INJUNCTIVE RELIEF UNDER SECTIONS 10(j) AND 10(e)

The following sections concern guidelines for considering 10(j) relief and for processing cases in which the 10(j) relief sought involves the substantive issues raised in a charge.

(For discussion of injunctive relief under Section 10(j) and (e) regarding respondent's sale or transference of assets, which may prejudice collection under a Board or court Order, see Compliance Manual, Sec. 10674. For 10(l) priority—CC, CD, CE, and CP—cases, see Secs. 10238–10248.)

10310 Consideration of 10(j) Injunctive Relief

Section 10(j) of the Act authorizes the Board, in its discretion, to petition a district court for temporary relief or a restraining order, pending the Board's adjudication of an unfair labor practice complaint. The Regional Office, based on either the Director's sua sponte determination or a request from the charging party, initially considers whether 10(j) relief is warranted. In contrast to 10(l) injunctive relief, where by statute interim relief must be sought whenever certain unfair labor practices have occurred and are likely to continue, the Board decides on a case-by-case basis whether to authorize the Regional Office to seek 10(j) relief.

10310.1 Notification to Parties

Whenever the issues in a charge reveal that interim relief may be warranted, the Regional Office should notify all parties that it will examine possible 10(j) relief as part of the investigation of the charge and should invite the parties to submit evidence and argument relevant to the 10(j) consideration. Such notice should be given as soon as feasible in the investigation. Early notice allows the Region to combine the merits and 10(j) aspects of its investigation and thus complete its investigation more expeditiously; it may result in the parties' prompt cooperation in the investigation and also provides them

an opportunity to argue to the Regional Office and the General Counsel whether 10(j) injunctive relief is appropriate.

10310.2 Guidelines for the Utilization of Section 10(j)

Section 10(j) is an interim remedy used to preserve or restore the status quo during the time an unfair labor practice case is pending before the Board. Section 10(j) itself authorizes district courts to grant interim relief that is "just and proper." In general, a Regional Office's inquiry into whether 10(j) relief would be appropriate should include consideration of two elements: whether there is a sufficient showing that an unfair labor practice has occurred and whether the effects of that unfair labor practice threaten to make the Board's ultimate remedial order a nullity unless interim relief is obtained. The Regional Office should be guided in its evaluation of potential 10(j) cases by the periodically updated "Section 10(j) Manual," including its discussion of the specific standards of the circuit in which the case arises. This Manual details the types of situations that typically give rise to a need for 10(j) relief, the types of evidence that would support or negate a finding that such unfair labor practices threaten remedial failure and the case law regarding the propriety of 10(j) relief in such situations.

10310.3 Submission to the Injunction Litigation Branch

(a) *10(j) Deemed Appropriate:* When a Regional Director determines that a charge has merit and that 10(j) authorization should be sought, the Regional Office should, within 14 days of the merit determination, submit a memorandum so recommending to the Injunction Litigation Branch, together with a copy of the complaint and any 10(j) position statements submitted by the parties. If the complaint has not issued by the time the Region's 10(j) recommendation is prepared, the Region should not delay submission of its 10(j) recommendation. The complaint should be forwarded to the Injunction Litigation Branch immediately upon issuance. The Regional Office's memorandum should:

- Indicate in the first paragraph whether the recommendation is made sua sponte or based on a charging party request
- Detail the facts and legal theories regarding the violations alleged, including responses to defenses raised by the respondent
- Discuss the impact of the violations on protected activities and the reasons injunctive relief is needed
- Include the proposed order the Regional Office would seek from the district court and
- List counsel representing the parties and include address, phone and fax information

For further information regarding the format of the memorandum, Board agents should consult the Section 10(j) Manual and other directives from the Injunction Litigation Branch. If the General Counsel concludes that 10(j) relief is appropriate, the Regional Office's memorandum, together with any supplemental memorandum of the General Counsel, will be transmitted to the Board for its consideration. The Injunction Litigation Branch will forward to the Regional Office a copy of the General Counsel's memorandum when it is transmitted to the Board.

(b) *Litigation Hold:* Upon submission to the Injunction Litigation Branch of a recommendation to institute 10(j) proceedings, the Regional Office should institute a litigation hold to preserve documents, including electronically stored information, which may be relevant to the reasonably foreseeable litigation. See Sec. 11863 and in particular GC Memo 07-09 and OM Memo 07-64.

(c) *When Merit Determination is Submitted to Division of Advice:* If a case which the Regional Office believes warrants 10(j) relief is also being submitted for advice on the merits of the charge, the Regional Office generally should include its 10(j) recommendation together with its request for advice on the merits. In some cases, it may be necessary to wait for the analysis of the Division of Advice, Regional Advice Branch on the merits before preparing a memorandum regarding the propriety of 10(j) relief. The Regional Office may wish to consult with the Regional Advice Branch or the Injunction Litigation Branch to determine the appropriate course of action in a particular case.

(d) *Special Circumstances Requiring Submission:* Regional Offices must submit a written recommendation, as described above in subsection (a), whether for or against 10(j) authorization, in all cases in which it seeks a remedial *Gissel* bargaining order. See GC Memo 99-10.

(e) *10(j) Relief Not Warranted:* Generally, if the Regional Office determines that a case does not warrant 10(j) relief, it need not submit the case to the Injunction Litigation Branch. A Region may always informally consult with the Injunction Litigation Branch regarding the propriety of 10(j) relief in a particular case.

10310.4 Settlement Efforts and Issuance of Complaint and Hearing Date Pending 10(j) Determination

The Regional Office should begin settlement efforts immediately after it has determined that the charge is meritorious and should issue complaint if such settlement efforts fail, even while the 10(j) issue is pending.

(a) *Complaint Hearing Date in 10(j) Cases:* In any case in which a Regional Office finds merit and concludes 10(j) relief is warranted, the Region should proceed to hearing before an ALJ not later than 8 weeks from the issuance of complaint. Regions should generally oppose any requests to postpone the hearing. However, Regional Directors retain discretion to grant, where appropriate, short postponements based on substantial reasons. In the rare occasion when a Regional Office believes there are compelling circumstances which warrant setting a hearing in excess of 8 weeks, clearance should be sought from the appropriate Assistant General Counsel or Deputy AGC in the Division of Operations-Management. In all cases requiring 10(j) relief,

Regions should immediately prepare and submit a memorandum to the Injunction Litigation Branch seeking 10(j) authorization. See OM Memo 06-60 for a detailed discussion regarding ALJ hearings in 10(j) cases.

(b) *Expedited ALJ Hearings:* In cases requiring consideration of the evidence at an ALJ hearing before determining whether to seek 10(j) injunctive relief, a Regional Office should schedule an expedited ALJ hearing not later than 28 days from complaint issuance. Examples of where an expedited hearing may be appropriate include consideration of a substantial defense to alleged discriminatory action under *Wright Line*, an economic defense to a restoration remedy, or where there are serious issues regarding witness credibility. Immediately upon the closing of the hearing, or earlier where appropriate, a Regional Office should evaluate whether to seek 10(j) relief. An exception to such an immediate evaluation may arise in cases where the strength of a defense depends solely on critical determinations to be made by the ALJ. See OM Memo 06-60 for a detailed discussion regarding ALJ hearings in 10(j) cases.

10310.5 Preparation of Court Papers and Expeditious Filing

Upon notice that the Regional Office's recommendation has been submitted to the Board, the Regional Office should finalize its 10(j) petition and supporting memorandum of law. If the Board authorizes 10(j) proceedings, the Injunction Litigation Branch will notify the Region. Absent settlement, the Regional Office should file the 10(j) petition with the district court within 48 hours of notification from the Injunction Litigation Branch. If the Regional Director believes a delay in filing would be productive, (e.g., a settlement is imminent and the filing of the petition may upset the prospective settlement), the Regional Office should seek telephone authorization from the Injunction Litigation Branch to file the petition outside the 48-hour deadline.

10310.6 Court Action; Expeditious Processing

The Regional Office should request from the district court expedited consideration of its 10(j) petition. If the district court issues an order to show cause returnable at an unduly late date and the circumstances demonstrate a need for more immediate relief, the Regional Office may wish to consider seeking a temporary restraining order. In such situations or in other circumstances indicating that the district court will not expeditiously hear and decide the 10(j) petition, the Regional Office should follow the procedures set out in the Section 10(j) Manual and consult with the Injunction Litigation Branch.

In all cases where 10(j) injunctive relief is sought or obtained, General Counsel policy requires that the underlying unfair labor practice case be expedited. See also Sec. 102.94(a), Rules and Regulations. To that end, the Regional Office should:

- Schedule the hearing for a date as early as possible (Sec. 10310.4)
- Notify the Administrative Law Judge that 10(j) relief has been sought or obtained and, on the record, request that the matter be expedited

- Oppose any unwarranted attempt by any party to delay the proceeding

- In any brief filed with the Board, note that 10(j) relief has been sought or obtained and request that the matter be expedited

- When the case is transferred to the Board, notify the Executive Secretary of the status of the 10(j)

10310.7 Post 10(j) Informal Settlements

When a 10(j) injunction has been obtained prior to the settlement of a case, the standard provision for withdrawal of the complaint on execution of the settlement should be altered through an addendum to the settlement agreement form to provide for withdrawal of complaint upon closing of the matter in compliance. Sec. 10146.4.

10312 Appeals and Contempt of 10(j) District Court Orders

The Injunction Litigation Branch handles all appeals from district court orders in 10(j) cases. Accordingly, whenever the requested relief is denied in whole or in part, the Regional Office should immediately notify the Injunction Litigation Branch. As soon as possible, the Regional Office should forward to the Injunction Litigation Branch copies of the court's decision or order, the Regional Office's petition, supporting memoranda and exhibits and the respondent's Answer or Opposition and supporting papers, together with the Regional Office's written recommendation on whether an appeal should be taken.

If respondent notifies the Regional Office that it intends to appeal from the grant of an injunction or serves the Regional Office with a notice of appeal, the Regional Office should immediately notify the Injunction Litigation Branch and forward a copy of the notice of appeal.

Whenever it is claimed that an injunction is being violated, the Regional Office should notify respondent of the claim and conduct an investigation. If upon conclusion of the investigation, the Regional Office determines that respondent, by clear and convincing evidence, has engaged in contumacious conduct, the Regional Office should submit to the Injunction Litigation Branch a recommendation on whether to institute contempt proceedings.

10314 Effect of Board's Decision and Order on 10(j) Proceeding

In cases where the Regional Office has obtained a 10(j) Injunction or has such a request pending in a district court, if the Board issues a Decision and Order in the corresponding unfair labor practice proceeding, such Board Decision and Order renders moot the injunctive relief sought. See *Sears, Roebuck & Co. v. Carpet Layers Local 419*, 397 U.S. 655 (1970); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975). Since the Board's Decision and Order supplants the necessity for injunctive relief

under 10(j) of the Act, the Regional Office, after consultation with the Injunction Litigation Branch, should inform the district court, in writing, of the issuance of the Board decision and its impact on the 10(j) decree.

10320 Injunctive Relief Under Section 10(e)

Section 10(e) of the Act provides that while a petition for enforcement is pending, the court "shall have power to grant such temporary relief or restraining order as it deems just and proper." See *Auto Workers v. NLRB*, 449 F.2d 1046, 1050 (D.C. Cir. 1971). When a 10(j) injunction expires as the result of the issuance of a Board Order, absent immediate compliance with such order, the Regional Office should promptly recommend to the Division of Enforcement Litigation that enforcement proceedings commence and that Enforcement seek a new injunction under Section 10(e), unless changed circumstances render such action unnecessary or appropriate. In addition, the Regional Office should consider the appropriateness of seeking 10(e) injunctive relief with respect to any case pending or to be filed in a circuit court, even if 10(j) was not earlier sought or had been denied.

If such relief is necessary to effectuate the purposes and policies of the Act, the Regional Director's memorandum to Enforcement should discuss the Board's Decision and Order and set forth the reasons that interim injunctive relief is just and proper. Based on the Regional Office memorandum and the evidence submitted in support, Enforcement will determine if such injunctive relief under 10(e) should be sought.

NOTE: Upon submission to Enforcement of a recommendation to institute 10(e) proceedings, the Regional Office should institute a litigation hold to preserve documents, including electronically stored information, which may be relevant to the reasonably foreseeable litigation. See Sec. 11863 and in particular GC Memo 07-09 and OM Memo 07-64.

10330–10352 TRIAL PREPARATION

10330 General Preparation

Appropriate preparation, which should ordinarily begin no later than one month prior to the trial, is critical to successful prosecution of a case. Accordingly, the period immediately preceding the hearing should be devoted to analyzing the pleadings, reviewing the evidence uncovered during the predecisional investigation, conducting further investigation of evidence relevant to the complaint, preparing the witnesses, and discussing trial strategy with supervision.

10331 Guidance for High Quality Litigation

In order to consistently maintain the highest quality and success in litigation of cases, Regional Offices and Board agents should routinely consult this manual, the Rules and Regulations, Board and court decisions, the Pleadings Manual, the Division of Judges Bench Book, and OM and GC memoranda. In particular, the Agency's quality committee periodically reviews field office performance in the various facets of litigation throughout the country and issues memoranda recommending practices for ensuring the highest quality litigation, starting with accurate and precise complaint drafting and continuing through trial preparation, presentation and briefing. See OM Memos 06-16, 06-91, 07-84, and subsequent memoranda. Regional Offices and Board agents should be guided by these recommendations in conjunction with their own experience and should follow the practices set forth in the memoranda.

10332 Analysis of Pleadings

The trial attorney must carefully analyze the complaint(s) and answer(s) to determine what is admitted and what must be proved at hearing. Additionally, such review will enable the trial attorney to organize pretrial preparation and plan the introduction of evidence and arguments to be made at hearing.

10334 Pretrial Preparation and Investigation

The trial attorney has an initial obligation to become familiar with the contents of all evidence in the investigative file. Moreover, the trial attorney should also seek any additional evidence bearing upon the allegations of the complaint. When such evidence arguably supports further complaint allegations, the trial attorney should bring such evidence to the Regional Office's attention. Likewise, when such evidence arguably undermines any complaint allegations, the trial attorney should bring such evidence to the Regional Office's attention.

In particular, in order to maintain the highest possible quality in litigation (see Sec. 10331 and OM Memos 06-16, 06-91, and 07-84), the trial attorney in consultation with the Regional Office should focus on:

- Continuous review of a case for changes in the facts and the law
- Emerging legal issues or high profile cases likely to receive press attention which may require consultation with the Division of Advice
- Obtaining and presenting corroborative testimony or evidence

10334.1 Examination of Documents

The trial attorney should review all documents which could be introduced at trial and give consideration to the most effective manner in which the documents can assist in examining witnesses.

10334.2 Interview of Witnesses

The trial attorney should interview each prospective witness intensively and as frequently as is necessary in order to properly prepare for trial. Such interview should avoid leading questions, should address all matters that might likely be covered by cross-examination and should thoroughly prepare the witness for credibility challenges. See OM Memo 06-16. For general principles regarding interviews of witnesses, see Secs. 10054.2 and .3; regarding credibility, see Sec. 10064.

When a witness suffers a loss of memory on an important matter, that phase of the testimony should be reviewed until the Regional Office is satisfied with the reliability of the witness' memory. Any details that will help to refresh such memory should be noted. If difficulty is experienced in directing the witness' attention to a new subject, the attorney should set forth in the trial brief the actual question, in a form that will succeed in so directing the witness' attention.

The necessity for re-interviews will be determined by the nature of the case and the ability of the witness. Repeated interviewing creates a possibility of reducing the witness' testimony to an apparently rehearsed story; such risk must be weighed against the advantages of fixing details and of obtaining additional information. Late filed pleadings are one circumstance which may militate in favor of re-interviews.

Preparing non-English speaking witnesses often requires additional time. The trial attorney should also be sensitive to any special problems that need to be addressed during the interview.

The trial attorney should advise the Regional Office whenever significant evidence is adduced or where critical matters that affect credibility of a witness are discovered.

10334.3 Affidavits from Additional Witnesses

Whether the trial attorney should take an affidavit from a prospective witness who did not give a prior affidavit will depend upon an assessment of various circumstances, including:

- Whether the witness' testimony relates to a new issue not currently in the complaint or merely corroborates an existing allegation
- The relative significance of the testimony in relationship to the overall case
- An evaluation of the likely reliability and cooperation of the witness at trial

10334.4 Instructions to Witnesses

The trial attorney should instruct all witnesses that the truth is expected at all times, regardless of who may be helped or harmed. Specifically, the trial attorney should inform the witness that the obligation to answer truthfully extends to all matters, including any conversations with the trial attorney. The goal of pretrial witness interviews is to prepare the witness to testify truthfully and completely.

In addition, the trial attorney should instruct witnesses that, at the hearing, the witness should consider each question before answering it; should ask for a rephrasing if the question is not understood; should remain calm in the face of possible argumentative or hostile cross-examination and should answer no question to which an attorney objects unless and until the Administrative Law Judge overrules the objection. Finally, the trial attorney should routinely review with each witness the standard witness instructions during pretrial preparation. See OM Memo 06-91.

10334.5 Charged Party's Ability to Comply with Remedy

At all postcomplaint stages, the trial attorney should assess respondent's current and, when possible, future ability to comply with the remedy sought by the Agency. The trial attorney should be alert to evidence from the charging party, the witnesses and respondent as appropriate. Any indication that respondent has rendered or will render itself unable to comply should be fully investigated and appropriate action taken. Consideration should again be given to the appropriateness of 10(j) protective relief (Compliance Manual, Sec. 10594.2) or amendment of the complaint to allege parties, such as an alter ego, successor, individual, trustee in bankruptcy, or other party, as derivatively liable for remedying the alleged unfair labor practices. Secs. 10054.2(c), 10264.3, 10274 and Compliance Manual, Secs. 10505.4 and 10596. The trial attorney should continue to monitor respondent's ability to comply until the case is transferred to the Compliance Officer. Sec. 10407.5.

In addition, the charging party and witnesses whose potential remedial rights may be affected should be advised to notify the trial attorney immediately of any significant change in respondent's operation, identity or financial condition, so that an assessment of ability to comply or derivative liability can be made.

10335 Interpreters for Hearing

When interpreters are required for hearing, the Regional Office should consult OM Memo 06-49 and the attached guidelines for the best practices to follow in order to:

- Seek the services of qualified interpreters
- Educate interpreters about our procedures
- Advise interpreters of their responsibilities in a formal hearing, particularly the need to avoid even the appearance of partiality and to ensure proper translation.

10336 Trial Brief

A trial brief is necessary for proper preparation. It provides a guide and checklist to the attorney in the preparation and trial of the case and for developing opening and closing statements.

The trial attorney should begin preparation of the trial brief immediately after trial assignment is made. A trial brief is never completed, since insertions will be made even during the hearing. The trial attorney should provide a copy of the trial brief to the Regional Attorney or designee sufficiently in advance of trial to permit meaningful review.

The test of any good trial brief lies in the ability of a new attorney to take over the case and, through the trial brief, try it with a minimum of overlapping preparation. Although the contents will vary with each case, it should at least contain the following elements:

- List of formal exhibits with exhibit numbers, descriptions of exhibits to be offered and space for noting all exhibits actually offered
- Issues and outline of theory
- Abstract of pleadings to include allegations made, elements to be proved, admissions, denials and affirmative defenses

- Preliminary motions to be made, with brief statement in support thereof
- Stipulations that have been procured, are expected or should be sought
- Documents and materials expected to be offered and sought to be produced by other parties
- Order of witnesses, together with a brief statement of their expected testimony, key questions, exhibits to be introduced during their testimony and copies of their affidavits
- Order of introduction of exhibits, showing the witnesses through whom exhibits will be introduced
- Preparation for examination under Rule 611(c), Federal Rules of Evidence, or cross-examination of prospective respondent witnesses, including an outline or narrative summary for such witnesses, prior statements or affidavits, pertinent memos, letters and impeachment material
- Points on which each witness' testimony is corroborated by other witnesses and the names of such witnesses
- Legal authorities applicable to anticipated trial problems, including the admission or rejection of certain evidence
- Rebuttal witnesses with their prospective testimony
- Closing motions
- Closing argument outline

10338 Preparation of Exhibits

Documents or records expected to be introduced in evidence should be reproduced in advance, so that sufficient copies are available for introduction into evidence and for the Administrative Law Judge and all other parties. Where only a part of a document or record will be offered and is reproduced, the whole should be kept available for inspection. No informal markings should be inserted on documents or records that are to be introduced.

10340 Service of Trial Subpoenas

Subpoenas should, where circumstances allow, normally be served at least 2 weeks prior to trial. This allows sufficient time to arrange for production of the witness or documents and for ruling on a petition to revoke prior to trial. Secs. 11778 and 11782.4. Any subpoena should be served on the party, with a copy sent to the attorney or other representative of the party or witness by mail or facsimile, depending upon the circumstances.

10350 Prehearing Conferences with Parties

Counsel for the General Counsel should, where appropriate, schedule a prehearing conference with respondent's counsel to further explore settlement and factual stipulations. Secs. 10124, 10126.3, and 10128. In each case, careful consideration should be given before evidence beyond that in the complaint is revealed to respondent in order to reach a factual stipulation. Any such stipulation should be reduced to writing and signed as soon as possible. When a settlement is reached prior to hearing, the Division of Judges should be immediately notified so that the matter can be removed from its hearing calendar.

10351 Settlement Judge

If settlement efforts have not been fruitful subsequent to issuance of complaint, the Regional Office should consider whether a settlement judge would be beneficial. Sec. 10154.2. Sec. 102.35(b), Rules and Regulations, provides for the assignment of an Administrative Law Judge (herein a settlement judge), other than the trial judge, to conduct conferences and settlement negotiations, if all parties agree to the use of the procedure. The initiative for the settlement judge may come from any party, the judge assigned to hear the case or from the Division of Judges. Discussions between the parties and the settlement judge are confidential and not admissible in the Board proceeding, except by stipulation of the parties. Further, the settlement judge cannot discuss any aspect of the case with the trial judge and any documents disclosed in the settlement process may not be used in litigation, unless voluntarily produced or obtained pursuant to subpoena. This procedure does not affect the role of the trial judge in terms of pursuing settlement, resolving subpoena issues or working out stipulations. Sec. 10381. The settlement judge does not open the record.

Where feasible, the settlement judge may require that the parties or their representatives attend the settlement conference in person, since such a meeting provides the best opportunity to engage in a fruitful discussion. In addition, the alleged discriminatees should be encouraged to attend the conference. When only the representative of a party is present, the party, or an agent with full authority to settle, should be available by telephone. When personal attendance at a meeting is not feasible, the discussion could be conducted by conference call.

The Regional Office representative should be familiar with the facts and legal theory, as well as the settlement position of the charging party and the Regional Director.

When discussing the facts, the Regional Office's representative needs to be prepared to discuss the nature of the evidence on specific violations, but should not reveal the names of possible witnesses. Sec. 10128 and especially 10128.3. Any settlement agreed upon is still subject to the approval of the Regional Director. If the Regional Director approves a unilateral settlement, the normal appeal procedure is available to an objecting party.

10352 Depositions in Lieu of Trial Testimony

10352.1 Depositions; General

The Federal Rules of Civil Procedure providing for various types of compulsory pretrial discovery are not applicable to Board proceedings. See *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 236–237 fn. 16 (1978). Therefore, depositions may not be used merely for purposes of pretrial discovery. They may be taken only for good cause shown after issuance of complaint. See Sec. 102.30, Rules and Regulations, for the general requirements and procedures to be followed.

10352.2 "Good Cause"

"Good cause" may arise from a variety of circumstances. It relates generally, however, to situations where the witness will not be available to testify at the hearing. The lack of availability may be due to serious illness of the witness or other extraordinary circumstances.

However, where it is anticipated that the testimony of the witness may conflict with other evidence or testimony, the use of depositions should be discouraged. A better alternative would be, where practicable, to request an adjournment of a portion of the hearing to a time and place at which the witness can testify.

10352.3 Application for Deposition

Sec. 102.30(a), Rules and Regulations, provides any party may make application for deposition to the Regional Director before hearing or, if the hearing has opened, to the Administrative Law Judge. An order granting the application will be served on the parties if, in the discretion of the Regional Director or Administrative Law Judge, good cause has been shown.

10352.4 Order and Notice of Deposition

The order and notice of deposition should set forth the name of the witness whose deposition is to be taken, the date, hour, and place of deposition, and the "officer" before whom the "witness" will testify. Normally the "officer" will be counsel for the General Counsel, who will fully participate in the deposition. All parties should be served with the order.

10352.5 Taking of Deposition

Sec. 102.30(b), Rules and Regulations, provides that the deposition may be taken before any officer authorized to administer oaths by the laws of the United States or of

the place of deposition, including any Board agent authorized to administer oaths. Sec. 102.30(c) provides that at the time and place specified, the officer should permit the witness to be examined and cross-examined under oath.

Sec. 102.30(c), Rules and Regulations, provides that all objections to questions or evidence shall be deemed waived unless made during the examination. The officer shall not have the power to rule on any objections, but shall note them on the record.

10352.6 Reporter and Transcript of Testimony

The party seeking the deposition must arrange and pay for the reporter. An original and two copies of the transcript of the testimony should be delivered to the Regional Director for prehearing depositions, or to the Administrative Law Judge during and subsequent to hearing. The transcript must be signed by the witness, unless counsel by stipulation waive such signature.

10352.7 Introduction into Evidence

When a party wishes to introduce a deposition into evidence, the transcript should be marked for identification and offered into evidence as an exhibit. If counsel for the General Counsel wishes to object to the introduction of all or a portion of the transcript, the attorney should present the objections with supporting legal argument. The Administrative Law Judge will rule on the admissibility of the deposition or any part thereof. Errors or irregularities in the transcript will be deemed to be waived, in the absence of a prompt motion to suppress part or all of a deposition.

10380–10409 THE HEARING

10380 Role and Conduct of Trial Attorney

The trial attorney is an advocate who prosecutes the case as set forth in the complaint on behalf of the General Counsel. The trial attorney represents the public's interests by presenting evidence and arguments in support of the complaint with honesty and integrity. In order to maximize the potential for success, the trial attorney should be guided by the recommendations and suggested practices set forth in the memoranda of the quality committee in conjunction with the Regional Office's and trial attorney's own experience. See OM Memos 06-16, 06-91, and 07-84.

10380.1 Conduct Toward the Administrative Law Judge

The trial attorney should address the Administrative Law Judge using terms of respect, such as "the Court" and "Your Honor." The attorney must be sensitive to the role of the ALJ as an impartial decisionmaker and avoid any appearance of a special relationship with the ALJ or engage in other conduct that would suggest bias or prejudice by the judge in favor of the General Counsel's case. The trial attorney should be an example to the other parties by showing respect for the ALJ's procedural rulings, starting times and role in conducting the hearing. However, the trial attorney must exercise independent judgment in vigorously presenting and advocating the General Counsel's case as set forth in the complaint. As counsel for the General Counsel, the trial attorney must protect the record and, where appropriate, raise objections, take a special appeal to the Board or submit offers of proof.

10380.2 Conduct Toward the Parties

The trial attorney is an officer of the court and a public servant whose dealings with others, including all parties, should be courteous and marked by integrity and common sense. The trial attorney should maintain a professional relationship with the charging party, respondent, their counsel and any representatives, and maintain an appropriate independence from the interests of any party.

10380.3 Responsibility for Prosecution of the Case

As counsel for the General Counsel the trial attorney represents the public's interests by prosecuting the complaint on behalf of the General Counsel, under the direction of Regional Office management and supervision. Although the interests of the charging party will, in most instances, be in harmony with such prosecution, counsel for the General Counsel does not represent the charging party. During preparation and the course of the hearing, the charging party or its counsel may make suggestions or give advice about the prosecution of the case. The trial attorney must be cautious in determining which suggestions to adopt or resist and be courteous but firm in maintaining control of the presentation of the case. The charging party, on its own behalf upon entering an appearance, is entitled to examine witnesses and introduce additional evidence, as well as to argue for additional remedies. However, the trial attorney should

oppose anything that will jeopardize the prosecution of the complaint or that is unnecessarily cumulative. This opposition should be pursued either informally, in consultation with the charging party, or, when necessary, by objection on the record.

10380.4 Record

Counsel for the General Counsel is responsible for proving the complaint allegations by making a persuasive record. The trial attorney should seek factual stipulations, where appropriate, and introduce relevant evidence and arguments in an efficient manner. Such techniques conserve resources and make a record that will best assist the Administrative Law Judge in reaching a sound decision.

10381 Pretrial Conferences at Hearing with Administrative Law Judge

Parties are notified of the opportunity for a pretrial conference by Form NLRB-4668, Statement of Standard Procedure in Formal Hearing Held Before the National Labor Relations Board in Unfair Labor Practice Cases, which is sent to all parties with the Complaint and Notice of Hearing.

The Administrative Law Judge may conduct, at the request of the parties or on the judge's own initiative, a pretrial conference prior to or shortly after the hearing's opening. The conference provides the opportunity to further explore settlement, work out stipulations and joint exhibits and clarify pleadings and theories set forth in the complaint and answer. Sec. 10154.3. The formal hearing will commence or be resumed immediately on completion of the conference. No prejudice will result to any party unwilling to participate in or to make stipulations or concessions during any pretrial conference.

This opportunity for conference conducted by the ALJ on the hearing date does not preclude earlier meetings to narrow the issues or effect settlement. Secs. 10126.3, 10128.5, 10350, and 10351.

When a pretrial conference is requested by another party or the ALJ, the Regional Office should normally agree to participate and take the initiative by seeking the agreement of all parties to the conference.

10382 Opening of Hearing

The hearing will open at the place, date and hour scheduled. The record should reflect any deviation from the schedule, the reasons that they occurred and the positions of the parties.

10384 Formal Papers

The formal papers include the following:

- Each original and amended charge
- All complaints and notices of hearing, along with Form NLRB-4668 "Statement of Standard Procedure . . ." in ULP cases before the Board
- All written postponement requests, subsequent responses and orders on such requests
- All pretrial motions, responses and rulings on each motion (except, as noted below, for petitions to revoke subpoenas and related documents)
- An affidavit of service of each of the above that was served by the Regional Office

The formal documents should be assembled in advance of hearing and arranged in chronological order, starting with the earliest document on the bottom to the most recent document at top, with the very top document being the Index and Description of Formal Documents. The documents should be marked with the earliest (bottom) document being General Counsel's Exhibit 1(a), the second earliest 1(b) and so on until the Index, which will be marked as the last of the sequence of General Counsel's Exhibit 1.

Petitions to revoke and related documents and rulings are not part of the record unless the aggrieved party or person specifically requests. Sec. 11782.5.

The trial attorney should show the parties the formal papers prior to the opening of the hearing and give them a copy of the index. (The parties should already have the rest of the documents in GC Exh. 1.) Extra copies of Form NLRB-4668 ("Statement of Standard Procedure . . .") should be made available on request.

Following the opening of the hearing by the Administrative Law Judge, counsel for the General Counsel should introduce the formal papers with substantially the following statement:

> **I offer into evidence the formal papers. They have been marked for identification as General Counsel's Exhibits l(a) through 1( ), inclusive, Exhibit 1( ) being an index and description of the entire exhibit. This exhibit has already been shown to all parties.**

Extended arguments in support of the receipt of the formal papers into the record will not normally be necessary. If objection is raised, counsel for the General Counsel should note that these papers are pleadings, normally part of any judicial or administrative record.

10386 Opening Statements

The trial attorney should prepare an opening statement in each case. Such a statement should be presented if likely to be helpful for the Administrative Law Judge's understanding of the case or if requested by the judge. An opening statement is useful to set the context of the case, help explain why certain elements and evidence are relevant and may assist the ALJ in making later evidentiary rulings. In such a statement, the trial attorney may also express on the record separate and alternative theories of a violation encompassed by the complaint. See OM Memo 07-84.

10388 Trial Motions

Motions at hearing may be either written and served on all parties or made orally on the record. Rulings by the Administrative Law Judge, and any subsequent orders may be in writing and served on all parties or stated orally on the record. Where practical, motions calling for a detailed ruling may be served on all parties with a proposed order for the ALJ. Depending on the nature of the motion the ALJ may reserve ruling, but should eventually rule on all motions made.

Special permission of the Board is necessary to directly appeal an ALJ's ruling made at the hearing. Sec. 102.26, Rules and Regulations and Sec. 10404. Absent the Board's grant of special permission to appeal, the ruling of the ALJ will be considered by the Board only if timely and specific exceptions are filed with the Board to the ALJ's recommended decision.

10388.1 Motion to Intervene

The Administrative Law Judge rules on all motions to intervene made after the opening of the hearing. Counsel for the General Counsel should not oppose intervention by parties or interested persons with direct interest in the outcome of the proceeding. Sec. 102.29, Rules and Regulations and *Camay Drilling Co.*, 239 NLRB 997 (1978). Otherwise, counsel for the General Counsel should oppose such intervention.

10388.2 Motion to Dismiss

Counsel for the General Counsel should oppose any motion to dismiss unless the motion is well founded. Sec. 10388.3. If the Administrative Law Judge grants the motion and dismisses the complaint, counsel for the General Counsel should appeal the decision, absent a total failure of evidence as discussed below. The appeal should be in the form of a request for review filed with the Board within 28 days and served on all parties. Sec. 102.27, Rules and Regulations and Sec. 10436.

10388.3 Failure of Proof

Counsel for the General Counsel, after consultation with the Regional Office, should move to withdraw an allegation from the complaint where there is an unquestionable failure of proof on that allegation. Otherwise, no such motion should be made. If the Administrative Law Judge treats the motion to withdraw an allegation as one to dismiss and does dismiss the allegation, no appeal should be taken.

10388.4 Other Common Motions

Other common motions are more fully discussed in the following sections:

- Motions involving the answer to the complaint, Secs. 10280 and 10290–10292.3
- Motions to amend the complaint, Sec. 10274
- Petitions to revoke, Sec. 11782
- Motions to sequester witnesses, Sec. 10394.1
- Motions for continuance, Sec. 10406

10390 Rules of Evidence

Section 10(b) of the Act provides that Board hearings shall, "so far as practicable, be conducted in accordance with the rules of evidence applicable in the district courts of the United States . . . ." Trial attorneys should be thoroughly familiar with the Federal Rules of Evidence and Board decisions interpreting and applying these rules. They should also be familiar with any rules of evidence peculiar to the states or territories within their Region which may also be followed in the local Federal district courts.

10392 Stipulations

Wherever possible, evidence should be introduced into the record in the form of stipulations. Time is well spent in seeking stipulations that help reduce the size of a record. Additionally, sometimes a stipulation will secure evidence for the record which might otherwise be difficult to prove through General Counsel's witnesses. Sec. 10350.

Stipulations should contain detailed, factual assertions and should not be conclusionary. For example, a stipulation that the Board has commerce jurisdiction is inadequate, without a recital of supporting facts.

Stipulations may be in writing or orally introduced, with each party attesting to the accuracy of the stipulated facts and the admissibility of the stipulation. Nevertheless, any party to a stipulation retains all rights to argue about the relevance and relative weight of any such stipulated evidence.

The charged party(ies) and the General Counsel must be parties to all stipulations, unless the stipulation is entered into the record without objection. *NLRB v. Haddock-Engineers, Ltd.,* 215 F.2d 734 (9th Cir. 1954); *U.S. v. Three Winchester 30-30 Caliber Lever Action Carbines,* 504 F.2d 1288 (7th Cir. 1974). However, a stipulation need not include the charging party if given adequate opportunity to adduce evidence to contradict

or to explain parts of the stipulation. See *Auto Workers (BorgWarner) v. NLRB*, 231 F.2d 237, 242 (7th Cir. 1956).

10394 Witnesses

10394.1 Sequestration of Witnesses

Board procedures permit any party to move to sequester witnesses. In *Greyhound Lines*, 319 NLRB 554 (1995), the Board set forth a model sequestration order with which trial attorneys should be familiar. Discretion should be used in determining whether to initiate or oppose the sequestration of witnesses. Sequestration orders by an Administrative Law Judge at trial should be carefully followed. See, e.g., *Sargent Karch*, 314 NLRB 482 (1994).

10394.2 Examination of Witnesses

The trial attorney should call and examine witnesses as planned in the trial brief (Sec. 10336), unless changed circumstances favor altering the order or direction of the examination. In order to enhance the credibility and reliability of the witness, direct, nonleading questions should generally be used. Some leading, however, is permitted to advance the witness to a particular subject matter and for refreshing recollection. For adverse witnesses, examination by leading questions is appropriate. Sec. 10394.3.

10394.3 Rule 611(c) Federal Rules of Evidence

This Rule in pertinent part provides:

> When a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.

Examination of respondent's decisionmakers and agents by leading questions has proven to be a useful tool that should be seriously considered in each case. The advantages of this examination, used early in the General Counsel's case, include:

- Fixing respondent's defenses on critical issues, such as the cause for discharge in an 8(a)(3) or 8(b)(2) case
- Securing admissions early in the proceeding for efficient and effective presentation of the case
- Securing admissions on matters particularly within the knowledge of respondent's witnesses

In the event it is decided to use Rule 611(c) examination, the trial attorney should carefully prepare the examination prior to trial and, when appropriate, use it in tandem with a subpoena duces tecum.

10394.4 Cross-Examination of Witnesses

Cross-examination of a witness called by another party is not mandatory and may be unnecessary. The goals of cross-examination include impeaching the witness' testimony and gaining admissions of fact favorable to the General Counsel's case. With respect to impeachment, the relative reliability of a witness' direct testimony may be revealed by questioning as to, for example, the timing and specific circumstances of the events or conduct in issue. In preparation for cross-examination, the trial attorney should carefully review the defenses proffered during the investigation and also those that may be reasonably anticipated. Thus, the trial brief should set forth in detail possible lines of cross-examination. Finally, cross-examination should proceed with firmness, direction and cordiality.

10394.5 Objections

Counsel for the General Counsel should be well versed in the Federal Rules of Evidence, so that objections can be raised at suitable times and argued with authority. Objections should be used to keep improper evidence from being considered and to make a record for Board and appellate review. Counsel for the General Counsel should show restraint in raising technical objections, avoiding those that serve little useful purpose. On the other hand, objections should be raised when the testimony or proffered exhibits are incompetent. Failure to object on grounds of incompetence, such as hearsay, may be found to be a waiver of the defect and could allow as probative what would otherwise be incompetent testimony. Rule 103(a)(1) of the Federal Rules of Evidence; 1 *Wigmore on Evidence* § 18 (3d ed. 1940). Sec. 5033 Federal Practice and Procedure, *Wright & Miller* (1977); *U.S. v. Fuentes*, 432 F.2d 405 (5th Cir. 1970); and *Diaz v. U.S.*, 223 U.S. 442, 450 (1912).

Objections should be made in a timely manner. They should be addressed to the ALJ and stated crisply with a specific ground, e.g., "I object, hearsay." Questions by the Administrative Law Judge are as subject to objection as questions by other parties.

If the ALJ overrules an objection to a question that is one of a series, counsel for the General Counsel may ask to note objection to the entire line. This approach can be suggested to opposing counsel in similar circumstances.

Voir dire is an examination into the authenticity of an exhibit proffered by an opposing party and the competence of the witness to authenticate such exhibit or to be an expert witness. Voir dire is used to explore whether an objection should be made and may be conducted by leading questions. Voir dire must be conducted at the time an exhibit is offered into evidence and is untimely after the exhibit is accepted into the record. Moreover, voir dire must not expand into general cross-examination; it must be limited to the specific purposes noted above.

10394.6 Use of Statements or Affidavits

Counsel for the General Counsel should use affidavits and other statements from the investigation to prepare witnesses for trial. At trial, statements may be used to refresh recollection, to impeach a witness' testimony and, in certain circumstances, may be introduced as substantive evidence in the form of an admission or in the absence of the witness. See generally Federal Rules of Evidence 612, 613, 801, and 803(5) as well as *Alvin J. Bart & Co.,* 236 NLRB 242 (1978).

Secs. 102.117 and 102.118(a), Rules and Regulations govern access to statements and other materials from the case file. Express consent must be obtained under Sec. 102.118(a) for a party's access to file materials and statements under the General Counsel's control not otherwise required to be produced. When opposing a party's request for material not required to be produced, counsel for the General Counsel should not solely rely upon the fact that consent was not obtained pursuant to Sec. 102.118. Counsel for the General Counsel should also set forth the reasons that nonproduction is appropriate. See Secs. 11820–11828 for subpoenas seeking Board agent testimony and documents in the Board's or General Counsel's possession.

10394.7 Production of Witness Statements

(a) *Witness Statements Defined:* Sec. 102.118, Rules and Regulations provides for the production of witness statements under certain circumstances. See Sec. 10394.8 below. Under the rule, a statement is defined as:

> (1) a written statement made by said witness and signed or otherwise adopted or approved by him; or (2) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement made by said witness to an agent of the party obligated to produce the statement and recorded contemporaneously with the making of such oral statement.

Such statements are commonly referred to as "*Jencks* Statements." See *Jencks v. U.S.*, 353 U.S. 657, 672 (1957).

(b) *Circumstances Requiring Production:* Sec. 102.118(b)(1), Rules and Regulations provides for the production of witness statements to opposing parties when all the following circumstances have occurred:

- The witness was called by the General Counsel or the charging party for testimony at a Board hearing and
- After completion of the direct testimony, the opposing counsel requests the witness' statement for cross-examination and
- The statement is in the possession of the General Counsel and

- The statement relates to the subject matter of the witness' testimony on direct

The General Counsel will request of another Federal agency producible statements by the witness in such agency's possession for use in the Board proceeding, if notified by the requesting party of the existence of such statements. Cf. *Trailways, Inc.*, 237 NLRB 654, 656 (1978). Counsel for the General Counsel should also turn over any certified English translation of a producible affidavit taken in another language. Sec. 10060.8.

The charging party also may be entitled, upon request and for the purpose of cross-examination, to a producible statement, in the possession of the General Counsel, of an agent who testifies on behalf of a respondent. See *Senftner Volkswagen Corp.*, 257 NLRB 178, 186–187 (1981), and *Louisiana Dock Co*., 293 NLRB 233, 250–251 (1989).

10394.8 Opposition to Production of All or Certain Portions of Statement; In Camera Inspections

Counsel for the General Counsel should oppose production of a statement if any of the requirements for production under Sec. 102.118(b), Rules and Regulations are not met. For example, if the alleged statement of the General Counsel's witness was not signed, adopted or otherwise approved by the witness, the trial attorney should oppose its production. The Administrative Law Judge may require that the statement be turned over for the ALJ's review of the document alone, i.e., an *in camera* inspection. The ALJ may also allow counsel seeking the statement to question the witness about whether any such statement was reduced to writing and either signed or adopted, or whether the written statement is a substantially verbatim recitation of an oral statement.

Counsel for the General Counsel during pretrial preparation should fully explore with each prospective witness to determine whether any producible statements are in the General Counsel's possession, whether in the pending matter or in any other case, and the exact number of such statements. This may obviate the witness at hearing becoming confused and contradicting the trial attorney's assertion that no statement exists. If, however, the witness does provide incorrect information at the hearing, the trial attorney should request permission to question the witness about the existence or number of producible statements. Such questioning may reveal that a previous oral statement to a Board agent was not, at the time, reduced to writing; that the written statement the witness is referring to is in the possession of another federal agency, which should prompt the trial attorney to request the statement from that agency; or that the witness never read or otherwise adopted the written statement in question.

Counsel for the General Counsel may contend that certain portions of an otherwise producible statement should be excised before delivery to the cross-examiner. If so, the trial attorney should submit the statement to the ALJ for an *in camera* inspection designating to the judge those portions that should be excised. The ALJ should remove those portions that do not relate to the subject matter of the witness' direct

testimony. However, this is a discretionary matter and the ALJ may find that some or all of the proposed deletions relate to other matters raised by the pleadings.

10394.9 Copies of Statements for Counsel

Counsel for the General Counsel will provide, upon request and when producible, as set forth in Secs. 10394.7(b) and 10394.8, a copy of each witness' statement to the counsel or other representative for each respondent. Where the original affidavit is handwritten and a typed copy has been made of the affidavit, copies of both should be produced. The handwritten version will be controlling and the unsigned typewritten copy should be supplied as a matter of convenience. Where the Administrative Law Judge has excised portions of a statement, only the copy with the excision should be produced to respondent's counsel. The ALJ decides the amount of time afforded counsel for review of the affidavits for cross-examination. Counsel for the General Counsel should not oppose a reasonable period of time for such review. If counsel for the respondent desires, respondent may be permitted to retain the affidavits until the hearing is closed provided that they are retained for legitimate trial purposes. Unless, of course, the affidavits have been offered in evidence, affidavits may not be retained by respondent after the close of the hearing for purposes of drafting a posthearing brief, inasmuch as the discussion in the brief must be based on record evidence.

Since Sec. 102.118(b), Rules and Regulations limits the production of witness statements for the purpose of cross-examination, any other use is not permitted. Examples of prohibited practices include:

- Copying statements without permission
- Retaining statements after the close of hearing
- Disclosing statements to anyone not directly involved in respondent's cross-examination

The Division of Operations-Management should also be advised if the Regional Office becomes aware of any use of witness statements for other than cross-examination.

10394.10 Statements Produced and Entered in Record

Counsel for the General Counsel may introduce all relevant portions of a statement if respondent attempts to impeach the witness by examination on only a portion of the statement. See, e.g., *J. P. Stevens & Co.,* 239 NLRB 738, 750 fn. 29 (1978). A novel or unusual situation involving the production of statements should be submitted to the Division of Advice.

10396 Offers of Proof

Evidence excluded by the Administrative Law Judge that counsel for the General Counsel considers competent, relevant and necessary to the proof of the case should be preserved by an offer of proof. The offer may cause the ALJ to reconsider or reverse the adverse ruling. Moreover, the offer of proof is a necessary prerequisite to take exceptions to a ruling excluding the evidence and preserves the opportunity for a remand to accept the evidence if necessary.

The offer, in essence, is a detailed recitation of facts to which the witness would testify if permitted. Offers that set forth the evidence in summary fashion or that merely recite conclusions are insufficient.

An offer of proof may take the form of specific questions to and answers by the witness, if permitted by the ALJ, or may be an oral statement by counsel on the record or a written statement to be included in the record. "Questions and answers" effectively present an offer of proof while preserving the witness' credibility. (See Rule 103(b) of the Federal Rules of Evidence and also Chapter 13, Sec. 13-112 of the ALJ's Bench Book.) If the ALJ refuses to hear the offer by question and answer, counsel for the General Counsel may excuse the witness and present the evidence through an oral statement on the record. Recitation of the offer of proof outside the witness' hearing helps avoid claims that the credibility of the witness has been compromised. The oral statement would commence with "I offer to prove by this witness that Foreman Jones said to him . . ." and would contain exact or paraphrased words that the witness would use. Alternatively, a written offer of proof may be used where an extended line of examination is necessary, permitting full consideration of details and saving hearing time.

Counsel for the General Counsel should ensure the record clearly reflects when the offer is concluded. Upon completion of an opponent's offer, counsel for the General Counsel should renew appropriate objections. If the offer is rejected, the proffered evidence is not received into the record. However, if the ALJ reverses the ruling and receives an opponent's evidence, counsel for the General Counsel should demand the right of cross-examination and/or rebuttal.

10398 Exhibits

Documents and records, if relevant to the issues, are introduced into the record as exhibits. To the extent possible, exhibits should be prepared in advance. Sec. 10338. However, confidential documents such as internal deliberative memoranda intended for intragency use should never be introduced in evidence without prior clearance from the Division of Operations-Management. Sec. 11820.

10398.1 Identification

Counsel for the General Counsel should ask the reporter to mark a document for identification and hand a copy to opposing counsel before approaching the witness. The document is then handed to the witness through whom it is being offered and, through questions and answers, is identified and authenticated. It is then offered in evidence. At

this point, an objection may be made and the relevance and authenticity of the document argued.

10398.2 Introduction

Two copies of all exhibits must be furnished to the reporter by the party offering the exhibit. A copy of each exhibit should also be available for the Administrative Law Judge and copies distributed to all other parties. The ALJ may permit voir dire to explore the authenticity of an exhibit and the competence of the witness to testify about the exhibit. Sec. 10394.5.

10398.3 Rejected

A party offering an exhibit may request its inclusion in the "Rejected Exhibits" if the exhibit has been refused admission.

10398.4 Record of Exhibits

The trial attorney should keep a running record—a good place is in the trial brief—of identification numbers of all exhibits marked, a short description of each, whether they were offered, whether they were received and, under "Remarks," anything else that might be of value.

10398.5 Submitted After Close of Hearing

The Administrative Law Judge may allow parties to submit exhibits after the close of the hearing pursuant to the following procedures:

(a) All parties should stipulate on the record that certain evidence may be received after the close of the hearing and shall become part of the record upon receipt.

(b) A description of the document(s) that a party proposes to offer should appear as part of the stipulation in the record and an appropriate exhibit number should be reserved.

(c) Ordinarily, the trial attorney should reserve the right to inspect the documents when they are offered and to file objections; this right may be reserved by all parties.

10398.6 Custody of Exhibits

The official reporter retains custody of exhibits received into the record (or placed among the rejected exhibits). The reporter is responsible for their safekeeping during and between hearing sessions. The reporter will not turn exhibits over to any party except upon direction by the Administrative Law Judge, in which case the reporter will be furnished a receipt. After the hearing is closed or indefinitely adjourned, the reporter will forward one copy of the exhibits to the Regional Office and one copy to the ALJ. The reporter shall retain custody of all exhibits in the case when the hearing is adjourned to a specified date. If the hearing is subsequently adjourned indefinitely, the exhibits will be forwarded to the Regional Office as above.

10400 Requests to Produce by Opposing Counsel

Demands by opposing counsel for the production of documents other than statements or affidavits in possession of the Regional Office or of counsel for the General Counsel should be rejected except in the following two situations:

- Where a witness has been given or is about to be given the document to refresh memory or to impeach testimony.

- Where the General Counsel has granted advance permission to turn over the document. But see Sec. 10398.

See Secs. 11820–11828 if the demand is followed by service of a subpoena and Secs. 10394.6–.10 if the demand is for statements and affidavits.

Counsel for the General Counsel should consult with the Regional Office for consideration of a possible special appeal or other action if the Administrative Law Judge upholds the demand for production over the objection of counsel for the General Counsel.

10402 Evidence of Settlement Negotiations

Settlement offers and discussions are normally inadmissible. Rule 408 of the Federal Rules of Evidence. Counsel for the General Counsel should not introduce such evidence and should resist attempts of others to introduce it. But see *Miami Systems Corp.*, 320 NLRB 71 (1995), which held that threats during the course of grievance settlement discussions are admissible.

10403 Background Evidence and Use of Presettlement Conduct

In cases involving postsettlement unfair labor practice allegations, unfair labor practices or other statements and conduct prior to the settlement agreement may be considered in establishing the motive or object of respondent in its postsettlement activities. *Coastal Electric Cooperative,* 311 NLRB 1126, 1132 (1993).

10404 Appeals to Board

Sec. 102.26, Rules and Regulations requires special permission of the Board before a party may file a direct appeal to rulings and orders of the Administrative Law Judge. Requests for such permission should be made promptly in writing, with a copy served on each other party and on the ALJ. Requests for Special Permission to Appeal rulings and orders of the ALJ may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4. The request for special permission to appeal should succinctly state the ruling, the surrounding circumstances and the grounds urged for reversal.

Counsel for the General Counsel should consult with the Regional Office before filing a request with the Board for special permission to appeal. Factors to be weighed before deciding to specially appeal include the importance of the issue to the overall prosecution of the case and the likelihood that the Board will grant such special permission.

Ordinarily, the hearing should not be delayed because a party seeks special permission to appeal a ruling or order. Counsel for the General Counsel should exercise discretion in deciding whether to submit to the Board an opposition to the request.

10406 Postponements

The Administrative Law Judge has the authority to grant postponement requests once the hearing is open. Unless all parties agree, the ALJ will ordinarily grant the postponement only on a showing of good cause, in view of the costs of hearing and the schedules of the parties and witnesses.

Counsel for the General Counsel is expected to be ready to proceed with the case at the scheduled time and, absent compelling circumstances, should not request a postponement. Sec. 10294.

10406.1 Requested Because of Lack of or Newly Acquired Counsel

Normally, the Regional Office will oppose a respondent's postponement request for lack of or newly acquired counsel, unless respondent can demonstrate good cause.

10406.2 Requested Because of Amendment to Complaint

Respondent may request a postponement, asserting the need to investigate matters alleged in an amendment to the complaint granted by the Administrative Law Judge at hearing. Sec. 10274.2. Counsel for the General Counsel should oppose the requested delay if the amendment is an extension of matters already in issue or if it is reasonable that respondent can investigate the matters while proceeding with the rest of the case. Counsel for the General Counsel must, however, appreciate and support the Agency's responsibility to ensure adequate notice and due process to all parties. The ALJ will normally consider the amount of advance notice as well as the nature and extent of the amendment in determining whether to grant a continuance in the hearing and in setting the time allowed for answering the new allegations.

Answers to allegations newly added to a complaint during hearing may take the form of prehearing answers or may take another form with the ALJ's permission, such as interlineations on the face of the original answer or oral statements on the record. Sec. 102.23, Rules and Regulations.

10406.3 Requested to Prepare Defense

Another common type of postponement request is the request for an adjournment between the closing of the General Counsel's case and the opening of the defense. Counsel for the General Counsel should absent unusual circumstances resist any

continuances, arguing, for example, that the pleadings, settlement discussions and underlying investigation should have placed respondent on notice of the issues to be tried.

10406.4 Necessitated by Other Matters

To the extent that litigation needs require appeals to the Board or other ancillary proceedings which may result in a continuance of the hearing, counsel for the General Counsel should expedite such proceedings to minimize any delay.

10407 Remedy Sought

10407.1 Statement on Record

The complaint should set forth any specific remedies that are in addition to those traditionally granted for the violations alleged. See Secs. 10131, 10266.1, and 10410. Counsel for the General Counsel, with the Administrative Law Judge's permission, may reiterate and expand upon the reasons for such remedies at hearing, in addition to arguing for such remedies in the brief.

10407.2 New Developments Requiring Reconsideration

From time to time, new developments at a hearing may require reconsideration of the remedy proposed. In such situations, counsel for the General Counsel should discuss the matter with the Regional Office, which will decide the appropriate course of action.

10407.3 Proposed Remedy Not a Limitation

Counsel for the General Counsel should explain to the Administrative Law Judge and the parties that the recommended special remedy is not a limitation as to normal Board remedies, but needs to be granted in addition to such remedies. Counsel for the General Counsel should always request the ALJ and Board to provide "any further relief as may be appropriate." Sec. 10266.1.

10407.4 Charging Party Seeks Different Remedy

Differences between counsel for the General Counsel's and the charging party's view of the appropriate remedy can be presented to the Regional Office and normally resolved prior to hearing. However, absent such an accord, counsel for the General Counsel will advance only the Regional Office's views. The charging party will have opportunity to present its views to the Administrative Law Judge and the Board, if it so chooses.

10407.5 Possible Change in Circumstances After Hearing

Circumstances affecting respondent's operations may change significantly after the close of hearing. Such changes may include altered operating methods, relocation, merger, acquisition, and other major events. Therefore, counsel for the General Counsel should request remedies at hearing and in the brief in broad terms to ensure they are applicable in the face of potential change. Further, absent an approved settlement,

counsel for the General Counsel should not assume that a full remedy has been obtained by respondent's posthearing actions. For example, even where an alleged discriminatee has been put back to work, counsel for the General Counsel should not assume there has been a complete reinstatement. Instead, in the absence of a Regional Office determination that a full remedy has been obtained, counsel for the General Counsel should pursue an appropriate remedy for each complaint allegation.

Counsel for the General Counsel and the compliance officer should encourage the charging party and employees who have remedial rights to inform the Regional Office of any changed circumstances, such as the dissipation or transfer of assets, the starting of new businesses and the identification of potential entities with possible derivative liability. Secs. 10054.2(c), 10264.3, 10274.4, and 10334.5 and Compliance Manual, Sec. 10596.

10407.6 Litigation of Proposed Remedy

Counsel for the General Counsel should not oppose respondent's attempt to introduce relevant testimony or evidence concerning any remedy sought subject of course to cross-examination, rebuttal and further appropriate evidence by counsel for the General Counsel as allowed by the Administrative Law Judge. On the other hand, the trial attorney should oppose irrelevant, inappropriate or extended debate concerning the remedy.

(a) *Suitability of Reinstatement Remedy*: Of particular concern in this area are issues regarding the suitability of certain alleged discriminatees for reinstatement and the desire to avoid contingent orders which may prove problematic at the enforcement stage and may impede the Agency's ability to obtain meaningful remedies in an efficient manner. In this regard, Regional Offices should consult OM Memo 07-57 and follow the guidelines set forth below:

- The Regional Office should investigate claims of suitability for reinstatement.
- After consulting Regional management, the trial attorney should agree to litigate at the unfair labor practice hearing evidence which, as a matter of law, constitutes a defense to the complaint allegations or could alter the reinstatement remedy.
- The trial attorney should, however, oppose the proffer of evidence legally insufficient on its face as well as proffers related to whether the alleged discriminatees are legally in the country. See also GC Memos 02-06 and 98-15.
- If the hearing record has closed but the Administrative Law Judge's decision has not issued, the trial attorney should, after consulting Regional management and where otherwise appropriate, join in the request to reopen the record. However, the trial attorney should oppose attempts to raise such matters when material evidence was deliberately withheld at the earlier hearing.

- Generally, attempts to raise such matters after the issuance of an Administrative Law Judge decision has issued should be opposed.

(b) *Other Remedial Issues:* Regional Offices may follow the approach outlined above in appropriate circumstances regarding other remedial issues and especially where such actions will:

- Enhance the likelihood of obtaining meaningful compliance results more promptly
- Assure availability of more current evidence
- Generally enhance the quality and efficiency of casehandling

10408 Bench Decisions and Oral Argument

The Board's Rules and Regulations give Administrative Law Judges the discretion to dispense with posthearing briefs and hear oral argument in lieu of briefs and to issue bench decisions. Sec. 102.42, Rules and Regulations provides that in any case the ALJ believes written briefs may not be necessary, the ALJ shall notify the parties at the opening of hearing or as soon thereafter as practicable of the judge's wish to hear oral argument in lieu of briefs. Additionally, the ALJ, under Sec. 102.35(a)(10), Rules and Regulations has the authority to make and file decisions, including bench decisions, within 72 hours after conclusion of oral argument. While the Board has not set forth in its Rules the circumstances under which these procedures should be utilized, it has suggested cases in which it may be appropriate to dispense with briefs and/or to issue bench decisions. Such cases include:

- Cases that turn on straightforward credibility issues
- Cases involving 1-day hearings
- Cases involving a well-settled legal issue where there is no dispute as to the facts
- Short record, single-issue cases
- Cases in which a party defaults by not appearing at the hearing

In any case that might result in a bench decision, counsel for the General Counsel must prepare an oral argument in advance of trial.

Upon issuance of a bench decision, the ALJ must certify the accuracy of the transcript pages containing the decision; file with the Board a certified copy of those pages, together with any supplementary matter the judge may deem necessary to complete the decision; and serve a copy on each of the parties. Upon the filing of the decision, the Board will issue an order transferring the case to the Board and serve a copy on the parties. Accordingly, the period for filing exceptions to an ALJ's bench decision

does not commence until the date of service of the order transferring the case to the Board.

In addition, oral argument may be appropriate in hearings which do not involve a bench decision. Thus, when appropriate, unless the ALJ has indicated that oral argument will not be permitted, counsel for the General Counsel should be prepared to argue orally. Accordingly, in preparation for the hearing, counsel for the General Counsel should prepare a detailed outline of the facts and legal argument with case citations, as appropriate. During the hearing, counsel for the General Counsel should be particularly sensitive to the ALJ's understanding of the General Counsel's theory. If it appears that further elucidation is needed, an oral argument should be made as to the issues warranting clarification, including any complex or novel legal principles in issue.

Since bench decisions and oral argument each will expedite issuance of ALJ decisions, Regional Offices should carefully assess the opportunity to recommend their use. In appropriate circumstances, counsel for the General Counsel should urge use of oral argument and bench decisions.

10409 Close of Hearing

Counsel for the General Counsel should check the trial brief to make sure all matters have been handled before the close of hearing. Regarding exhibits, counsel for the General Counsel should make sure:

- All exhibits intended to be offered in the General Counsel's case were offered and received or otherwise ruled upon
- All copies of exhibits were supplied

- The reporter has two copies of all General Counsel, joint and other exhibits the trial attorney is relying on

- All parties understand the arrangements, if any, for submission of exhibits after the close of hearing

Counsel for the General Counsel should also ensure that the complaint was amended, if necessary, to specifically allege violations of the Act supported by evidence adduced at trial.

Immediately after close of hearing, counsel for the General Counsel should complete the Report and Obligated Cost of Hearing form, Form NLRB-4237.

10410–10444 POSTHEARING

10410 Briefs to Administrative Law Judge

Briefs should normally be filed in the absence of oral argument and especially where involved credibility issues are present, the record is long, the issues varied or where legal argument may be helpful. The trial attorney should allow adequate time for drafting the brief and for supervisory review. Additionally, the discussion on persuasive brief writing in OM Memo 07-84 as well as the following briefing guidelines may be useful.

The brief should be succinct yet comprehensive and address:

- All alleged violations and the testimony and exhibits in support with specific record citations

- All points specifically raised by the Administrative Law Judge or that otherwise appear to be of concern to the judge

- Issues of credibility, highlighting undisputed facts and evidence and inconsistencies in testimony, inherent probabilities of witness' testimony, whether the testimony was specific and detailed and whether it was adduced by leading questions

- Argument and case law for the substantive allegations and for any specifically pled remedies the General Counsel is seeking

- Adverse evidence and case authority

Additionally, the brief should be respectful, scrupulously accurate, and comprehensive in discussing the case-in-chief and dealing with adverse evidence.

Three copies of the brief shall be filed with the ALJ and a copy served on all other parties, with a statement of service furnished on all copies. Time limits set by the ALJ and any subsequent rulings by the Division of Judges must be met. Sec. 102.42, Rules and Regulations. Briefs also may be filed electronically at the Agency's website under "Division of Judges." See Sec. 11846.4.

Copies of the brief should be retained in electronic form for use in possible exceptions or for briefs in support of the ALJ's decision. Sec. 10438.

The trial attorney, supervisor, and Regional Attorney should carefully review Respondent's brief to uncover and address potential problems. If the entire case or a particular allegation appears to have a fatal flaw, reconsideration may be warranted.

Regions should also be alert to changes in the law and take appropriate action. Additionally, in *Reliant Energy*, 339 NLRB 66 (2003), the Board adopted a procedure,

modeled after Rule 28(j) of the Federal Rules of Appellate Procedure, which permits parties in unfair labor practice cases and in representation cases to call to the Board's attention pertinent and significant authorities that come to a party's attention after the party's brief has been filed.

10412 Correcting the Transcript

Counsel for the General Counsel should ensure that the testimony of witnesses and the statements of counsel and the Administrative Law Judge are accurately set forth in the transcript, since all further proceedings will be based on the record. Counsel for the General Counsel should carefully read the hearing transcript upon delivery, especially in breaks during the course of hearing. Such review permits the opportunity to supplement an incomplete record with additional testimony. Further, counsel for the General Counsel should note all material inaccuracies and take necessary steps to correct the record. Corrections may be made by stipulation or by motion to the ALJ or the Board after transfer. Three copies of the stipulation or motion must be submitted to the ALJ. Eight copies are required if such stipulation or motion to correct is filed with the Board. In either instance, a copy should be served on each of the parties, with proof of service furnished. See generally Secs. 102.24 and 102.47, Rules and Regulations.

10430 Administrative Law Judge's Decision

The Administrative Law Judge's ultimate decision on the merits is based on full consideration of the record. After the close of the hearing and submission of briefs (except with a bench decision), the ALJ issues a decision that sets forth findings of fact, legal conclusions and recommended remedial action. If the ALJ delivers a bench decision, the judge shall certify the accuracy of the transcript containing the decision. In either case, upon the filing of the decision with the Board, the Board issues an order transferring the case to the Board, thereby divesting the ALJ of all jurisdiction. Sec. 102.45, Rules and Regulations.

Counsel for the General Counsel should review the ALJ's decision, including the factual findings, conclusions of law, and any remedy, to enable the Regional Office to determine whether any exceptions, cross-exceptions or an answering brief should be filed.

The trial attorney or other designated agent should continue to monitor respondent's ability to comply with the remedial provisions of the ALJ's decision and any changed circumstances with respect to the respondent's operation, identity or financial condition. Sec. 10407.5 and Compliance Manual, Secs. 10505 and 10596.

10430.1 Analysis of Significant Losses in Administrative Law Judge's Decision

Within 10 days following the issuance of an Administrative Law Judge's decision containing a significant loss to the General Counsel, an analysis should be submitted to the Division of Operations-Management. Such analysis should emphasize not only the result, but also the adequacy of the ALJ's proposed remedy.

10430.2 Novel or Complex Policy Questions Arising in Administrative Law Judge Decision

If the Administrative Law Judge's decision embodies novel or complex policy questions, the Regional Office should notify the Division of Advice as to whether it intends to file exceptions. Further action should await direction from Advice.

10434 Compliance with Administrative Law Judge's Decision

If no exceptions are filed, compliance efforts should be promptly initiated.

10436 Request for Review of Order Granting Dismissal

Where a motion to dismiss the entire complaint is granted by the Administrative Law Judge, any appeal should be in the form of a request for review filed with the Board within 28 days of the order of dismissal. Sec. 102.27, Rules and Regulations and Sec. 10388.2.

10438 Exceptions, Cross-Exceptions, Briefs Supporting the Administrative Law Judge's Decision and Requests for Oral Argument

Sec. 102.46, Rules and Regulations sets forth the time limits and format of exceptions, cross-exceptions and briefs in support, as well as any answering briefs and reply briefs. The time limits, format and strictures of Sec. 102.46 must be read with care and followed. The various filings described below may also be filed electronically at the Agency's website under "Board/Office of the Executive Secretary." See Sec. 11846.4.

10438.1 Filing of Exceptions and Cross-Exceptions

Any party, including the General Counsel, may file written exceptions and a brief in support of those exceptions contending that a material part(s) of the Administrative Law Judge's decision and recommended order is erroneous and should not be adopted by the Board. Cross-exceptions may be filed in response to another party's exceptions by any party who has not previously filed exceptions; they are governed by the same rules and format applicable to exceptions. Sec. 102.46(e), Rules and Regulations. Eight copies of the exceptions or cross-exceptions and any brief in support must be filed with the Board, with copies served on all other parties. See also Sec. 11846.4 for electronic filing and service.

10438.2 Time for Filing Exceptions and Cross-Exceptions

Exceptions must be filed within 28 days of service of the order transferring the case to the Board, unless an extension of time is granted. Sec. 102.46(a), Rules and Regulations.

Cross-exceptions must be filed within 14 days from the last date on which exceptions and any supporting brief may be filed, unless an extension of time is granted. Sec. 102.46(e), Rules and Regulations.

Secs. 102.111–102.114, Rules and Regulations govern time computations and other service and filing requirements and must be strictly followed. Exceptions, cross-exceptions, briefs in support, and other briefs in this topic area are accepted as timely filed by the Board if they are "postmarked on the day before (or earlier than) the due date" or hand delivered to or electronically received by the Board on or before the closing time of the receiving office on the due date. See particularly Sec. 102.111(b).

10438.3 Responsibility for Determination and Preparation of Exceptions and Cross-Exceptions

Ordinarily, the Regional Office determines whether to file exceptions or cross-exceptions. However, where a complaint was authorized by the Office of the General Counsel, normally the Division of Advice or the Office of Appeals, the Regional Office should make a timely recommendation to the branch or division involved as to filing exceptions or cross-exceptions and whether the original theory or another should be pursued.

Generally, exceptions should be filed when there is a reasonable possibility of success and the matter involved is of sufficient importance to the overall case. See OM Memo 07-84 for a detailed discussion. The standard for cross-exceptions should be substantially similar. Credibility findings are often difficult to successfully overturn and should normally be attacked only when other factors besides "demeanor" are the basis of the resolution.

Exceptions to *favorable* Administrative Law Judge findings and conclusions should be filed only where there are obvious errors, the rationale of the ALJ needs bolstering or the recommended remedy is inappropriate or inadequate.

10438.4 Preparation of Exceptions and Cross-Exceptions

Sec. 102.46(b), Rules and Regulations sets forth the format and requirements of each exception filed and Sec. 102.46(c) addresses the format and substance of the brief in support. The format and requirements for cross-exceptions and any brief in support thereof are governed by the same considerations applicable to exceptions. Sec. 102.46(e), Rules and Regulations. These documents frame the issues presented to the Board for its consideration. The supporting brief, if filed, contains the argument and citation of authority and the exceptions shall not contain such argument and citations, unless no supporting brief is filed. Together, both documents should, at a minimum, make clear:

- Specifically, the questions of procedure, fact, law or policy to which exception is taken

- Where in the Administrative Law Judge's decision each excepted to item is found or discussed

- What transcript pages and/or exhibits support the argument being made
- Where a disputed ruling may be found in the Administrative Law Judge's decision or the transcript
- The reasons and citations of authority the party asserts to support its position

Broad general exceptions, which do not clearly identify the issues, are not acceptable. See *Howe K. Sipes Co.*, 319 NLRB 30 (1995). For example, an exception claiming the ALJ failed to find a violation of Section 8(a)(1) or 8(b)(1)(A), without more, is insufficient. On the other hand, such an exception is sufficient if it identifies a specific complaint allegation the ALJ found without merit, or did not address, and, in tandem with the brief in support, contains the specificity described above. If no brief is filed, the supporting argument must be included in the exceptions.

10438.5 Answering Briefs and Reply Briefs

Sec. 102.46(d) and (f), Rules and Regulations provide for the content, circumstances and time to file answering briefs to exceptions. Reply briefs to answering briefs are addressed in Sec. 102.46(h).

10438.6 Requests for Oral Argument – Division of Advice Notification

A request for oral argument before the Board should be filed, if at all, along with the exceptions. The Regional Office should not request argument without clearance from the Division of Advice.

10438.7 Briefs in Support of Administrative Law Judge's Decision

Any party may file a brief in support of the Administrative Law Judge's decision. Sec. 102.46(a), Rules and Regulations. The number of copies and service are the same as exceptions.

10442 Oral Argument Before Board

The Regional Office should notify the Division of Advice if oral argument is ordered by the Board and consult regarding who will argue, the nature of the argument and related details.

10444 Posthearing Motions

Motions filed by any party after the close of the hearing but before transfer to the Board should be filed with the Administrative Law Judge. Sec. 102.24(a), Rules and Regulations.

After transfer to the Board, motions should be filed with the Board by transmitting eight copies and an affidavit showing service on all other parties. Sec. 102.47, Rules and Regulations. See also Secs. 10412 and 10452. Posthearing motions may also be filed in the appropriate office electronically at the Agency's website under "Division of Judges" or "Board/Office of the Executive Secretary." See Sec. 11846.4.

10450–10452 BOARD ORDER

10450 Issuance

In the event no exceptions have been filed, the Board will issue an order adopting the Administrative Law Judge's findings, conclusions, and recommendations. Sec. 102.48(a), Rules and Regulations.

Sec. 102.48(b) provides that upon the filing of exceptions, cross-exceptions, or answering briefs the Board may decide the matter on the record made before the ALJ. The Board may also decide the matter after oral argument or after reopening the record to receive further evidence or may make other appropriate disposition of the case.

10452 Motions for Reconsideration Under Sec. 102.48

The Regional Office should not file a motion for reconsideration under Sec. 102.48, Rules and Regulations, without prior clearance from the Division of Advice. The recommending memo should set forth the legal and evidentiary reasons for the recommended action and the substance of the proposed motion. The Regional Office, should, where appropriate, oppose other parties' motions for reconsideration. However, where new or novel legal problems are raised by such motions, prior clearance should be requested from Advice. Should a respondent file a motion for reconsideration with the Board, after the Regional Office has recommended enforcement, the Regional Office should notify the Division of Enforcement Litigation promptly.