

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-09

March 16, 2011

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

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: Report on the Midwinter Meeting of the ABA Practice and Procedure
Committee of the Labor and Employment Law Section

Earlier this month, I attended the Annual Midwinter meeting of the Practice and Procedure Committee (P & P Committee) of the ABA Labor and Employment Law Section together with several senior Agency managers. As in years past, the primary purpose of this meeting was to respond to and discuss Committee concerns and questions about Agency casehandling processes. As is the practice, I provided responses to questions that the Committee had submitted earlier in the year, collected from practitioners from across the country who appear before the Agency. As prior General Counsels have done, I am sharing the P & P Committee members' concerns and my responses with you so that you can have the benefit of this important exchange. Questions directed to the Board have been deleted. While we did not have time to respond to every question raised at the meeting, we have included all the questions posed to me and my responses. The statistics included are current as of the time of the meeting.

During my tenure as Acting General Counsel, it is my intention to conduct the business of the Office of the General Counsel in an open and transparent manner. Continuing a constructive, cooperative relationship with the organized Bar is an important element of this objective and one to which I am committed. At the Midwinter meeting, members of the Committee stated their appreciation to me of the open and constructive relationships enjoyed by members of many local P&P groups with individual Regional Directors. I encourage you to create those liaisons where they do not exist and to continue and broaden those relationships where they do. Constructive relations with representatives of both management and labor who appear before us will only improve the performance of our mission and provide better service to all Agency stakeholders.

/s/
L. S.

Attachment
Release to the Public

cc: NLRBU
NLRBPA

MEMORANDUM GC 11-09

Responses of Acting General Counsel Lafe E. Solomon to
Questions Submitted by the ABA Committee on Practice and
Procedure under the National Labor Relations Act
March 2-5, 2011

I. UNFAIR LABOR PRACTICE ISSUES

A. Investigations

1. Remedies in Organizing Campaigns.

In recent months, the Acting GC has issued two memoranda addressing remedies for unfair labor practices committed by employers during organizing campaigns. In GC Memorandum 10-07, issued on September 30, 2010, he announced an initiative to seek 10(j) relief in all cases involving discriminatory discharges during organizing campaigns, so-called "nip-in-the-bud" cases. He identified as his goal "to give all unlawful discharges in organizing cases priority action and a speedy remedy." In GC Memorandum 11-01, issued on December 20, 2010, the Acting General Counsel expanded this initiative and instructed the Regions to request in their complaints, and to seek authorization to pursue in their requests for 10(j) authorization, additional remedies, as appropriate, for discharges and violations of Section 8(a)(1). The additional remedies include: notice reading by a responsible management official; union access to employee bulletin boards; and employer production of a list of employee names and addresses. Memorandum 11-01 also provides that Regions should submit cases to the Division of Advice where it may be appropriate to seek an order requiring an employer to provide a union access to its electronic communication and email systems, and to grant a union access to its property.

a. What are the results, so far, of these initiatives? Can you share with us any statistics on cases covered by these initiatives to date?

Regional Processing of Nip-in-Bud Discharge Cases

Period: October 1, 2010 through January 30, 2011

Charges Filed

- No. of charges filed on or after October 1, 2010 that allege a discharge during an organizing campaign 157
- Total ULP charges filed during this period 7348
- % of intake involving Organizing Campaign Discharges 2.1%

Merit Determination:

- Pending 78
- No Merit Found 57
- Reasonable Cause to Believe (Merit) 22
- Merit Rate 28%

Complaints Issued

- Submitted to ILB Seeking 10(j) Relief 3
- No. Proceeding to Expedited Hearing 5

○ Expedited Hearings Closed	0
○ Pending before RD	4
Results	
○ Settlements Reached	12
▪ Settlements Prior to 10(j) Authorization	11
▪ Settlements After 10(j) Authorization	1
○ No. Employer Offer Reinstatement	26
○ Employees Accepting Reinstatement	14
○ Backpay & Interest Received	\$151,530.86
Litigated Cases	0
Time for Processing	
	Average
○ Time From Filing to Board Authorization	62 days
○ Time From Filing to Settlement Prior to 10(j) Auth.	61 days
○ Time From Filing to Settlement After 10(j) Auth.	72 days
○ Overall Time from Filing to Resolution	61 days

b. What staffing, budgetary and other effects, if any, have these initiatives had on the Regions?

As you note, GC Memorandum 10-07 issued on September 30, 2010, and GC Memorandum 11-01 issued on December 20, 2010. As a result, it is still too early to calculate the impact that these initiatives will have on Regional Office staffing and other budgetary matters. However, the Division of Operations- Management is closely watching the processing of pending cases and, in particular, the need to provide priority treatment of charges alleging unlawful discharges in an organizing campaign. Absent settlement, Regions will clearly be utilizing resources to seek 10(j) authorization and litigate such cases in district court. The Division of Operations-Management will closely monitor the impact of this work on overall case processing and take prudent steps to provide resources to Regional Offices, as needed, consistent with overall budgetary constraints.

c. What discretion do Regional Directors have in determining whether to submit a nip-in-the-bud case for 10(j) authorization and whether to seek the additional remedies.

The Regional Directors have no discretion to determine whether to submit a nip-in-the-bud case. The Acting General Counsel will review all such cases as required in GC Memorandum 10-07. However, pursuant to GC Memorandum 11-01, Regional Directors do have discretion to seek notice reading, union access to bulletin boards, and employee names and addresses. Regional Directors, however, do not have discretion to seek additional remedies, including union access to non-work areas during non-work time; union notice of, and equal time and facilities for, the union to respond to any address made by a company regarding union organizing; and union right to deliver a speech to employees before a representation election. Regional Offices must submit requests for these remedies to the Division of Advice.

d. What guidance has been given to Regions concerning the reading of notices to employees or members, e.g. would such reading be live, by videotape, over the internet?

We are making inquiries and gathering experiences from the Regions concerning the reading of notices in their respective geographic locations and will be issuing "best practices" instructions should the need be demonstrated.

e. Does the Acting General Counsel anticipate expanding these initiatives to other unfair labor practice cases?

Not at this time.

2. Investigative Subpoenas. What is the Agency's current policy on issuance of investigative subpoenas?

Casehandling Manual (CHM) Section 11770 provides:

Investigative subpoenas should be utilized responsibly to make available to the Regional Director evidence necessary for:

Deciding whether a complaint or compliance specification should issue, absent settlement,

Determining whether there has been compliance with remedial obligations,

Determining the possible derivative liability of additional parties,

Determining the need to initiate proceedings to obtain a protective order or other *pendente lite* relief, or

Making appropriate determinations in processing R cases.

CHM 11770.2 provides: Scope of Regional Director's Discretion The Regional Director has full discretion to issue pre-complaint investigative subpoenas ad testificandum and duces tecum seeking evidence from parties and third-party witnesses whenever the evidence sought would materially aid in the determinations described above in Sec. 11770 and whenever such evidence cannot be obtained by reasonable voluntary means. The Regional Director's discretion is subject only to limited clearance and recordkeeping requirements. See CHM Sec. 11770.4.

CHM 11770.4 Clearance by Headquarters

(a) Clearance Required

Headquarters' clearance should be obtained by the Regional Office prior to issuance of an investigative subpoena where:

A witness or entity may claim a constitutional protection,

A witness or entity may claim a privilege, such as where the subpoena seeks evidence from an organization or from current or former employees or agents concerning communications with organizational counsel, or where the subpoena seeks evidence from a member of the press to elicit testimony relating to information gained in his or her professional capacity or requiring the production of materials secured as a result of news gathering activities,

The subpoena seeks evidence from a healthcare provider, which could implicate the doctor-patient privilege or the Health Insurance Portability and Accountability Act (HIPAA) (see Sec. 10054.7),

Party counsel claims to represent a third-party witness in an individual capacity under circumstances described in Sec. 10058.4(c),

The Regional Office wants to issue a subpoena, subsequent to complaint and before issuance of a Board order, which is related to an issue in the complaint.

Generally, in all of the above cases, requests for clearance should be submitted to the Division of Advice and the Special Litigation Branch. If an issue under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, clearance requests should also be submitted to the Contempt Litigation and Compliance Branch.

(b) Clearance Not Required

The Regional Office may issue an investigative subpoena, without Headquarters' clearance, where the issues involved in (a) above are not present and where there is a need to:

Investigate new post-complaint charge allegations,

Investigate the possible dissipation of assets and/or the need to initiate proceedings to obtain a protective order or other *pendente lite* relief,

Investigate the possible derivative liability of additional parties,

Preserve testimonial evidence as contemplated under Sec. 102.30, Rules and Regulations, or

Investigate noncompliance with Board orders or court decrees enforcing such orders. See, e.g., *Alaska Pulp Corp.*, 149 LRRM 2684, 2688 fn. 6 (D.D.C. 1995) (court enforced subpoena investigating possible noncompliance with court enforced Board order).

a. Is the Acting General Counsel considering any changes to this policy?

No

- b. Is the General Counsel's office consulted in any cases where subpoenas are issued?

Yes-see **CHM 11770.4** above

- c. What are the most recent statistics available on investigative subpoenas, e.g., number issued, types of cases, to whom issued (charged parties and third parties), types of subpoenas (ad testificandum and duces tecum), voluntary compliance, number of enforcement actions, success rate in enforcement actions?

In FY 2010, Regional Offices issued 930 ad testificandum and 517 duces tecum subpoenas, 1447 in total. There has been a gradual increase in the use of investigative subpoenas over the years. However, the use of investigative subpoenas remains relatively rare. For example, in 2005, the percentage was 1.8% and for 2010 the percentage was 2.8%. The measure is not precise, however, because investigative subpoenas often cover multiple charges. In FY 2010, we initiated 20 enforcement actions and were successful in all that went to decision. There was compliance with the remainder of the subpoenas issued or they were withdrawn. We do not have records of the types of allegations as to which the investigative subpoenas issued sought evidence.

3. Position Statements.

- a. What guidance has been provided to the Regions on the amount of information that should be given to a charged party when requesting that it submit a position statement?

Regions follow the guidance set forth in CHM Section 10054.4. When communicating with the charged party representative, agents should relate the basic contentions that have been advanced with regard to all violations alleged in the charge. This information should include the general nature of the alleged unlawful conduct, where – in general terms - the violation occurred, when it occurred, and the identity of the charged party agent involved. Board agents are advised to avoid providing details that would likely disclose the identities of witnesses.

A charged party's full cooperation with the investigation includes allowing the Board agent to take sworn statements from the charged party's witnesses. In these circumstances, the amount of information provided by the Board Agent regarding the alleged unfair labor practices may be more detailed.

CHM Section 10054.4 provides that in situations involving questions of law and legal theory, the Board agent should candidly discuss with the charged party the legal issues being advanced by the parties and under consideration by the Regional Director. The Board agent should invite a position statement from the charged party articulating its legal theories and addressing the other legal theories being advanced.

- b. What guidance has been provided the Regions on whether to offer a charging party an opportunity to submit a supplemental position statement on any issues that may be

determinative before the case is considered at an agenda meeting?

CHM Section 10050 provides that Board agents should freely identify and discuss the theories underlying the charge with both parties.

Throughout the investigation, Board agents should obtain sufficient information to allow the Regional Director to make an informed decision on the case. This information includes evidence adduced during the course of the investigation, as well as the positions of the parties on the legal theories relevant to resolving the allegations. While there is no specific guidance requiring Board agents to request supplemental position statements from the charging party, the Board agent's goal to provide the Regional Director with a complete picture of the investigation includes seeking supplemental positions from the parties regarding the evolving investigation.

Of course, there is nothing in the NLRB's published materials to preclude a charging party from submitting, or the Regional Director from considering, a supplemental position statement regarding any issues relevant to the investigation.

c. What guidance has been provided the Regions on the nature and scope of discretion that they have to make credibility determinations?

When faced with credibility determinations, the Regions are guided by CHM Section 10064. Regional Directors resolve factual conflicts only on the basis of compelling documentary evidence and/or an objective analysis of the inherent probabilities in light of the totality of the relevant evidence.

To avoid credibility issues, the Regions are advised to obtain a complete factual investigation. Board agents are instructed to focus interview questions to probe into the facts surrounding an event, rather than the opinions and conclusions of the witnesses. Board agents should stress the need for witnesses to testify to the specific language used in critical conversations. When a witness is contradicted regarding relevant testimony and further interview of the witness might help resolve the issue(s) administratively, the Board agent is directed to re-interview the witness. Board agents seek out, and if necessary subpoena, third-party witnesses to provide evidence to assist in an administrative resolution of factual conflicts or credibility disputes. If, after taking these steps, the Regional Director is unable to resolve credibility conflicts on the basis of objective evidence regarding matters which would affect the merit determination, a complaint should issue, absent settlement.

B. Settlements.

1. In GC Memorandum 11-04, issued on January 12, 2011, the Acting General Counsel instructed the Regions routinely to include default language in all informal settlement agreements and all compliance settlement agreements.

- a. What statistics can you share with us with respect to the number of cases in which complaint issued based in any respect on a determination that a charged party had failed to comply with an informal settlement agreement that did not contain default language?

The Agency does not track and, as a result, has no statistics to show how often Regions sought to set aside a settlement agreement based on a charged party's noncompliance. While CATS data can show us when a settlement agreement is approved and a complaint issued in the same case, it cannot show if the same allegations are involved.

- b. What flexibility do the Regions have to include or not to include default language in an agreement?

GC Memorandum 11-04 instructs Regions to **routinely** include default language in all informal settlement agreements and all compliance settlement agreements. Regional Directors have limited discretion to approve settlement agreements not containing default language.

- c. What discretion do the Regions have to change the form default language?

Since the model default language follows the form of default language that has been approved by the Board, Regions are generally not authorized to modify the form default language

- d. Does the Agency maintain any statistics on the inclusion of default language in settlement agreements that can be shared with us? How do the Regions report that information?

The NLRB Case Activity Tracking System (CATS) does not track the inclusion of default clauses in informal settlement agreements secured in unfair labor practice cases or settlement agreements to resolve compliance disputes. Once the NxGen case management system is deployed to all Regional Offices, it will capture the documents that form the basis of the settlement agreement in unfair labor practice cases and compliance cases. However, there are currently no plans to track the inclusion of default language since our policy now provides that such language should be routinely included.

- e. How do Regions determine if a charged party has failed to comply with its obligation under an agreement containing default language? Are there any standards or procedures that should be followed?

Once a settlement agreement is approved, Regions will be seeking to ensure compliance with the terms of a settlement agreement by a charged party. Therefore, during the processing of the settlement agreement, a Region will be actively considering whether the charged party has complied with its obligations as outlined in the agreement. In addition, a charging party may raise with a Region any issues regarding

non-compliance with the settlement. Regions generally follow standard investigative procedures to determine whether a settlement agreement has been breached. See generally CHM Section 10594.12.

- f. In what respects is non-compliance with a cease and desist obligation handled the same as, and in what respects is it handled different than, non-compliance with an affirmative obligation?

The investigation procedures followed to determine non-compliance will generally be the same. The affirmative provisions of the settlement generally call for specific acts to be taken, such as reinstatement of a discriminatee or payment of backpay in accordance with the provisions of the agreement. Therefore, the matters to be considered are generally more straightforward. By contrast, an allegation of non-compliance with a cease and desist provision of the agreement will generally raise the issue of whether the charged party has engaged in a subsequent violation of the Act covered by the terms of the outstanding settlement agreement. If after a full investigation, a Region concludes that a charged party has committed a subsequent unfair labor practice and that this conduct is in violation of the cease and desist provision of the outstanding settlement, the Region would issue a complaint on the new unfair labor practice and seek to consolidate the hearing on this complaint with its motion to the Board for a default judgment. Regional Directors will be exercising their prosecutorial discretion to determine whether to seek a default judgment, including considering such factors as the passage of time since the settlement agreement was approved and implemented, whether the cease and desist language clearly covers the new alleged unfair labor practice, and the strength or weaknesses of the new alleged violation. Regional Directors historically have had discretion to decide whether subsequent conduct by a charged party/respondent constitutes non-compliance with the affirmative and cease-and-desist provisions of an informal settlement agreement warranting setting aside the agreement and issuing complaint. Regional Director discretion is similar with respect to the processing of a settlement agreement containing a default provision.

- g. What effect, if any, has the directive had to date on settlement rates?

Since the directive only issued on January 12, 2011, we have not yet had enough time pass to determine if there is any impact on the Agency's overall settlement rate. Based on the past experience of several Regions that routinely sought default clauses in all settlements, we do not expect that the settlement rate will be adversely impacted.

2. Non-Board settlements.

- a. What discretion do the Regions have in applying the policy considerations for determining whether to approve the withdrawal of a charge in a case in which the parties have entered a non-Board settlement?

The procedures for a Region to follow when considering whether to approve a withdrawal based on a non-Board adjustment are set forth in CHM Section 10142, which provides, in relevant part, that in those situations where alleged discriminatees are not represented by counsel, caution should be exercised to ensure that the non-Board settlement is not repugnant to the purposes of the Act or that advantage has not been taken of an individual in the private negotiations. A Regional Director's discretion to reject a settlement reached between the parties is governed by the standards set forth in *Independent Stave Co.*, 287 NLRB 740 (1987) and *Alpha Beta Co.*, 273 NLRB 1546 (1985). CHM Section 10142.1 provides that the Regional Director should take into consideration the strictures of Section 10(b) in deciding whether to approve a withdrawal request before all of the requirements contemplated by the non-Board adjustment have been carried out. Approval may be withheld or granted conditionally, pending full performance of the requirements of the parties' private adjustment.

Beyond the above Unfair Labor Practice Casehandling Manual provisions, other guidance on this issue can be found in Memorandum OM 07-27 "Non-Board Settlements", which issued on December 27, 2006 and which sets forth principles that Regions should follow in assessing whether to approve non-Board adjustments:

1. Regions should not approve non-Board adjustments that include a provision requiring an employee to release future rights, with the exception that an employee may knowingly waive the right to seek employment with a named employer in the future.
2. Regions should not approve non-Board adjustments that prohibit a discriminatee from providing assistance to other employees.
3. Absent special circumstances, Regions should not approve a withdrawal request based on a non-Board adjustment that prohibits a discriminatee from engaging in discussions about the employer or the terms of the settlement with other employees, except that defamatory statements may be prohibited. However, the non-Board adjustment may contain a provision limiting the disclosure of the amount of money received pursuant to the terms of the non-Board adjustment.
4. Non-Board adjustment should not include language that specifies unduly harsh penalties for breach of the agreement such as repayment of backpay or a requirement that the charging party or discriminatee pay attorneys' fees or costs for enforcing the agreement. A provision that seeks damages that are directly related to the breach of the agreement would not be considered an unduly harsh penalty.
5. Regions should refuse to approve a withdrawal request based on a non-Board adjustment that appears to violate tax laws or regulations.

These parameters must be taken into account by the Regional Directors in determining whether to accept a non-Board settlement. However, a Director has the discretion to approve withdrawals in cases involving these issues when in his/her judgment the mission of the Agency will be best served by approving the settlement.

b. What discretion do the Regions have to approve the withdrawal of a charge in a case in which the parties have entered a non-Board settlement that provides for the payment of less than 80% of full back pay to any alleged discriminatee?

CHM Section 11752 provides, in relevant part that:

Certain settlements amounting to less than 80 percent or more than 100 percent of net backpay require clearance from the Division of Operations-Management as follows:

- All formal and informal Board settlements. See also, Sections 10592.4 and 10592.8 of the Compliance Manual
- Non-Board settlements in cases where the Regional Office has decided to issue complaint. See also, Sections 10592.4 and 10592.8 of the Compliance Manual.

Section 10592.4 of the Compliance Manual states that Regions should strive to obtain 100 percent of backpay and that the requirement for clearance does not imply that settlements that constitute more than 80 percent but less than 100 percent of backpay should be routinely accepted. (Note: Section 10592.8 discusses offers of more than 100 percent of backpay owed.)

C. Deferral

1. The Board's current policy under *Collyer* and *United Technologies* provides that certain charges must be deferred to the contractual grievance procedure if the conduct is cognizable under the grievance procedure, the grievance procedure culminates in final and binding arbitration and the charged party waives all timeliness defenses to the grievance. Under the policy, the Regional Director withholds making a "final determination" based on the Board's preference that the parties resolve differences through their own procedures.

a. The Committee is interested if either the Board or General Counsel is contemplating any changes in current deferral policy. For example, will the Regional Directors continue to withhold announcing any merit determination? Is the General Counsel considering restricting the scope of deferral?

The Acting General Counsel has issued GC Memorandum 11-05 regarding proposed changes in the scope of post-arbitral (Spielberg) deferral, but is not currently considering changes in the scope of pre-arbitral (Collyer) deferral. As part of the new policy on post-arbitral deferral, Regions have been instructed to take affidavits from Charging Party's witnesses before making Collyer "arguable merit" determinations. The purpose of that instruction is to ensure preservation of evidence that may be needed to determine whether post-arbitral deferral is appropriate.

b. What is the current policy regarding deferral of charges brought under Sections 8(a)(5) or 8(b)(3) alleging a refusal to provide relevant information necessary for bargaining?

The current policy regarding refusal to provide information allegations is that they should not be deferred to grievance/arbitration. See Team Clean, Inc., 348 NLRB 1231 (2006).

- c. What is the current policy where the Union's position is that the dispute does not involve a matter that is cognizable under the grievance and arbitration procedure of the parties' collective-bargaining agreement?

Where the Union's position is that a dispute is not cognizable under the parties' grievance/arbitration procedure, the Regional Office reviews the agreement and the parties' past practice and makes an independent determination as to whether the dispute is cognizable under the parties' grievance/arbitration procedure. Under longstanding Board law, if the grievance/arbitration provision is sufficiently broad, a dispute may be cognizable even in the absence of a specific contractual requirement alleged to have been breached. See Wonder Bread, 343 NLRB 55 (2004).

- d. Have there been any changes to the application of the standards set forth in *Spielberg*?

The Acting General Counsel intends to propose, in appropriate Section 8(a)(1) and (3) cases, that the Board modify its Spielberg deferral standards as described in GC Memorandum 11-05. Briefly, the Acting General Counsel intends to argue that deferral to an arbitration award is not appropriate unless the party urging deferral demonstrates that (1) the contract had the statutory right incorporated in it or the parties presented the statutory issue to the arbitrator; and (2) the arbitrator correctly enunciated the applicable statutory principles and applied them in deciding the issue. If that showing is made, deferral will be appropriate unless the award is repugnant ("palpably wrong"), as under the present standard.

- e. What statistics, if any, does the Agency keep on deferred charges and can they be shared with the Committee?

The Agency actively monitors pending deferred cases. Consistent with CHM Section 10118.5, Regional Directors make quarterly inquiries into the status of the grievance-arbitration proceedings and, based on the responses submitted by the parties, re-evaluate the decision to defer the case to those processes.

In 2002, the General Counsel launched an initiative to reduce the inventory of pending *Collyer* and *Dubo* cases. At that time there were 4526 cases pending deferral. By January 2010, that number was reduced to 2033 cases. Currently, there are 2092 cases pending *Collyer* or *Dubo* deferral - 54% reduction in cases from 2002 levels. The chart below shows the age of our current inventory of deferred cases:

Year deferred	Number of Pending Deferred cases	% of all deferrals
2011	150	7.2

2010	1241	59.3
2009	409	19.6
2008	144	6.85
2007	77	3.7
2006	31	1.5
2005	14	.7
2004	6	.2
2003	9	.4
2002	4	.2
2001	4	.2
2000	2	.1
1998	1	.05

- f. Does the Agency maintain any communications with arbitrators or the FMCS regarding its deferral policies, its impact on arbitral decisions, and the training of arbitrators?

When a case is deferred to pending grievance arbitration proceedings, a “Notice to Arbitrator” form (Form NLRB-5433), which requests that a copy of any arbitration award be forwarded directly to the Regional Director, is enclosed with the letter to the parties advising them of the decision to defer the charge. The parties are asked to provide the arbitrator with this form. Other than this request, the Agency does not maintain any communications with arbitrators or the FMCS regarding its deferral policies.

D. Notices and Remedies.

1. Following the Board’s decision in *J. Picini Flooring*, what are the circumstances under which electronic publication of Board notices will be required?

Electronic publication of Board notices will be required in all cases in which the charged party/respondent communicates with employees electronically.

- a. Will the requirement extend to websites as well as email?

If the charged party/respondent communicates with employees via its website, this requirement will be extended to the website as well.

- b. Where the respondent routinely communicates with its employees or members by electronic means, will a physical or mail posting still be required?

Yes. The Board orders currently require both physical posting/mailing and electronic distribution.

- c. What guidance has been provided to the Regions concerning cases in which a national or international company is ordered to issue a notice based upon a violation that involves a single location or discrete segment of its workforce?

To date, no guidance has been provided. The Division of Operations-Management is in the process of surveying the Regions regarding experiences with electronic distribution. Once the responses have been reviewed, guidance will be provided.

- d. What guidance has been provided to the Regions on the use and content of cover emails from a respondent transmitting an electronic copy of a notice to employees?

To date, no guidance has been provided. The Division of Operations-Management is in the process of surveying the Regions regarding experiences with electronic distribution. Once the responses have been reviewed, guidance will be provided.

2. What changes in procedure have been made or are planned based upon the Board's decision in *Kentucky River*, adding daily compound interest to backpay and other monetary awards?

In GC Memorandum 11-08, issued March 11, 2011, the Acting General Counsel announced a new approach to the calculation of backpay, to implement the Board's decision in *Jackson Hospital Corporation d/b/a Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In brief, it will be argued to the Board in discriminatory discharge cases that daily compounded interest should now be assessed beginning at the end of the payroll period during which the unlawful discharge occurred. The dollar amount upon which daily compounded interest is applied will be gross backpay less an apportioned amount of interim earnings, if any. GC Memorandum 11-08 also calls for the treatment of search-for-work and interim work related expenses in line with the traditional treatment of medical expenses and for reimbursement for the excess federal and state income taxes owed from receiving a lump-sum backpay award covering more than one year of backpay.

3. Have any instructions been given to the Regions on providing assistance to alleged discriminatees in complying with their mitigation obligations at various stages of a proceeding?

No instructions have been issued to the Regions on this issue, however, there too we are developing an approach to present to the Board.

E. First Contract Bargaining Initiative.

1. In GC Memorandum 06-05, the General Counsel rolled out his remedial initiative in first contract bargaining cases. GC Memorandum 07-08 outlined additional remedies that should be considered in such cases. In GC Memorandum 08-09, the General Counsel extended for six months the requirement that certain first contract bargaining cases be submitted to the Division of Advice. Memorandum OM 09-54, issued on March 30, 2009, directed that such cases be submitted to Advice until further notice.

a. What is the current status of the initiative?

The requirement that first contract bargaining cases be submitted to the Division of Advice remains in effect, per Memorandum OM 09-54, in order to ensure that Regional Offices are properly considering special remedies and Section 10(j) relief in these cases and to ensure that there is consistent analysis of these issues among the Regions.

b. The Committee would also like a report updating the first contract bargaining case data provided previously.

In fiscal year 2010, special remedies described in the General Counsel memoranda were authorized in 5 cases, all of which settled. The following special remedies were authorized in first contract bargaining cases:

- Bargaining schedules in 2 cases
- Reimbursement of bargaining costs/litigation expenses in 1 case
- Extension of the certification year in 4 cases
- Notice reading in 1 case

During FY 2010, the General Counsel or Board authorized the initiation of Section 10(j) proceedings in 3 first contract bargaining cases. One of these cases settled, and district courts granted injunctions in the other 2 cases, including one remedy involving reading of the court's order by the employer to all employees.

G. GC Appeals.

1. What are the current statistics on appeals from Regional Directors' refusals to issue complaint?

In FY 2010, the Office of Appeals received 2,146 appeals from Regional Directors' refusals to issue complaint, a nearly 5% increase over the 2,046 appeals received in FY 2009. In FY 2010, the Office processed 2,036 appeals, also nearly a 5% increase from the 1,944 appeals decided in FY 2009. The rate of reversal of Regional Directors' dismissals was 1.4%, almost the same as the 1.5% reversal rate in FY 2009.

For the first quarter of FY 2011, the Office received 501 appeals, and closed 456. In this period, 8 appeals were sustained, 1.8 percent of the closed cases. By comparison, in the first quarter of FY 2010, the Office received 573 appeals and closed 496. In that period, 5 appeals had been sustained for a rate of 1 percent.

2. What are the statistics on the number of cases in which oral presentations are requested on appeals? Granted?

We do not keep statistics on the number of cases in which oral presentations are requested on appeals.

Our records reflect that oral arguments were granted in four appeal cases in FY 2010, and in one appeal situation (multiple case numbers) so far in FY 2011.

II. REPRESENTATION CASES

C. Pre-Election Representation Hearings.

1. Have there been any changes, or are any changes being contemplated, to the current policy on the setting and postponement of representation hearings?

No. Current policy with respect to the setting of hearings and dealing with postponement requests are unchanged.

2. May the Regional Director direct an election without a hearing if the employer or incumbent does not articulate a colorable bar to the petition?

If a Regional Director has reason to believe that a question concerning representation exists, and if the parties do not reach agreement to enter into a consent or stipulated election agreement, a notice of hearing is issued. In cases where no question concerning representation exists, a Director will solicit withdrawal of the petition. Where the Petitioner will not withdraw, the Director will issue a dismissal letter, setting forth the reasons that form the basis of the decision, and describing the parties' rights to appeal the decision.

In cases where a question concerning representation exists, Regional Directors would conduct a hearing in all cases, except that in UC cases hearings are not required. While a Director may use a Notice to Show Cause procedure to assist in expediting a representation proceeding, that procedure will not obviate the statutory requirement to conduct a hearing.

D. Post-Election Hearings.

1. What are the most recent statistics on post-election hearings, e.g., number held, type of hearing, processing time, and resolution (settlements, withdrawals, rerun elections, results of rerun elections)?

	Number of post election hearings held	Type of Hearing (Objections, Objections and Challenges, Challenges)	Processing Time (median of days from election or filing of objections to issuance of Hearing Officer's Report)

FY 2010	49	16 reports on Objections 2 Reports on Objections and Challenges 6 Reports on Challenges 2 Supplemental Decisions on Objections 13 Petitions w/d after election conducted	66
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Resolution:

For Post Election Hearings Closed in 2010	
Certification of Representation issued	21
Certification of Results issued	16
Rerun elections ordered	5
Results of re-run elections	5 cases resulted in the issuance of Certification of Representative
Remanded to RD to conduct Hearing	1
Withdrawn	13

E. Decertification Petitions.

1. Has the Board issued any guidance or does it have an established a practice on processing a petition that appears barred on its face, but neither the employer nor the union raise the issue?

During the investigation of the representation petition, the Regional office would review the facts and circumstances with the parties and make a decision based upon the outcome of the investigation. In most cases, the Regional Director would not authorize the expenditure of Agency resources to conduct an election where not appropriate under the Act.

F. Foreign Language Ballots.

1. Some Committee members have reported issues regarding the use of non-English ballots.

a. Is there any policy concerning use of such ballots?

CHM Section 11315.1 provides, in relevant part, that:

The use of foreign languages may be required in Board elections. As detailed in CHM Section 11315.2, notices of election, including side panels and/or center panels and/or ballots in languages other than English, may be provided in addition to English notices, where the need is shown in appropriate circumstances. As an alternative or a supplement to these arrangements, foreign language interpreters may be provided at the polling site.

Because the preparation of foreign language notices and/or ballots may be extremely costly and may delay the election, the Regional Director should carefully evaluate requests for such notices. In deciding whether to provide translated notices and/or ballots, the Regional Director may consider the following factors:

- (a) the portion of the voting group which speaks a foreign language and does not read English,
- (b) the number of foreign language translations that would be required to accommodate these voters, or
- (c) whether written communication between the employer and these employees is in English or their native language. (The mere fact that employees may communicate among themselves in a language other than English is insufficient to demonstrate that they do not understand written English.)

b. Under what circumstances, if any, should non-English ballots be required?

Non-English ballots are not required. However, most of the Regions will use ballots printed in English and Spanish or another foreign language when there is a large contingent of potential voters who are not proficient in English and are literate only in the non-English language. Some Regions, with Board and court approval, use English only ballots in such circumstances, with notices prepared in English and Spanish that contain a copy of the ballot to be used.

c. What discretion do Regional Directors have in requiring such ballots?

See a above

d. Has the Agency experienced any unreasonable delays, objections, or other problems concerning the use of non-English ballots?

We are not aware of any situations where parties experienced unreasonable delays or other problems concerning the use of non-English ballots. CATS shows only one case involving foreign language ballots, *Jet Plastica*, 4-RC-21582, noting objections. The objections related to the use of foreign language ballots were overruled.

G. Statistics.

1. What are the current statistics on representation cases?

a. In the last reporting year, what was the average time it took to conduct an election following the filing of a petition? To certify a bargaining representative? What was the longest time?

In FY 2010, total representation case intake was 3,204, a 10% increase from the FY 2009 R-case intake of 2,912. In FY 2010, the Agency resolved 86.3% of its representation cases from filing to closure within 100 days, an improvement of 1.9% over FY 2009. The Agency obtained voluntary election agreements in 92% of the merit petitions filed in FY 2010, and conducted elections in a median of 38 days after the filing of a petition. 95.2% of the NLRB's elections were conducted within 56 days after filing.

For the first three months of FY 2011, the election median remains at 38 days and 94.2% of elections have been conducted within 56 days.

For petitions filed in FY 2010, the average time it took to conduct an election following the filing of a petition was 31 days. The longest time it took to certify a bargaining representative was 424 days. The case was *Kansas City Repertory Theatre, Inc.*, Case Number 17-RC-12647. The petition in the case was filed on 12/3/2009, a hearing was held promptly and the DDE issued on 12/28/2009. A Request for Review was filed and granted, the election was held and ballots were impounded. A Board Decision and Order on Review issued on 11/16/2010. All ballots were challenged. The Director's Report on Challenged Ballots issued on 12/27/2010. The Board Decision issued 1/12/2011 ordering that the challenged ballots be opened and counted. A Certification of Representative issued shortly thereafter.

III. ADMINISTRATIVE MATTERS

A. Overarching Goals and Time Targets.

1. What are the most recent statistics on the Agency's performance against its overarching goals and time targets?

For FY 2010, the Agency exceeded its three overarching goals by closing:

- 86.3% of all representation cases within 100 days (target 85%),
- 73.3% of all unfair labor practice cases within 120 days (target 71.2%), and
- 84.6% of all meritorious unfair labor practice cases within 365 days (target 80%).

For the first quarter of FY 2011, the Agency has not met all of the overarching goals, but expects to do so by the end of the year. Specifically, the Agency closed:

- 86.37% of all representation cases within 100 days (target 85%),
- 70.64% of all unfair labor practice cases within 120 days (target 71.2%), and
- 78.46 of all meritorious unfair labor practice cases within 365 days (target 80.2%).

FY 2010 was another excellent performance year for the Field operation of the Agency and that excellent performance has continued into FY2011.

Settlements - In FY 2010, the Regions obtained 7,246 settlements of unfair labor practice cases, representing a rate of 95.8% of total merit cases, compared to 7,175 settlements in FY 2009 and a rate of 95.2%. Over the last 10 years the settlement rate has ranged from between 91.5% and 99.5%.

Complaints - In FY 2010, the Regional Offices issued 1,243 complaints as compared to 1,166 in FY 2009. The median time to issue complaints was 101 days in FY 2010, a slight increase over the median of 100 days experienced in FY 2009. The median number of days from issuance of complaint to opening of the unfair labor practice hearing was 87 days in FY 2010, compared to a median of 75 days in FY 2009.

Merit Factor - The percentage of unfair labor practice cases in which a Regional Director determines that formal proceedings are warranted is called the merit factor. In FY 2010, the merit factor was 35.6%, slightly lower than the merit factor of 36.2% in FY 2009. Since 1980, the merit factor has fluctuated between 32% and 40%.

Litigation Results - The Regional Offices won 91.0% of Board and Administrative Law Judge decisions in whole or in part in FY 2009, which is slightly above the 89.8% rate experienced in FY 2009. Over the last 10 years, the percentage of wins, in whole or in part, has ranged between 78% and 91%.

Remedies - The Regional Offices recovered \$86,557,684 on behalf of employees as backpay or reimbursement of fees, dues, and fines in FY 2010, compared to \$77,611,322 in FY 2009. In FY 2010, a total of 2,250 employees were offered reinstatement, compared to 1,549 in FY 2009.

Representation cases

Elections - The Regions conducted 1,790 initial representation elections in FY 2010, of which 92.1% were held pursuant to agreement of the parties, compared to 1,690 initial elections and a 91.9% election agreement rate for FY 2009. Actual performance thus continues to exceed our goal, which is to conduct 85% of elections pursuant to voluntary election agreements.

In FY 2010, the median time to proceed to an election from the filing of a petition was 38 days, one day more than the 37 median days achieved in FY 2009, and well below our target median of 42 days.

Most critically, 95.1% of all initial representation elections were conducted within 56 days of the filing of the petition in FY 2010, compared to 95.5% in FY 2009, and above our target of 90%.

In 56 cases post-election objections and/or challenges were filed requiring the conduct of an investigative hearing. Decisions or Supplemental Reports issued in those cases after hearing in 70 median days from the election or the filing of objections. Post-election objections and/or challenges that could be resolved without a hearing were filed in 32 cases. Decisions or Supplemental Reports in those cases issued in 22 median days. The goal in hearing cases is 80 median days and in non-hearing cases 32 median days.

Regional Director Decisions - In FY 2010, Regional Directors issued 185 pre-election decisions in contested representation cases after hearing in a median of 37 days, well below the allowable median of 45 days. In FY 2009, Regional Directors issued 151 pre-election decisions in a median time of 34 days.

2. What is the status of the NxGen computer project?

The NxGen Case Management has been fully integrated with the Board's Judicial Case Management System and the Board is utilizing the system for issuance of Board and ALJ decisions. The Office of Appeals of the General Counsel is utilizing NxGen for processing of all of its cases. Region 9, Cincinnati, Region 10, Atlanta and the Birmingham Resident Office are the Field pilot offices utilizing NxGen and are providing regular feedback on the operations of this new case management system. All Regional Offices are putting dismissal letters, comments on appeals that are filed in C cases with the Office of Appeals, and all R cases decisions into NxGen. All Agency offices receive documents e-filed through the Agency's website through the NxGen system. The Regional Office case processes have been built in NxGen and are currently being refined and improved. In April 2011, Regions 9 and 10 and the Birmingham Resident Office will begin exclusively handling all case work in NxGen and will no longer utilize the Case Activity Tracking System (CATS). In June 2011, the Agency will begin deployment of NxGen to all Regional Offices and it is expected that the field rollout will be completed by August 2011. At the same time, the Agency is continuing to build functionality in NxGen for the remaining GC Headquarters Offices and for the Division of Judges. Subject to budgetary constraints, the Agency hopes to have a fully functional NxGen system in all Agency offices in 2012.

a. What changes should practitioners be seeing in how the Agency operates?

The Agency will be strongly encouraging all parties to a case to e-file all documents with the Agency through the E-filing System on the Agency's website. When NxGen is deployed to all field offices, we expect that more information and public documents related to case processing to be available to parties on the Agency's website. Because NxGen is built around a web-based software supporting an electronic cases file, NxGen will enable the Agency to carry on work in face of any weather or other emergency disruption in operations and all Agency offices will be able to instantly collaborate on case processing. In short, the Agency hopes that NxGen will allow more efficient and effective case processing, more transparency in our operations and better service to the public.

D. Budget.

1. What is the status of the Board's budget and the outlook for the balance of this year and Fiscal Year 2012?

a. Does the Board anticipate any budgetary shortfalls and, if so, what contingency plans are in place to reduce costs?

The Board continues to operate under a short-term continuing resolution at FY 2010 funding levels.

E. Boundary Study.

1. The Committee is interested in an update on the status of this study.

The Agency is continuing to conduct its boundary study in the course of a broader study examining our "footprint" around the country. In the course of the study we are looking for the most efficient, effective and economical way to ensure that we can continue to achieve our mission. This includes, among other things, a review of our space utilization in our Regional Offices and in Headquarters.

Once we analyze the necessary data, recommendations will be made by staff to the Acting General Counsel and the Board. We will, of course, seek input from the affected stakeholders prior to implementation of any recommended changes.