

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-09

June 26, 2020

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

FROM: Peter B. Robb, General Counsel

SUBJECT: Guidance Memorandum on Make Whole Remedies in Duty of Fair Representation Cases

I. Introduction

When a union violates Section 8(b)(1)(A) by breaching its duty of fair representation to employees, the Board's decision in *Ironworkers Local Union 377 (Alamillo Steel)*,¹ governs whether the offending union is liable for make whole relief. Specifically, the General Counsel must show that the grievant would have prevailed absent the failure to lawfully process the grievance, and upon such showing the union would be liable for any increase in damages caused by its misconduct.

Whether any given grievant "would have prevailed" had a union lawfully processed her grievance,² and determining the "increase in damages" caused by the union's misconduct³ are often perplexing questions without clear cut answers. More than 20 years after the issuance of the decision in *Alamillo Steel*, experience has shown that requiring Counsel for the General Counsel to show a grievant would have prevailed in a particular grievance/arbitral forum with which the grievant has no familiarity or experience and possesses little of the information known by the union and the employer, is difficult at best. Nor is it workable to require the General Counsel to engage in guesswork to assess any possible increase in damages caused by the union's unlawful conduct.⁴ The unduly high and difficult standard imposed on the General Counsel in these cases has prevented

¹ 326 NLRB 375 (1998)

² *Id.* at 380.

³ *Id.* at 378.

⁴ The lack of clarity this issue is given in *Alamillo Steel* was palpable. See *id.* at 378, n.16 (where the Board refused to provide a particular method for determining the amount of damages for which a union would be responsible under the standard).

wronged employees from achieving not only make whole relief, but often, any relief at all, thereby permitting this type of illegality with impunity.

Thus, it is clear that this outdated standard should be abandoned for one that is more realistic and properly suited to bring justice to the industrial landscape. Therefore, Regions should, in accordance with the foregoing guidance, urge the Board to reverse *Alamillo Steel* and adopt a standard requiring that, once the General Counsel establishes that the underlying grievance has “arguable merit,” the burden shifts to the respondent union to establish that the grievance was not meritorious. If the union fails to carry its burden, the union will be liable to make the employee(s) whole for the damage. While Regions are free to attempt to settle these cases pursuant to the casehandling guidance below, if they are not able to reach a reasonable settlement with the parties, they should argue that the Board abandon the unworkable framework set forth in *Alamillo Steel* for the more reasonable arguable merit standard.

II. Development of the Current Remedial Framework

In *Alamillo Steel*, the Board modified the remedy for violations of Section 8(b)(1)(A) where a union breaches its duty of fair representation by mishandling a unit employee’s grievance. The Board’s previous standard was articulated in *Rubber Workers Local 250 (Mack-Wayne II)*.⁵ Pursuant to *Mack-Wayne II*, after a finding that the respondent union had breached its duty of fair representation, the Board would first order the union to request that the employer rescind the adverse employment action or process the grievance.⁶ If the employer agreed to process the grievance, the union was required to promptly pursue the remaining stages of the grievance procedure, including arbitration, in good faith. However, if the union was unsuccessful at obtaining relief for the grievant from the employer, the union had to make the employee whole for the loss of pay he or she suffered if the General Counsel established that there was a “nexus” between the unfair labor practice and the backpay remedy; or in other words, that the underlying grievance was not “clearly frivolous.”⁷ The General Counsel’s initial burden was light; it was sufficient to show, for example, that there were mitigating circumstances that supported a reduced penalty had the grievance gone to arbitration.⁸

⁵ 290 NLRB 817 (1988), *reconsidering and modifying* 279 NLRB 1074 (1986) (*Mack Wayne I*).

⁶ 290 NLRB at 817, 818 (the remedial provisions requiring the union to request that the employer rescind the adverse employment action or accept the grievance so that it can be processed under the terms of the collective-bargaining agreement are designed to restore the parties to their pre-unfair labor practice posture as much as possible).

⁷ *Id.* at 818.

⁸ *See id.* at 819 & n.19.

Once the General Counsel established this nexus, the burden shifted to the union to prove that its conduct did not cause any injury because the grievance was not meritorious. The union had the option of litigating the merits of the grievance at the unfair labor practice hearing or at a compliance proceeding.⁹ If the union failed to meet its burden, the union owed a full backpay remedy to the employee.¹⁰

In *Alamillo Steel*, the initial steps of the provisional make-whole remedy remain the same and the union must first attempt to properly pursue the grievance consistent with its duty of fair representation.¹¹ If it is not possible for the union to pursue the grievance procedure, such as in circumstances where the employer refuses to waive the contractual time limits, the union then must make the grievant whole by paying the “increase in damages caused by its misconduct” if it is established that the grievant “would have prevailed” had the union properly processed the grievance.¹² The General Counsel has the burden of establishing that the grievance would have been meritorious, according to the standard that would have been applied by the arbitrator under the parties’ grievance and arbitration procedure.¹³ The merits of the underlying grievance should ordinarily be handled at the compliance stage of the proceeding unless there is prior agreement by all the parties,

⁹ *Id.* at 821. Member Cracraft criticized this procedural element in her dissenting opinion concluding that it prejudiced the General Counsel since it permitted the union alone to decide when the merits would be litigated, which would likely result in wasted resources. *Id.* at 823.

¹⁰ *Id.* at 818 (“the union must make the employee whole or the employee will be left without adequate remedy for the union’s unlawful refusal to process the grievance”).

¹¹ 326 NLRB at 380.

¹² *Id.* at 377, 378. As referenced in note 4 above, the Board did not specify how the “increase in damages” owed by the union should be calculated under this remedial scheme. *See id.* at 378 n.16 (noting with approval the system used by a circuit court in a Section 301 lawsuit in which the “increase” occurred between the date on which an arbitration hypothetically would have occurred had the union acted in accordance with its duty of fair representation and the date of the jury verdict, but declining to specify that system because “the appropriate method may depend of the type of contract violation, the type of breach by the union, and the nature of the damages suffered by the employee”). The Board has not subsequently reached this issue to provide any further explanation.

¹³ 326 NLRB at 377. *See State, County Employees AFSCME Local 1640 (Children’s Home of Detroit)*, 344 NLRB 441, 448 (2005) (Board affirmed the ALJ’s finding that the General Counsel had established that the grievance would have been meritorious because of the employer’s past practice, evidence of which should have been readily available to the union); *Union de Obreros de Cemento Mezclado (Betterroads Asphalt Co.)*, 336 NLRB 972, 973 (2001) (Board affirmed the ALJ’s determination that the grievant would have won his arbitration had the union not perpetuated an unreasonable interpretation of the contract and that a backpay remedy was owed). *See also ATU Local 1498 (Jefferson Partners L.P.)*, 360 NLRB 777, 787-88 (2014) (issue moot since Board majority reversed the finding that the union violated its duty of fair representation, but the ALJ thoroughly discussed the evidence needed to determine whether the grievance would have been meritorious and determined that the General Counsel did not meet its burden and, therefore, a provisional make-whole remedy was not appropriate).

including the Administrative Law Judge, to litigate that issue during the unfair labor practice hearing.¹⁴

The remedial scheme in *Alamillo Steel* therefore departed from that in *Mack-Wayne* // in two important ways. First, the General Counsel's initial burden is now much higher and in order to obtain a make-whole remedy, the General Counsel has to establish that the grievance would have been meritorious before the burden shifts to the union. Second, with respect to the available monetary remedy, the union's liability is now limited to the portion of the employee's damages caused by the union's mishandling of the grievance. The Board decided to change the General Counsel's burden because of concerns that the prior remedy could be punitive and potentially granted a windfall to the grievant if the grievance was not actually meritorious.¹⁵ By requiring the General Counsel to establish that the grievance would have had merit, the Board determined that remedy would then comport with the Section 10(c) requirement that affirmative relief must be "remedial, not punitive."¹⁶

The Board majority made several arguments in *Alamillo Steel* to support its limitation on the union's liability for damages. The Board majority said that the make-whole remedy should be governed by the Supreme Court's principle of apportioned liability from *Vaca v. Sipes*, 386 U.S. 171 (1967), in which the Court decided that a union may not be required to pay damages that are solely attributable to an employer's breach of contract.¹⁷ Apportioned liability also comports with the requirements of Section 10(c) that Board remedies are not punitive.¹⁸ The majority said that the fact that the employer is not a party to a Section 8(b)(1)(A) violation and therefore not available for its apportioned liability is a product of the statutory scheme created by Congress.¹⁹ Congress created the Section 301 action in

¹⁴ 326 NLRB at 379-80 (describing the procedure for litigating the merits of the underlying grievance, which is intended to insure all parties have notice of what is to be litigated at each stage of the proceeding and reduce resources spent investigating and litigating the merits of the grievance at the initial unfair labor practice hearing phase). The General Counsel must plead the provisional make-whole remedy in the complaint and the union must include any request to litigate the merits of the grievance during the unfair labor practice hearing in its answer to the complaint. The Administrative Law Judge will then hold a pre-hearing conference with the parties and determine whether they all consent to litigating the merits at the unfair labor practice hearing rather than the default option of reserving that issue for the compliance procedure. *Id.*

¹⁵ *Alamillo Steel*, 326 NLRB at 376.

¹⁶ *Id.*

¹⁷ *Id.* at 378 ("the governing principle, then, is to apportion liability between the employer and the union according to the damage cause by the fault of each."). The Board noted that this principle of apportioned damages was reaffirmed by the Court in *Bowen v. Postal Service*, 459 U.S. 212, 223 (1983), and then again in *Del Costello v. Teamsters*, 462 U.S. 151, 168 (1983).

¹⁸ *Id.*

¹⁹ *Id.* at 379.

federal court as the sole way that an employee can recover damages from his employer for breach of contract. The union should not be responsible for the employer's portion of the damages due to the employer's breach of contract because of the employee's choice of forum.²⁰

The dissent by Members Hurtgen and Brame takes issue with awarding less than full relief to victims of these unfair labor practices.²¹ They argue that the purpose of remedies under Section 10(c) of the Act is to restore the status quo ante and eradicate the consequences of the unfair labor practice to the greatest extent possible. Therefore, a grievant should not be awarded less than he or she would have secured through a grievance victory.²² The dissent also takes issue with the majority's reliance on its analogy to hybrid duty of fair representation/Section 301 cases since the employee is able to seek relief from both the employer and the union in those cases and does not miss out on a full remedy.²³

III. The Board Should Overturn *Alamillo Steel* and Adopt an "Arguable Merit" Standard that Imposes Full Liability on the Union for Mishandling a Grievance to Ensure Discriminatees are Made Whole

The *Alamillo Steel* standard places nearly an impossible burden on the General Counsel regarding the merits of the underlying grievance and does not adequately compensate the wronged employee. Such is underscored by the few reported cases in the area.²⁴ Therefore, *Alamillo Steel* should be overturned and the Board should institute a new standard that equitably adjusts the burden on the General Counsel and fully compensates aggrieved employees for their losses.²⁵

The unrealistic burden imposed on the General Counsel under *Alamillo Steel* almost ensures that employees will not be made whole for the misconduct of their exclusive

²⁰ *Id.*

²¹ 326 NLRB at 383.

²² *Id.*

²³ *Id.* at 383-84.

²⁴ See *supra* at note 13 for reference to the only two reported cases, of which the General Counsel is aware, where the Board applied the *Alamillo Steel* standard and concluded the General Counsel established the grievant would have prevailed: *State, County Employees AFSCME Local 1640 (Children's Home of Detroit)*, 344 NLRB 441, 448 (2005); *Union de Obreros de Cemento Mezclado (Betteroads Asphalt Co.)*, 336 NLRB 972, 973 (2001).

²⁵ The General Counsel does not take issue with the procedural elements of *Alamillo Steel* and agrees that the merits of the grievance will ordinarily be litigated during the compliance phase, if at all.

bargaining representative. This result occurs because it is unlikely that the General Counsel can develop sufficient evidence to prove the merits of the grievance.²⁶ The union is in a far better position than the General Counsel or the employee to gather the necessary evidence to establish whether or not the grievance would have had merit due to the union's collective-bargaining relationship with the employer. The union also has the ability to request evidence from the employer about the grievance on the basis of their relationship.²⁷

In addition, the General Counsel does not litigate private sector arbitrations. A Charging Party employee is not often familiar with any aspect of the arbitration process. Arbitrators are hard to predict even for those who regularly litigate before them. The union is more intimately familiar with the collective-bargaining agreement and the past practice between the parties. Given these advantages of familiarity with the collective bargaining agreement, past practice of the parties, the arbitration process, and greater access to information from the employer, the union is still in a much better position than the General Counsel to proffer evidence and defend its position under this new standard and would not be disadvantaged by shifting the burden of proof in this manner. Rather, the new burden-shifting standard would provide a more balanced approach in which a wronged employee with a meritorious grievance has some possibility of being made whole, which the current standard virtually forecloses.

To properly accommodate the relative positions of the aggrieved employee and a respondent union, the Board should utilize a burden shifting analysis, similar to that applied under *Wright Line* when determining if an employer's adverse employment action violates the Act.²⁸ Once the General Counsel has established that the grievance has arguable merit, the burden shifts to the union to prove that the grievance lacked merit. While this arguable merit standard is less demanding than the burden imposed in *Alamillo Steel*, it does not

²⁶ See *Mack Wayne II*, 290 NLRB at 819 ("As between the General Counsel and the union, the union obviously has more particular knowledge regarding the merits of the underlying grievance than does the General Counsel.").

²⁷ See e.g., *NLRB v. Acme Industrial Co.*, 385 U.S. 432, 436 (1967) (confirming that the duty to provide relevant information includes information necessary to enable a union to evaluate the merits of a grievance); *Centura Health St. Mary-Corwin Medical Ctr.*, 360 NLRB 689, 689, 692 (2014) (an employer has a statutory obligation to provide information requested by the union to evaluate whether to process a grievance).

²⁸ See *Wright Line*, 251 NLRB 1083, 1089 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *approved in NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393 (1983) (where the General Counsel bears the initial burden of demonstrating that protected activity was a motivating factor in the adverse employment action taken by the employer and then the burden shifts to the employer to establish that it would have taken the same action even in the absence of the protected activity); *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 1 n.3, 5-6 (Nov. 22, 2019) (describing the burden shifting framework in *Wright Line*).

represent a return to the mere “nexus” standard from *Mack Wayne II*, as that prior standard is insufficient to support the imposition of full backpay liability on the union.²⁹

If the union is not able to satisfy its burden by establishing that the grievance lacked merit, the union should then be liable for the entire backpay remedy.³⁰ The Board should overturn the apportionment element of *Alamillo Steel* and return to the *Mack Wayne II* standard of awarding the grievant the full amount he or she would have received had the grievance been lawfully processed.³¹ This is the only way that the employee will receive a meaningful remedy. Such remedy is not punitive to the union because it is the union’s unlawful actions in violation of Section 8(b)(1)(A) that caused the harm to the grievant. The failure to process a meritorious grievance in itself is sufficient to require the union to make the employee whole. This remedy is supported by traditional equitable principles that the wrongdoer should bear the consequences of any uncertainty created by its actions.³² Even though the employer’s breach of contract may have initiated the scenario, as with the doctrine of joint and several liability, the union can be held financially responsible for the entire harm to the employee.³³ It is a function of the statutory scheme that the harmed

²⁹ Arguable merit in this situation is analogous to the Regional determination of whether to defer an arguably meritorious charge to the parties’ grievance and arbitration procedure. See, e.g., Memorandum GC 19-03, *Deferral under Dubo Manufacturing Company*, dated Dec. 28, 2018, at p. 3; NLRB, *Casehandling Manual Part One: Unfair Labor Practice Proceedings* § 10118.1 (2020). See *infra* for more detailed casehandling guidance.

³⁰ This eliminates the confusion associated with how to calculate the “increase in damages” under *Alamillo Steel*.

³¹ As discussed above, the dissent argued in *Alamillo Steel* that when the Board instituted the apportioned liability, it departed from the “well-established Board policy of seeking full relief for the victims of unfair labor practices.” 326 NLRB at 383.

³² See e.g., *Mack Wayne II*, 290 NLRB at 819 (citing *Bigelow v. RKO Pictures*, 327 U.S. 251, 265 (1946) (“[t]he most elementary conceptions of justice and public policy require that the wrongdoer shall bear the risk of uncertainty which his own wrong has created.”)). See also *Graphic Communications Local 4 (San Francisco Newspaper)*, 272 NLRB 899, 900 (1984) (citing “well-established equitable principles”); *TNT Skypak, Inc.*, 328 NLRB 468, 470 (1999) (relying on the principle that uncertainty should be resolved against the wrongdoer in determining liability for a bargaining violation), *enforced* 208 F.3d 362 (2d Cir. 2000); *Love’s Barbeque Restaurant No. 62*, 245 NLRB 78, 82 (1979) (resolving uncertainty about what the employer would have done absent its unlawful purpose against the employer in the successor hiring context), *enforced in part sub nom. Kallmann v. NLRB*, 640 F.2d 1094 (9th Cir. 1981).

³³ Under the joint and several liability doctrine, when two or more persons cause an injury, each is liable for the full amount of damages. *Joint-and-several liability doctrine*, BLACK’S LAW DICTIONARY (11th ed. 2019). See, e.g., NLRB, *Casehandling Manual Part One: Unfair Labor Practice Proceedings* § 10130.5 (2020) Joint and Several Liability (describing Board procedures for settlements involving joint and several liability, including where the settlement is only with one party). Cf. *UPMC*, 365 NLRB No. 153 (Dec. 11, 2017) (Board majority approved a settlement and dismissal of a single employer allegation, finding the settlement reasonable and therefore effectuated the purposes of the Act, despite the charging party union and General Counsel objecting to the identity of the entity providing the remedy).

grievant can only collect from the union through a duty of fair representation case, so the union should be liable for the entire amount of lost wages and benefits.³⁴

IV. Casehandling Guidance

Based on the new approach described above, Regions should investigate the merits of the underlying grievance prior to issuing complaint or settling any Section 8(b)(1)(A) allegation concerning a union's failure to lawfully process a grievance. This investigation should be a standard investigation, including at a minimum taking affidavits from the charging party and all witnesses within his or her control and requesting evidence from the charged party union.³⁵ The investigation may also include gathering evidence from third-party sources, such as the employer, as is appropriate to the circumstances of the individual case.³⁶ The Region should provide an opportunity to the union to establish that the grievance would not have been meritorious as a defense against any backpay obligation, even if it does not excuse the underlying duty of fair representation violation.³⁷

If the Region has determined that the underlying grievance is arguably meritorious and the union has not presented sufficient evidence to establish the grievance was not meritorious, the Region should pursue a reasonable settlement between the union and the charging party.³⁸ Similarly, if there has already been a Board decision finding merit to the unfair labor practice allegation, the Region may approve a reasonable settlement should the underlying grievance have arguable merit.

Although any Board order, even under the General Counsel's proposed remedial scheme, will require the union to first seek to have the employer rescind the adverse

³⁴ If the union is able to later collect anything from the employer to go towards the remedy, such as by requesting that the employer rescind its adverse employment action or through their collective-bargaining relationship, it can be treated as an offset to the union's full liability burden.

³⁵ See Memorandum GC 08-06 Attachment E, *Checklist for 8(b)(1)(A) Allegations*, dated May 15, 2008 (listing areas to cover in a duty of fair representation affidavit, including sufficient information about the subject matter of the grievance to be able to determine the merits). Cf. Memorandum GC 11-05, *Guideline Memorandum Concerning Deferral to Arbitral Awards and Grievance Settlements in Section 8(a)(1) and (3) cases*, dated Jan. 20, 2011, at p. 10 (describing the investigation for determining arguable merit for the purposes of deferral).

³⁶ The process for investigations remains in the sound discretion of the Regional Director.

³⁷ Regions should be cognizant of any related Section 8(a)(5) information request cases as unions may need to obtain evidence from the employer concerning the merits of the grievance.

³⁸ Such a settlement should include make whole relief. If the grievance either does not have arguable merit, or the union has demonstrated it would not be meritorious, the Region can accept a settlement with the union with the standard cease and desist language and notice posting remedy for violations of Section 8(b)(1)(A).

employment action and then to have the employer process the grievance,³⁹ Regions may not approve informal settlement agreements of Section 8(b)(1)(A) allegations concerning the mishandling of arguably meritorious grievances where the union is only committing to those steps and the settlement does not have an agreed-upon backpay amount should the first two steps fail.⁴⁰ Informal settlement agreements in these cases must include an agreed-upon backpay amount if, after applying the burden shifting framework described above, the Region concludes the grievance has arguable merit and the union did not establish the grievance was not meritorious. Backpay disputes may not be left open in informal settlement agreements, as there is no mechanism to facilitate their resolution. Although formal compliance proceedings may be used to resolve such disputes arising under Board orders, they are not available in an informal settlement agreement.⁴¹ Thus, any disputes over backpay must be resolved prior to reaching an informal settlement agreement and the agreed-upon amount must be included therein.

V. Conclusion

In Section 8(b)(1)(A) duty of fair representation cases where make whole relief may be appropriate, Regions should investigate the merits of underlying grievances prior to issuance of complaint, and attempt to settle unfair labor practice allegations pursuant to the results of those investigations. If the parties are not able to reach a reasonable settlement, the Region should urge the Board to overturn the relevant aspects of *Alamillo Steel* and implement a standard requiring the General Counsel to show the grievant's grievance had "arguable merit." The burden then shifts to the union to demonstrate that the grievance was not meritorious. Where the General Counsel meets its burden and the union is unable to meet its burden under the foregoing test, the union will be held liable for the entirety of the make whole remedy.

/s/
P.B.R.

³⁹ The General Counsel is not advocating to overturn the procedural requirements put in place by *Alamillo Steel* which require the General Counsel to affirmatively plead the provisional make-whole remedy in the complaint and defers the litigation of the merits of the grievance to the compliance proceeding unless all parties agree to litigate it during the unfair labor practice hearing.

⁴⁰ It is advisable, though not required, to have the union attempt these two steps prior to entering into an informal settlement.

⁴¹ See Rules and Regulations of the National Labor Relations Board, 29 CFR 102.54; see also NLRB Casehandling Manual, Part Three, Compliance Proceedings, Sec. 10646 (2018).