

OFFICE OF THE GENERAL COUNSEL  
Division of Operations-Management

MEMORANDUM OM 94- 104

December 2, 1994

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

FROM: William G. Stack, Associate General Counsel

SUBJECT: Reservation Language in Settlement Agreements

The Committee on Casehandling and Cost Savings unanimously recommended that the Agency incorporate reservation language in its informal settlement agreement forms. It was the Committee's view that the labor bar would more likely accept reservation language if it were preprinted in the agreements. Preprinting the language would also ensure uniformity among the Regions. With respect to formal settlements, the Committee recommended that the reservation language should be added to the pattern settlement language set forth in the ULP Casehandling Manual.

The inclusion of a clause in a settlement agreement which reserves the right of the Agency to litigate other matters may be necessary in a particular instance in view of the settlement bar rule. Under this rule, a settlement agreement disposes of all issues involving presettlement conduct unless earlier violations of the Act were "unknown to the General Counsel, not readily discoverable by investigation, or specifically reserved from the settlement by the mutual understanding of the parties." Hollywood Roosevelt Hotel Co., 235 NLRB 1397 (1978). In situations where the General Counsel reserves the right to litigate other matters, it may be necessary to use evidence in the settled cases during such litigation.

After reviewing these recommendations, we have concluded that the following language should be incorporated in the preprinted informal settlement agreements and the Pattern for Settlement

Stipulations set forth in Casehandling Manual Sections 10168 and 10170:

This Agreement settles only the allegations in the above-captioned cases(s), and does not constitute a settlement of any other cases(s) or matters. It does not preclude persons from filing charges, the General Counsel from prosecuting complaints, or the Board and the courts from finding violations with respect to matters which precede the date of the approval of this Agreement regardless of whether such matters are known to the General Counsel or are readily discoverable. The General Counsel reserves the right to use the evidence obtained in the investigation and prosecution of the above-captioned case(s) for any relevant purpose in the litigation of this or any other case(s), and a judge, the Board and the courts may make findings of fact and/or conclusions of law with respect to said evidence.

The first two sentences reserve the right of the General Counsel to litigate other cases wherein there is alleged presettlement misconduct. The last sentence is the reservation of evidence provision. Under current Board law presettlement conduct may properly be introduced into evidence and be considered as background evidence to establish motive or animus. See e.g., Host International, Inc., 290 NLRB 442 (1988); Lawyers Cooperative Publishing Co., 273 NLRB 129 (1984). This reservation of evidence provision, however, would permit the Board and the courts to make findings of fact and conclusions of law with respect to the settled issues. For example, a finding of an unfair labor practice with respect to matters in the settled case could be made in order to support an unfair labor practice strike allegation in the litigated case, even though the settlement would bar any further remedy of the settled allegation.

Absent specific language permitting the findings of fact and conclusions of law with respect to the settled allegations, it is unclear whether Board law would permit the finding of an unfair labor practice. Thus, in Metropolitan Alloys Corp., 233 NLRB 966 (1977), the General Counsel had expressly reserved the right to introduce evidence bearing on the issues in the settled case at any hearing regarding the issues not settled. The Board held that unfair labor practice findings could not be

made with respect to the allegations which had been disposed of in the settlement agreement. In Washington Heights-West Harlem-Inwood Mental Health Council, Inc., d/b/a The Council's Center for Problems of Living, 289 NLRB 1122 (1988), the reservation of evidence provision stated that the settlement did not preclude the introduction of any evidence in the settled cases by any party in any other proceeding. It was concluded, based on the particular facts of the case, that the parties had understood that the General Counsel had reserved the right to seek a finding that the settled conduct supported a finding of an unfair labor practice strike. This holding was upheld by the U.S. Court of Appeals for the Second Circuit. (897 F.2d 1238, 133 LRRM 2895, 2901 (1990)). In view of these cases, it was concluded that the reservation of evidence provision should include language permitting the Board to make findings of fact and conclusions of law with respect to the settled conduct. Moreover, when there is a partial settlement, this language would permit such findings in the litigation of that portion of the case which was not settled.

The reservation language set forth above is similar to that which was used in Ratliff Trucking Corporation, Inc., 310 NLRB 1224 (1993). Notwithstanding the reservation language, the Board held in that case that the Hollywood Roosevelt rule precluded the General Counsel from litigating "remain members in good standing" language in a union security clause when another part of that clause had been the subject of a settlement agreement in a prior case. The Board stated that in order to relitigate the union security clause it was required that there be a specific reservation of the right to proceed on the clause's unaltered provisions. The Board did not view the broad reservation language "other case" to encompass any other allegations concerning the union security clause because the validity of the union security in total was in question. Therefore, another case or different presettlement events were not involved.

The Ratliff decision demonstrates that the "general" reservation language set forth above may not be sufficient in all cases. Thus, Regions should continue their practice of incorporating specific reservation language where there are other cases pending against the same charged party. When doing so, the language should state that the cases reserved from the settlement "include, but are not limited to, Case(s) \_\_\_\_\_."

Moreover, there may be situations where a Region believes that modification or deletion of the reservation language is necessary to effectuate a settlement and that there will be no resulting adverse consequences. Accordingly, Regions have the authority to modify or delete this language in appropriate cases. Regions may consult with the Division of Operations-Management or the Division of Advice regarding particular cases.

In the near future, Regions will be receiving a revised informal settlement agreement template<sup>1</sup> which will incorporate the reservation language. Regions should use this template in the future and discontinue using their supply of paper informal settlement agreement forms. Regions should also take note of the addition of the reservation language in the Pattern Settlement Agreements in Casehandling Manual sections 10168 and 10170 and include the provision in formal settlement agreements.

Any questions concerning this matter should be addressed to your Assistant General Counsel, or to me.

  
W. G. S.

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<sup>1</sup> As discussed in Memorandum OM 94-28, dated April 7, 1994, Regions have previously been supplied a series of templates which were illustrations of the types of templates which could be developed. One of these templates was an informal settlement agreement form which contained reservation language that differs from the language set forth above.