11700–11886 COMMON TO ALL CASES

11700–11711 JURISDICTION

11700 Jurisdictional Standards

The Board's jurisdictional standards existing on August 1, 1959, provide the extent to which the Board might, in its discretion, decline to exercise its legal jurisdiction. Pursuant to Section 14(c)(1) of the Act, these standards may be modified, provided that the Board shall not decline to assert jurisdiction over any labor dispute over which it would assert jurisdiction under the standards prevailing on August 1, 1959.

Although the Board has statutory authority to assert jurisdiction over all enterprises, not specifically exempted by Section 2(2) of the Act, whose operations affect interstate commerce, the Board has exercised its discretion to assert jurisdiction only over enterprises that meet monetary standards which are based on the character of the business. The standards which have the broadest application are those for retail and non-retail operations and are set forth in *Siemons Mailing Service,* 122 NLRB 81 (1959). Jurisdiction will be asserted over any retail operations with a gross volume of business in excess of $500,000 annually and which has some business, greater than de minimis, across State lines. The nonretail standard requires $50,000 of direct or indirect inflow or outflow of goods or services across State lines.

In addition, the Board has established separate individual standards to address certain industries and types of enterprises, including health care organizations, newspapers, and educational institutions. The Agency's publication "An Outline of Law and Procedure in Representation Cases," Chapter 1, Jurisdiction, contains a more complete discussion of the Board's jurisdictional standards and their application.

Even where an employer fails to meet the appropriate Board discretionary monetary standard, the Board will assert its jurisdiction to the extent necessary to address alleged violations of Section 8(a)(4) of the Act if it can be established that the Board has statutory jurisdiction, i.e., a greater than de minimis flow of goods or services across State lines. *Pickle Bill's, Inc.,* 224 NLRB 413 (1976).

11702 Investigation

Among the earliest determinations to be made is whether the employer is an "employer" under Section 2(2) of the Act and whether the employer meets the appropriate Board jurisdictional standard. If Board jurisdiction cannot be asserted, the Regional Office should dismiss the charge or petition, absent withdrawal.

11702.1 Obtaining Commerce Information from Employer

Normally, commerce information is furnished by the employer involved. Where appropriate, a Questionnaire on Commerce Information, NLRB Form-5081, is sent to the

employer with the initial letter serving the charge or petition. If the completed questionnaire is not conclusive, further investigation must be undertaken. As an alternative to the Commerce Questionnaire, the Regional Office may, where appropriate, accept a written stipulation of facts establishing Board jurisdiction.

11702.2 Examination of Employer Records

If an employer fails or refuses to stipulate to commerce facts, or to return a properly completed questionnaire on commerce, or if the Regional Office has reason to question the accuracy of a stipulation or questionnaire, an examination of the relevant records of the employer should be undertaken.

11702.3 Commerce Affidavit

The Regional Director may wish to procure an affidavit from an official of an employer certifying the completeness and accuracy of the employer's records examined by the Regional Office relative to the question of jurisdiction. The Regional Office should obtain such an affidavit where the investigation reveals that an employer's revenues fall just short of the Board's jurisdictional standards or where the Regional Director finds compelling circumstances. As with other witnesses in appropriate circumstances, the Board agent should inform the affiant of the criminal penalties under the United States Code applicable to any one giving false information to the U.S. Government. The affidavit could contain the following statement, which appears on petitions and charges:

> Willful false statements herein can be punished by fine and imprisonment. (U.S. Code, Title 18, Section 101)

If an employer refuses to provide such an affidavit in an R case and there exists a reasonable question as to the issue of the Board's jurisdiction, the matter should be set for hearing. However, in an unfair labor practice investigation, see Sec. 11704.2.

11702.4 Action on Basis of Commerce Investigation

All determinations on jurisdiction should be based on admissible evidence or stipulated facts, rather than bare admissions.

11704 Subpoenas for Commerce Information

11704.1 Representation Cases

In representation cases, if reasonable and practical efforts fail to develop sufficient evidence to dispose of the question of jurisdiction, production of the relevant material should be demanded by subpoena returnable either at the hearing or, in appropriate circumstances, before issuance of the notice of hearing.

The hearing officer should be prepared to establish facts concerning statutory jurisdiction and otherwise make a record appropriate for a jurisdictional determination under the rule set forth in *Tropicana Products,* 122 NLRB 121 (1958), in the event of noncooperation or noncompliance with the subpoena.

Under the Board's *Tropicana* rule, in a case where an employer refuses, on reasonable request by a Board agent, to provide information relevant to the Board's jurisdictional determination, jurisdiction will be asserted without regard to whether any specific monetary jurisdictional standard is shown to be satisfied, if the record at a hearing establishes that the Board has statutory jurisdiction.

11704.2 Unfair Labor Practice Cases

If the utilization of reasonable and practical means fails to develop sufficient evidence to dispose of the question of jurisdiction in an unfair labor practice case, a subpoena—normally a duces tecum—should be served on the employer. It should be returnable *before* issuance of complaint unless it is otherwise clear by way of prior cases, widespread repute, etc., that the Board has jurisdiction. In the latter case, the subpoena should be returnable at the C case hearing. The *Tropicana* rule described above may also be applied in similar circumstances in C case hearings. *Strand Theatre, K.I.M.V.B.A. Corp.,* 235 NLRB 1500 (1989).

11704.3 Failure to Comply with Subpoena

Where a person has failed to comply with a subpoena relating to commerce, it should be enforced (Secs. 11770 and 11790) unless the Board's *Tropicana* rule is relied on or the need for the subpoenaed material is otherwise obviated.

11705 Other Sources for Obtaining Commerce Information

Other sources may be used as a supplement to, a check on or substitutes for information supplied directly by the employer. For example:

- Prior cases
- Employees, such as receiving/shipping department employees
- Suppliers or customers of employer
- Transportation services
- State and Federal agencies
- Commercial and financial reporting services and trade journals
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11705.1 Contacts with Other Agencies

Regional Offices may directly contact field offices of other agencies for commerce information. Contact with the headquarters of other agencies should be made through Operations.

11706 Jurisdictional Standards Not Met

Where it is clear that an employer does not meet the Board's discretionary monetary standards, the case should be dismissed, absent withdrawal.

11707 Jurisdictional Policy Question

Wherever a C case involves a policy question regarding jurisdiction, it may be submitted to Advice (Sec. 11750), whether or not any party objects to the assertion of jurisdiction.

11708 Proof in Formal Proceedings

In any formal proceeding, commerce facts sufficient to determine whether the Board has jurisdiction over the dispute must be established either through factual stipulation or by record evidence.

11709 Advisory Opinions

As set forth fully in Secs. 102.98 through 102.104, Rules and Regulations and Secs. 101.39 through 101.40, Statements of Procedure, under certain limited circumstances the Board will, at the request of a court or agency of a State or Territory, issue an advisory opinion as to whether it would assert jurisdiction over the parties to a particular controversy. (By Final Rule of January 10, 1997, Federal Register, Volume 61, Number 239, private parties may not petition for such advisory opinion.)

Whenever an agency or court of any State or Territory is in doubt whether the Board would assert jurisdiction over the parties in a proceeding pending before such agency or court, the agency or court may file a petition with the Board for an advisory opinion on whether the Board would decline to assert jurisdiction over the parties before the agency or the court (1) on the basis of its current monetary standards or (2) because the employing enterprise is not within the jurisdiction of the National Labor Relations Act. Unlike most other Agency matters that are initiated through the filing of documents with a Regional Office, petitions for advisory opinions must be filed directly with the Board. Although a copy of the petition should be served on the Regional Director, such does not satisfy the petitioner's obligation to serve the original on the Board.

11709.1 Regional Office Action

Upon the filing of a petition for an advisory opinion, a review of the petition and the Regional Office case files should be undertaken. If the Regional Director is in possession of facts bearing on the jurisdictional issues before the Board secured during the investigation of a prior or current C or R case and believes such facts would assist the Board in rendering its advisory opinion, the Regional Director should move to intervene in the advisory opinion proceeding. After conducting any additional investigation into jurisdiction, the Regional Director should submit to the Board the jurisdictional facts contained in the investigatory files with such motion. If the case is closed, however, no further investigation should be conducted unless the Board so requests.

In this regard, the Regional Director should:

- In accord with Sec. 102.113, Rules and Regulations, serve copies of the Regional Director's motion to intervene and a statement of jurisdictional facts on the State court or agency and the parties to the State proceedings
- Advise the parties so served that pursuant to Sec. 102.101, Rules and Regulations, they have 14 days after service thereof within which to make a response.

11710 Declaratory Orders

The procedures for the filing of a petition for a declaratory order on a question of Board jurisdiction by the General Counsel are set forth fully in Secs. 102.105 through 102.110, Rules and Regulations and Secs. 101.42 through 101.43, Statements of Procedure. Such a petition may be filed when both an unfair labor practice charge and a representation case relating to the same employer are contemporaneously on file in a Regional Office; there is doubt whether the Board would assert jurisdiction over the employer involved; and there is no dispute as to the facts concerning commerce. See, e.g., *Latin Business Assn.,* 322 NLRB 1026 (1997).

If the Regional Director determines that a declaratory order should be sought, a proposed petition containing the facts and pleadings required by Sec. 102.106, Rules and Regulations should be submitted to the Division of Operations-Management with a transmittal memorandum setting forth the Regional Office's recommendations. Eight copies of the petition, plus additional copies for service on all parties, and an affidavit of service, original and two copies, containing the names and addresses of all parties involved in the unfair labor practice and representation cases, should also be submitted.

If the petition is deemed appropriate, the General Counsel will sign it, file it with the Executive Secretary of the Board, serve a copy of the petition on each of the parties involved, complete the affidavit of service and notify the Regional Office by means of a conformed copy of the affidavit of service.

11711 National Mediation Board Jurisdiction

At times, questions may arise as to whether a particular employer involved in an NLRB proceeding is under the jurisdiction of the Railway Labor Act (RLA), administered by the National Mediation Board (NMB). See 45 U.S.C. §§ 151 (railroads) and 181 (air carriers). Section 2(2) of the National Labor Relations Act excludes from the definition of employer "any person subject to the Railway Labor Act."

11711.1 Jurisdiction Clear

If it is clear that the NLRB has jurisdiction over the employer, the Regional Office should proceed with the processing of the case. See *United Parcel Service,* 318 NLRB 778 (1995), for circumstances in which referral to NMB is not appropriate.

Conversely, if it is clear that the employer falls under the jurisdiction of the RLA, the parties should be referred to the NMB and the charge or petition should be dismissed, absent withdrawal.

11711.2 Arguable RLA Jurisdiction

The Board's practice is to refer cases of arguable or doubtful RLA jurisdiction to the NMB for an advisory opinion on the jurisdictional issue. *Federal Express Corp.,* 317 NLRB 1155 (1995). Thus, in such circumstances, the Regional Office should submit the case for referral either to the Executive Secretary or the Division of Operations-Management as specified below. In such cases, the written submission should contain the relevant facts as outlined in OM 90-83, concerning referrals to the NMB and should include the names, addresses, telephone numbers, fax numbers, and e-mail addresses of all parties to the proceedings and their representatives.

(a) *C Case:* In a C case, the Regional Office should initially contact the Division of Operations-Management to informally discuss the matter. If a formal submission is required, the Regional Office should draft a letter to the Chief of Staff of the NMB for the signature of the Associate General Counsel, Division of Operations-Management. The letter should be entitled "Request for Opinion on National Mediation Board Jurisdiction under the Railway Labor Act" and should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the Parties

The letter should conclude with a statement that the question of jurisdiction is being submitted for NMB consideration. The Regional Office should also submit its case file.

(b) *R Case:* Generally, in an R case, the Regional Office should conduct a hearing to develop a record on the jurisdictional issue. If, after review of the record, the

RLA jurisdictional issue remains doubtful, the Region should prepare a memorandum directed to the Office of the Executive Secretary which should be structured as follows:

- Background
- Facts
- Issues
- Contentions of the parties

The memorandum should not contain a legal analysis by the Regional Office but should conclude with the recommendation that the Board consider whether the issue should be submitted to the NMB. If a hearing is held, the Regional Office should forward the transcript, exhibits and all briefs on the issue with the memorandum. If the Regional Office investigates the matter without a hearing, the Regional Office should submit all evidence and position statements relating to the jurisdictional issue. The Regional Office must also issue an Order Transferring the Case to the Board, NLRB Form-4481.

11712–11720 TRANSFER, CONSOLIDATION, AND SEVERANCE

11712 Generally

The transfer, consolidation and severance of cases are addressed at Sec. 102.33, Rules and Regulations as to charges and Sec. 102.72 as to petitions. Transfer, consolidation, and/or severance may be appropriate in order to effectuate the purposes of the Act and for cost and time considerations.

11714 Interregional Transfers

Generally, there are two categories of interregional case transfers.

11714.1 Individual Case(s) Transfer

Individual cases may be transferred from one Regional Office to another for the purposes set forth above at the time of filing or as soon thereafter as the necessity becomes apparent. In such circumstances, the Regional Offices involved in the transfer will confer about the proposed action and the reasons therefor. The sending Regional Office will then request that the Division of Operations-Management issue an order transferring the case. See Clerical Procedures, Sec. 12420. The request will contain the case name, petitioner or charging party, the present case number, and the case number to be assigned by the assisting Regional Office; a brief statement of the reasons for transfer; and an indication of whether the assisting Regional Office concurs in the proposed action.

A copy of the request will be sent to the assisting Regional Office. On receipt of the General Counsel's order of transfer, the sending Regional Office will send the file to the assisting Regional Office after notifying all parties to the case of the transfer and that future correspondence in the case should be directed to that office. The assisting Regional Office should notify the parties of the name of the agent to whom the case has been assigned.

11714.2 Interregional Assistance Program

Due to staffing considerations and/or backlogs of overage cases, cases may be transferred between Regional Offices pursuant to an interregional assistance program by which a set number of cases and/or specified counties will be transferred over a specified period of time. See OM 98-5 and OM 96-26. Under the interregional assistance program, the General Counsel may issue a blanket order setting forth the terms of the anticipated transfers.

(a) *ULP Cases:* Unfair labor practice cases susceptible to telephonic investigation are appropriate for transfer under this program. Both the sending Regional Office and the assisting Regional Office will assign case numbers to the transferred cases. Typically, the blanket transfer order will direct the assisting Regional Office to process the case through: dismissal; approval of withdrawal; issuance of a deferral letter; approval of and compliance with a settlement agreement; or a determination to issue complaint. Thereafter, the case will be returned to the sending Regional Office which will be responsible for any further processing required.

(b) *Representation Cases:* Representation cases may be assigned to an assisting Regional Office for the limited purpose of drafting and issuing a decision after a preelection hearing. The resulting decision will issue under the originating Regional Office's case number. Generally, the assisting Regional Office's Director will sign the decision as Acting Regional Director for the originating Regional Office and will include a footnote stating that the case was transferred pursuant to the interregional assistance program for decision writing only. In some situations, the originating Regional Office's Director will sign the decision and in that event such a footnote should not be included. In either circumstance, the originating Regional Office will document that the assisting Regional Office provided decision writing assistance, along with the dates the assistance was provided, by making an entry in Case Notes in the Case Activity Tracking System (CATS). Thus, the case will remain under a single case number throughout the entire process, eliminating unnecessary paperwork and confusion. See OM 03-77.

Assisting Regional Offices may also be requested to supply hearing officers to other Regional Offices for preelection or postelection hearings. In such circumstances, the case need not be transferred between Regional Offices.

(c) *Temporary Changes to Regional Office Boundaries:* Due to staffing considerations and/or backlog of overage cases, unfair labor practice cases, and representation petitions may also be transferred pursuant to temporary changes to Regional Office boundaries. Thus, the General Counsel may issue a blanket transfer order requiring that all cases arising in specified counties of one Regional Office be filed in another designated, usually contiguous, Regional Office.

Under these circumstances, both the sending Regional Office and assisting Regional Office will assign case numbers to the transferred cases. The assisting Regional Office will retain responsibility for the processing of the cases, including litigation, if necessary, until they are closed and will then forward the case files to the sending Regional Office.

For further instruction with respect to the latter two methods of transfer, consult OM 98-5 and OM 96-26.

11716 Consolidation

Pursuant to Secs. 102.33(c) and 102.72(c), Rules and Regulations, the Regional Director has the authority to consolidate unfair labor practice and representation cases, respectively, which are pending in the same Regional Office. A consolidation normally does not take place while the cases involved are in the investigative stages, but occurs upon the institution of formal proceedings or thereafter.

The following are examples of circumstances where cases may be consolidated:

- C cases where the respondent is the same in each case, where multiple respondents are sufficiently related or where the fact situations are sufficiently related
- R cases where the employer is the same in each case or multiple employers are sufficiently related
- A postelection R case with a C case, where the two cases involve sufficient issues in common

The authority for the consolidation of cases pending in more than one Regional Office rests with the General Counsel; the Division of Operations-Management should be consulted on such issues.

11718 Severance

Pursuant to Secs. 102.33(c) and 102.72(c), Rules and Regulations, the Regional Director has the authority to sever unfair labor practice charges and representation cases, respectively, which have been previously consolidated by the Regional Office. Where the General Counsel has authorized consolidation, clearance should be obtained from the Division of Operations-Management before severing cases.

11720 Motions to Consolidate or Sever

11720.1 Unfair Labor Practice Cases

Pursuant to Secs. 102.33(d) and 102.24, Rules and Regulations, motions by parties to consolidate or sever unfair labor practice cases after the issuance of complaint should be filed with the Chief Administrative Law Judge, if prior to hearing, or with the ALJ, if during hearing.

11720.2 Representation Cases

Motions by the parties to consolidate or sever representation cases should be filed in accordance with Sec. 102.65, Rules and Regulations.

11730–11734 CONCURRENT R (REPRESENTATION) AND C (ULP) CASES

To the extent relevant, the principles of these Sections should also be applied to situations involving UD petitions.

These sections apply to preelection situations. They generally do not deal with those postelection situations in which challenges and/or objections and related unfair labor practice charges are being processed. Such situations are discussed in Secs. 11407 and 11420.1.

For special procedures where there are concurrent 8(b)(7) cases, see Secs. 10240–10248.

11730–11731 BLOCKING UNFAIR LABOR PRACTICE CHARGES; EXCEPTIONS

11730 Blocking Charge Policy—Generally

The Agency has a general policy of holding in abeyance the processing of a petition where a concurrent unfair labor practice charge is filed by a party to the petition and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted. However, there are significant exceptions to the general policy of having a charge "block" a petition. Accordingly, the filing of a charge does not automatically cause a petition to be held in abeyance.

The exceptions to the blocking charge policy are set forth in detail in Sec. 11731. Where the Regional Director is giving consideration to these exceptions while implementing the blocking charge policy, it should be recognized that the policy is not intended to be misused by a party as a tactic to delay the resolution of a question concerning representation raised by a petition. Rather, the blocking charge policy is

premised solely on the Agency's intention to protect the free choice of employees in the election process.

11730.1 Types of Blocking Charges

Blocking charges fall into two broad categories. The first, called Type I charges, encompasses charges which allege conduct that only interferes with employee free choice. The second, called Type II charges, encompasses charges which allege conduct that not only interferes with employee free choice but also is inherently inconsistent with the petition itself. After investigation of the latter charges and a determination as to their merit, such charges may also cause a petition to be dismissed.

11730.2 Type I Charges: Charges That Allege Conduct That Only Interferes With Employee Free Choice (Request to Proceed May be Honored)

When the charging party in a pending unfair labor practice case is also a party to a petition, and the charge alleges conduct that, if proven, would interfere with employee free choice in an election, were one to be conducted, and no exception (Sec. 11731) is applicable, the charge should be investigated and either dismissed or remedied before the petition is processed. Unless Type II conduct is involved, a request to proceed by the charging party (Sec. 11731.1) may be honored in these cases. *Columbia Pictures Corp.,* 81 NLRB 1313, 1314 (1949); *Carson Pirie Scott & Co.,* 69 NLRB 935, 938–939 (1946); *United States Coal & Coke Co.,* 3 NLRB 398, 399 (1937); see also *Holt Bros.,* 146 NLRB 383, 384 (1964).

11730.3 Type II Charges: Charges that Affect the Petition or Showing of Interest, that Condition or Preclude a Question Concerning Representation, or that Taint an Incumbent Union's Subsequent Loss of Majority Support (Request to Proceed May Not be Honored)

Some unfair labor practice charges allege conduct which, if proven, would not only have a tendency to interfere with the free choice of employees in an election, but also would be inherently inconsistent with the petition itself. Regardless of whether such charges are filed by a party to the petition or by a nonparty, and regardless of whether a request to proceed (Sec. 11731.1) is filed, such charges block a related petition during the investigation of the charges, because a determination of the merit of the charges may also result in dismissal of the petition. Inherently inconsistent charges include, but are not limited to, the situations described below in Secs. 11730.3(a) through (c).

11730.3(a) Charges that Affect the Petition or Showing of Interest

These are Section 8(a)(1) and (2) or 8(b)(1)(A) charges that challenge the circumstances surrounding the petition or the showing of interest submitted in support of the petition. If meritorious, such a charge may invalidate the petition or some or all of the showing of interest. As a consequence, the petition may be dismissed. Sec. 11733.2(a)(1).

Examples:

- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the initiation of a RD or UD petition.
- A finding of merit to an 8(a)(1) charge that alleges the employer's representatives were directly or indirectly involved in the support of a RD or UD petition, if the showing is reduced below 30 percent after the tainted showing is subtracted.
- A finding of merit to an 8(a)(2) charge that alleges employer representatives assisted in the showing of interest obtained by a labor organization, if the showing is reduced below 30 percent after the tainted showing is subtracted.
- A finding of merit to an 8(b)(1)(A) charge that alleges a labor organization's showing of interest was obtained through threats or force, if the showing is reduced below 30 percent after the coerced showing is subtracted.
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NOTE: See Sec. 11028.2 for the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

11730.3(b) Charges that Condition or Preclude a Question Concerning Representation

These are Section 8(a)(2) and (5), 8(b)(3), or other charges which allege violations that involve recognition issues. These charges include allegations of 8(a)(5) or 8(b)(3) failure to recognize or bargain, or 8(a)(1) and/or (3) violations requiring a remedial bargaining order, or 8(a)(2) unlawful recognition. A determination of merit in such a charge may impose conditions upon or preclude the existence of the question concerning representation sought to be raised by the petition (e.g., *Big Three Industries,* 201 NLRB 197 (1973)). Sec. 11733.2(a)(2).

Examples:

- An 8(a)(5) or 8(b)(3) charge, which seeks to establish, to continue or to reestablish a bargaining relationship and for which the remedy is an affirmative bargaining order, may require dismissal of a related petition upon a finding of merit to the charge.
- An 8(a)(1) and/or (3) charge, in which a remedial bargaining order is being sought, seeks to establish a bargaining relationship, and would require dismissal of a related petition upon a finding of merit to the charge. *NLRB v. Gissel Packing Co.,* 395 U.S. 575 (1969).
- An 8(a)(2) charge that seeks to disestablish a bargaining relationship imposes a condition upon the question concerning representation that the

petition seeks to raise and must be resolved prior to processing the petition. In this situation, a determination of no merit, permitting the challenged bargaining relationship to continue, may, because of contract or recognition bar principles, require dismissal of a related petition which seeks to establish a new bargaining relationship. A determination of merit to the 8(a)(2) charge may cause the petition to continue to be blocked, until resolution of the charge by the Board, since the bargaining relationship must be disestablished before the petition can be processed. EXCEPTION: Sec. 11731.1(c)(1).

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NOTE: Not all merit determinations in charges alleging 8(a)(2) and (5) or 8(b)(3) violations would require dismissal of the petition. If the remedy for the 8(a)(2) and (5) or 8(b)(3) conduct would not have an effect on the bargaining relationship and thus does not condition or preclude the existence of the question concerning representation sought to be raised by the petition, and if other Type II charges are not involved (Secs. 11730.3(a) and (c)), the petition would not be subject to dismissal.

Examples:

- Remedying a meritorious 8(a)(2) allegation of limited assistance by a low-level supervisor does not necessarily require disestablishment of a bargaining relationship.
- Remedying meritorious allegations of 8(a)(5) or 8(b)(3) unilateral change or failure to furnish information does not necessarily require an affirmative bargaining order.
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Accordingly, these kinds of charges should be viewed as type I charges that allege only interference (Sec. 11730.1(a)), notwithstanding their allegations of 8(a)(2) and (5) or 8(b)(3) conduct.

FURTHER NOTE: An 8(a)(2) and (5) or 8(b)(3) charge involving recognition conduct that postdates the filing of the petition does not warrant dismissal of the petition, since the petition was already on file when the later allegedly unlawful conduct occurred. Similarly, such conduct that postdates the obtaining of the showing of interest and did not affect the filing of the petition does not warrant dismissal of the petition. Hence, these kinds of charges should be viewed as Type I charges that allege only interference (Sec. 11730.1(a)). *Empresas Inabon, Inc.,* 309 NLRB 291 (1992) (also *Union de la Construccion v. NLRB,* 10 F.3d 14, 16 (1st Cir. 1993)); *Celebrity, Inc.,* 284 NLRB 688 (1987).

11730.3(c) Charges that Taint an Incumbent Union's Subsequent Loss of Majority Support

These charges can be of any kind, other than a charge that affects the circumstances surrounding the petition or the showing of interest or a charge that

involves a general refusal to recognize and bargain with the union. These charges raise the issue of a causal relationship between the violations alleged and the subsequent expression of employee disaffection with an incumbent union. A finding of merit to such a charge and of a causal connection between the violations alleged and the employee disaffection would warrant dismissal of a petition that was filed based upon that disaffection. Sec. 11733.2(a)(3).

Example:

An 8(a)(1) statement to a group of represented employees that the employer intends to operate in the future as a nonunion employer may require the dismissal of a petition that follows, if upon a finding of merit to the charge a causal relationship is established between the statement and the subsequent expression of employee disaffection with the incumbent union which is used to support the petition. *Williams Enterprises,* 312 NLRB 937, 939 (1993).

In *Saint Gobain Abrasives, Inc.*, 342 NLRB 434 (2004), the Board concluded that a hearing should be held to resolve genuine factual issues as to whether there was a causal nexus between alleged unfair labor practices and the filing of a decertification petition before the dismissal of such a petition.

Accordingly, in such circumstances the Regional Office should conduct a preliminary administrative investigation and proceed as follows:

(a) If no evidence of causal nexus exists, e.g., the showing of interest was obtained prior to the alleged unlawful conduct or the disputed conduct was de minimus or isolated:

- No further consideration should be given to dismissal of the petition
- The decision to treat the charge as blocking the processing of the petition should be reconsidered

(b) If evidence may support a finding of a causal nexus:

- Contact the Division of Operations-Management as to the appropriate action including a possible hearing on the causal nexus issue
- Advise the Office of Representation Appeals of the issue
- Continue to treat the charge as blocking the processing of the petition

11730.4 Decision Whether to Hold Petition in Abeyance

Regardless of whether the charge is already pending at the time of the filing of the petition or is filed after investigation of the petition has already begun, the Regional Director should decide whether the general policy of holding the petition in abeyance should be applied (Sec. 11730) or if one of the exceptions in Sec. 11731 applies. In implementing the blocking charge policy, the Regional Director should assess, throughout the steps of processing the charge and the petition, whether the charge blocks the petition.

If at any time during or after investigation the Regional Director establishes that there was no causal relationship between the unfair labor practice allegations and the decertification petition, the Regional Director should not give further consideration to dismissing the petition and should reconsider whether the charge should continue "blocking" the processing of the petition.

11730.5 AC and UC Cases

Although the blocking charge policy applies to AC and UC petitions, in most situations the charge and the petition raise significant common issues which may better be resolved by processing the UC or AC petition. Secs. 11490.3 and 11731.3.

11730.6 Period of Pendency of Charge

A charge is pending at all stages up to and including an administrative decision to dismiss or a withdrawal, on the one hand; or, on the other, up to and including a court judgment with which there has not been full compliance. However, also see Sec. 11732 regarding the impact of charges that are to be or have been dismissed.

11730.7 Informing Parties

The Board agent handling the matter should inform the parties of any determinations made with regard to concurrent charges and petitions and the reasons therefor. If any party requests the reasons in writing, the Regional Director should promptly provide them. If the determination is to hold the petition in abeyance, the letter should also inform the parties of their right to obtain review by the Board of this determination under Sec. 102.71 of the Rules and Regulations.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

11730.8 Notification to Board

If a blocking charge is filed at a time when a petition is pending before the Board in Washington, the Executive Secretary should be notified of the filing, as well as of any request to proceed that may be received. All subsequent relevant developments or dispositions of the unfair labor practice charge should also be reported to the Executive Secretary.

11731 Exceptions to Blocking Charge Policy

Exceptions to the Agency's general policy to block petitions are described below in Secs. 11731.1 through .5 as Exceptions 1 through 5. As noted in Sec. 11730.4, their applicability may be invoked or reconsidered at any time during the pendency of the petition.

NOTE: Exceptions 2 through 5 apply to Type II as well as Type I charges. The fact that a Type II charge may ultimately involve dismissal of the petition should be an element in the Regional Director's consideration as to whether an exception applies.

11731.1 Exception 1: Request to Proceed

11731.1(a) Receipt of Request to Proceed (Type I Charge)

A petition may be processed notwithstanding the pendency of a Type I charge (Sec. 11730.2) in a related C case, subject to the limitations set forth below, if the party filing the charge requests that the petition proceed. Form NLRB-4551 may be used for this purpose. On receipt of a request to proceed and if otherwise appropriate, the Regional Director may proceed with action on the petition. If the matter is before the Board for any reason, the Executive Secretary should be so advised.

11731.1(b) Rescission of Request to Proceed

Should a party seek to rescind a request to proceed and once again suspend action on the petition, the reasons for the change should be ascertained. The Regional Director should rule on the request to rescind, applying the same considerations outlined in Sec. 11730 regarding the Agency's blocking charge policy. The charging party's prior willingness to attempt to continue with processing the petition should not, in and of itself, be viewed as a reason not to honor the charging party's subsequent attempt to rescind its request to proceed. It may contend, for example, that with the passage of time the unfair labor practices have had a tendency to interfere with the free choice of employees in an election. On the other hand, if the Regional Director determines, upon consideration of all the relevant factors, not to grant approval of the rescission, processing of the petition should continue.

The parties should be appropriately informed. Sec. 11730.7.

11731.1(c) Where Type II Charges are Involved

A request to proceed should not be approved in the face of a Type II charge. Sec. 11730.3. Where such allegations are involved, they should be disposed of before a concurrent petition is processed, unless other exceptions apply (Secs. 11731.2 through .5).

11731.1(c)(1) Section 8(a)(2) *Carlson* Waiver

In cases in which the Board has entered an order requiring the respondent employer to withdraw and withhold recognition from the assisted union unless and until it has been certified, the Regional Director may honor a waiver whereby the petitioner affirmatively indicates a willingness to withdraw an 8(a)(2) assistance charge in the event

the allegedly assisted union is certified. *Carlson Furniture Industries,* 157 NLRB 851 (1966). In the event all parties reach an agreement that accomplishes the same purpose as a Board order disestablishing a bargaining relationship, thus removing recognition or contract bar as an issue from the processing of the petition, the Regional Director may honor a waiver from the petitioner modeled on *Carlson Furniture*.

11731.1(c)(2) Withdrawal and Attempted Reinstatement of Charge

A party which requests withdrawal of a refusal-to-bargain charge or of a domination of or assistance to union charge, in order to unblock a R case (in other words, which attempts to accomplish by withdrawal what it cannot accomplish by a request to proceed), should be advised that reinstatement of the charge might not be permitted after an election. *Fernandes Supermarkets,* 203 NLRB 568 (1973).

11731.2 Exception 2: Free Choice Possible Notwithstanding Charge

There may be situations where, in the absence of a request to proceed (Secs. 11731.1(a) and .1(c)(1)), the Regional Director is of the opinion that the employees could, under the circumstances, exercise their free choice in an election and that the R case should proceed notwithstanding the existence of a concurrent Type I or Type II unfair labor practice case and the absence of a request to proceed or a waiver.

Factors: The following are among the factors to be considered under this section.

(a) The character, scope, and timing of the conduct alleged in the charge, and the conduct's tendency to impair the employees' free choice

(b) The size of the work force relative to the number of employees involved in the events or affected by the conduct alleged in the charge

(c) Whether the employees were bystanders to or the actual targets of the conduct alleged in the charge

(d) The entitlement and interest of the employees in an expeditious expression of their preference regarding representation

(e) The relationship of the charging parties to labor organizations involved in the representation case

(f) The showing of interest, if any, presented in the R case by the charging party

(g) The timing of the charge.

Also see Sec. 11731.5 for the considerations that apply when a charge is filed before a scheduled election.

11731.3 Exception 3: Petition and Charge Raise Significant Common Issues; UC and AC Petitions

There are situations where the Type I or Type II alleged unfair labor practices are so related, at least in part, to the unresolved question concerning representation sought to be raised by the petition that the processing of the petition will resolve significant common issues. *Panda Terminals,* 161 NLRB 1215, 1223–1224 (1966); *Krist Gradis,* 121 NLRB 601, 615–616 (1958). Thus, it may be appropriate to conduct a hearing and

issue a decision to resolve an issue, such as supervisory status, that is relevant to both the petition and the unfair labor practice case. Sec. 11228. Where appropriate, the conditions of Exception 2 (Sec. 11731.2) should also be taken into account, especially with respect to proceeding to an election.

UC and AC Petitions: When a UC or AC petition and an 8(a)(2) or (5) charge raise the same issue, the UC or AC petition may be the more effective way of resolving the issue. Sec. 11490.3. Ordinarily, the UC or AC case should be processed while the 8(a)(2) or (5) charge is held in abeyance, unless the potential for excessively lengthy or duplicative proceedings warrants a determination to process the issue through the unfair labor practice case.

11731.4 Exception 4: Scheduled Hearing

In situations where a R case hearing has already been scheduled when a Type I or Type II unfair labor practice charge is filed and time does not permit determination of possible merit of the charge, the Regional Director may proceed with the hearing in the R case. A separate determination should then be made by the Regional Director pursuant to Exceptions 2 and 3 above (Secs. 11731.2 and .3) with regard to issuing a decision and/or conducting an election.

11731.5 Exception 5: Scheduled Election

When an election has already been scheduled and thereafter a Type I or Type II unfair labor practice charge is filed too late to permit adequate investigation before the scheduled election, the Regional Director may, in his/her discretion:

(a) Postpone the election pending disposition of the charge; or

(b) Hold the election as scheduled and impound the ballots until after disposition of the charge; or

(c) Conduct the election, issue the tally of ballots and, in the absence of objections, issue a certification; and then proceed to investigate the charge.

Factors: The following are among the factors to be considered under this exception:

(1) The extent to which substantial evidence in support of the allegations is submitted by the charging party with its charge

(2) The passage of time between the alleged conduct and the filing date of the charge

(3) The seriousness of the allegations and the evidence submitted with the charge as to its dissemination.

Relevant factors recited in Exception 2 (Sec. 11730.2) may also be considered.

If as a result of the determination a scheduled election is postponed, see Secs. 11302.1(b) and 11314.8 regarding notification to the parties.

11732–11733 FINDING AS TO MERIT OF UNFAIR LABOR PRACTICE CHARGE

11732 Charge Found Not to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge lacks merit and is to be dismissed, absent withdrawal, the Regional Director should proceed with the processing of the petition.

Where the situation involves a Type I charge (Sec. 11730.2), the Regional Director should proceed with the petition as if there were no concurrent charge, even though the dismissal of the charge is either pending or on appeal, unless, in his/her discretion, he/she concludes that further processing of the petition should await the results of the appeal.

Where the situation involves a Type II charge (Sec. 11730.3) and the dismissed charge is either pending or on appeal, the Regional Director may await the results of an appeal before processing or dismissing the petition, as appropriate, or he/she may proceed immediately.

If an appeal of the dismissal of the charge is filed with the Office of Appeals, that office should be immediately notified of the pending concurrent petition and its current status. If subsequent to this notification an election is scheduled in the petition, separate notification of such should be sent to the Office of Appeals. If an election is to be conducted before the Office of Appeals has ruled on the appeal of a Type II charge, the ballots ordinarily should be impounded pending a ruling from the Office of Appeals.

11733 Charge Found to Have Merit

If, upon completion of investigation of the charge, it is determined that the charge has merit and that a complaint should issue, absent settlement, the Regional Director should determine whether further processing of the petition should be blocked by the charge or the petition should be dismissed. The parties should be informed accordingly. Sec. 11730.7. For the purposes of that determination, the Regional Director shall accept the allegations to be set forth in the complaint as true.

11733.1 Blocking of Petition Warranted

If the Regional Director determines that the petition should be blocked by a Type I charge, because the impact of the meritorious unfair labor practices would have a tendency to interfere with employee free choice in an election, were one to be conducted, he/she should hold the petition in abeyance until disposition of the charge, whereupon the processing of the petition may be resumed. Absent unusual circumstances, Exceptions 1 through 5 to the foregoing, set forth in Secs. 11731.1 through .5, are equally applicable after a merit determination has been made in the charge.

11733.2 Dismissal of Petition Warranted

11733.2(a) Types of Violations Found

11733.2(a)(1) Violations that Affect the Petition or Showing of Interest

If the Regional Director finds merit to an 8(a)(1) and (2) or 8(b)(1)(A) charge that challenges the circumstances surrounding a petition or the showing of interest submitted in support of a petition (Sec. 11730.3(a)) and the alleged conduct, if proven, directly affects a petition or its showing of interest to an extent that the showing is insufficient, then the petition should be dismissed with a dismissal letter setting forth the specific connections between the alleged unfair labor practice allegations and the petition, subject to a request for reinstatement by the petitioner after final disposition of the C case. See Sec. 11733.2(b), OM 07-69, *Williams Enterprises*, 312 NLRB 937, 939 (1993), and *Canters Fairfax Restaurant, Inc.*, 309 NLRB 883, 884 (1972). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB No. 23 (2007), and OM 07-69.

NOTE: Sec. 11028.2 discusses the limited circumstances under which a petition may be dismissed because of conduct relating to the petition or the showing of interest, where such conduct is not the subject of an unfair labor practice charge.

11733.2(a)(2) Violations That Condition or Preclude a Question Concerning Representation

If the Regional Director finds merit to charges involving violations of Sections 8(a)(1), (2), (3), (5) or 8(b)(3), and the nature of the alleged violations, if proven, would condition or preclude the existence of a question concerning representation, as described in Section 11730.3(b), the petition should be dismissed with a dismissal letter setting forth the specific connections between the alleged unfair labor practice allegations and the petition, subject to a request for reinstatement by the petitioner after final disposition of the charge. Sec. 11733.2(b) and *Williams Enterprises*, 312 NLRB 937, 939 (1993). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB No. 23 (2007), and OM 07-69.

11733.2(a)(3) Violations That May Affect an Incumbent Union's Subsequent Loss of Majority Support

This section applies to an unfair labor practice charge of any kind other than one that directly challenges the circumstances surrounding the petition or the showing of interest or one that involves a general refusal to recognize and bargain with the union. If the Regional Director finds merit to an unfair labor practice charge of another kind than described in the preceding sentence, and there is specific proof of a causal relationship between the unfair labor practice allegations and ensuing events indicating that the alleged unfair labor practices caused a subsequent expression of employee disaffection

with an incumbent union, then the Regional Director should dismiss a petition that was filed based upon that disaffection**.** Prior to making such a decision, the Regional Office may be required to conduct a hearing on the causal nexus between the allegedly unlawful conduct and the filing of the petition. See Sec. 11730.3(c). The petition is subject to a request for reinstatement by the petitioner after final disposition of the C case. Sec. 11733.2(b). *Williams Enterprises,* 312 NLRB 937, 939 (1993). However, the petition cannot be dismissed based upon a settlement of alleged but unproven unfair labor practices. In these circumstances, unless the petitioner withdraws the petition or the respondent admits liability as part of the settlement, the petition should be processed. See *Truserv Corp.*, 349 NLRB No. 23 (2007), and OM 07-69.

11733.2(b) Dismissal of Petition

The dismissal letter (Sec. 11102) or order dismissing the petition should set forth the basis for the action, including the reasons that the unfair labor practice findings would affect further processing of the petition. The specific connection between the conduct alleged as unfair labor practices and the petition should be clearly articulated. If more than one basis for dismissal is arguably present, all such bases ordinarily should be stated. For example, conduct, such as direct dealing, which the investigation revealed was causally related to the employee disaffection upon which the petition was based (Sec. 11730.3(c)), may also be conduct the remedy for which—bargaining—precludes a question concerning representation (Sec. 11730.3(b)); the petition should be dismissed for both reasons. The parties should be informed of the right to obtain review by filing a request for such with the Board. Sec. 102.71, Rules and Regulations. Where there is provision for reinstatement of the dismissed petition on application of the petitioner after final disposition of the unfair labor practice case, the dismissal letter or order dismissing the petition should so advise the petitioner. A petition is subject to reinstatement only if the allegations in the unfair labor practice case, which caused the petition to be dismissed, are ultimately found to be without merit. An application for reinstatement under any other circumstances should be denied.

In order to assure notification to the petitioner of the disposition of the unfair labor practice proceeding, the petitioner should be made a party in interest in the unfair labor practice proceeding, with an interest limited solely to receipt of a copy of the order or other document that operates to finally dispose of the proceeding and the dismissal letter or order dismissing the petition should so advise.

11734 RESUMPTION OF PROCESSING OF PETITION

11734 Resumption of Processing of Petition Upon Disposition of Charge

Processing of a petition held in abeyance during the pendency of an unfair labor practice charge may be resumed upon the disposition of the charge. Where the charged party or respondent in the unfair labor practice proceeding has taken all action required by a settlement agreement, administrative law judge's decision, Board Order, or court judgment, except that the full period for posting any required notice has not passed, certain preelection action with respect to the R case may be taken, whether or not the charging party requests that the R case proceed. Thus:

(a) A hearing may be held

(b) An election agreement may be approved

(c) An order dismissing petition or a decision and direction of election may be issued.

As noted, these preelection actions may be taken in the absence of a request to proceed.

ELECTION: In the event the charging party wishes to proceed to an election during the posting period, a written waiver must be obtained from the charging party, stating that the unremedied unfair labor practices referred to in the posted notice may not constitute grounds on which the Board may set aside the election.

Absent such a waiver, an election should not be held until the posting period has expired.

EXCEPTION: When the remedy requires that recognition of an unlawfully assisted union be withdrawn and withheld unless and until that union has been certified by the Board, neither a RC petition filed by that union nor a RM petition should be entertained until after the expiration of the posting period. The showing of interest submitted in support of a petition filed by that union must be dated after expiration of the posting period.

11740 PRIORITY OF CASE PROCESSING

11740 Priority of Cases—Impact Analysis

Recognizing that limited resources prevent the processing of all cases on a first in, first out basis, the Agency has developed an Impact Analysis system. Impact Analysis assesses representation, unfair labor practice and compliance cases in terms of their relative impact on the public and their significance in effective achievement of the Agency's mission. Under Impact Analysis, cases are categorized as Category III, exceptional impact; Category II, significant impact; or Category I, important impact.

Since cases in a higher category should receive greater resources and have shorter time goals than cases in a lower category, categorization should be made as soon as possible, not later than 1 week from filing, and should be revised as warranted.

The General Counsel determines the type of cases which belong in each Impact Analysis category and establishes different time goals for the disposition of ULP cases within each category. These goals are most stringent for Category III cases and least stringent for Category I cases. The specific types of cases which belong in each category and the time goals are reviewed periodically and may be modified, depending upon a variety of factors, such as case intake, staffing, and budget. GC Memo 02-02.

The following guidelines are intended only to assist Regional Offices in exercising discretion as to the appropriate differentiation of cases; unusual situations undoubtedly will arise which will warrant placement in a category different from that which would ordinarily appear appropriate. As a guiding principle, Regional Offices should resolve any doubts about the appropriate category by selecting the higher category.

11740.1 Category III Cases: Exceptional Impact

Category III (Exceptional) cases involve the allegations most central to achievement of the Agency's mission.

Illustrations include:

- 10(j) and (l) cases
- All representation cases involving the resolution of a question concerning representation, i.e., RC, RD, and RM petitions, as well as any postelection cases
- All blocking charge cases
- All cases in which the establishment or continuation of a union's status as a 9(a) representative is at stake. This would include: cases involving *Gissel* bargaining orders; the relocation, transfer or elimination of a bargaining unit; test of certification summary judgment; and alleged misconduct designed to frustrate a union's ability to obtain an initial contract after certification
- Cases involving the resolution of whether a strike or lockout is based on economic or unfair labor practice considerations
- Any case involving the issue of whether a strike is unprotected or the status of strikers or the employment status of significant numbers of employees
- 8(g) cases
- 8(a)(1), (3), (4), or (5) permanent or indefinite loss of employment cases

- 8(b)(2) cases where individuals have been denied work opportunities because of the union's alleged discrimination, including hiring hall refusal to refer allegations
- National cases or cases of unusually high visibility.

11740.2 Category II Cases: Significant Impact

Category II (Significant) cases are all other cases, except for those included in Categories III and I. They typically involve conduct which affects core rights under the Act and for which there is no alternative remedy. In addition, this category includes those cases involving 8(d) duties where the conduct does not imperil the bargaining relationship itself.

Illustrations include:

- 8(a)(1), (3), and (4) discrimination cases which do not involve a permanent or indefinite loss of employment
- Refusal to hire cases
- Nonsection 10(j) picket line violence or misconduct cases
- All Representation cases which do not involve the resolution of a question concerning representation, i.e., UC, UD, AC, and WH cases
- 8(a)(5)/8(b)(3) refusal to provide information cases
- 8(a)(5) unilateral change allegations
- 8(b)(1)(A) duty of fair representation cases
- Independent 8(a)(1) allegations

11740.3 Category I Cases: Important Impact

Category I (Important) cases make up the remainder of the Agency's work. They either are deferrable or involve conduct for which alternative means of redress are available to the charging party.

Illustrations include:

- *Collyer/Dubo* and other deferral cases
- 8(a)(5) pension and welfare contribution collection cases. See GC Memo 02-05

11740.4 Priority of Cases Within Each Category

In determining which of several cases should be given priority within the particular Impact Analysis category, consideration should be given to the particular facts of each case, the nature of the alleged violation, its impact on the parties or the public, the type of relief indicated, and any other factors that would affect the policies of the Act. Generally, cases in which injunctive relief is being considered will take precedence over other matters, even in the same category.

11750–11754 SUBMISSIONS TO DIVISIONS OF ADVICE AND OPERATIONS-MANAGEMENT, THE SPECIAL LITIGATION BRANCH AND THE OFFICE OF THE EXECUTIVE SECRETARY

This section sets forth the general procedures regarding the submission of unfair labor practice case issues to the Divisions of Advice or Operations-Management, or the Special Litigation Branch for advice, clearance, or authorization. It also addresses the issues in representation cases which are to be submitted to the Board through the Office of the Executive Secretary. There are also other sections of the Manual regarding specific matters, including Section 10(j), 10(k), and compliance issues, in which advice, clearance or authorization should or must be sought.

11750 Unfair Labor Practice Cases

11750.1 Submissions to Division of Advice

Although the Regional Director generally has the responsibility to determine whether an issue warrants submission to the Division of Advice, the General Counsel periodically issues guidelines which establish that certain issues should be submitted to Advice. GC Memo 07-11 sets forth in detail such issues, which fall under the following categories:

- Cases requiring a decision by the General Counsel because of the absence of precedent or because they involve identified policy priorities
- Cases requiring development of a litigation strategy in light of adverse circuit court law or new Board precedent
- Cases presenting various difficult legal issues
- Matters traditionally requiring Advice clearance

In addition, certain other matters, as set forth in Secs. 11753.1(a) and 11753.2(a), should also be submitted to the Division of Advice. Credibility issues should not normally be submitted, but rather should be resolved by the Regional Director.

The Regional Office should notify the parties that the case is being submitted to the Division of Advice and the specific issue(s) involved. If the parties have not

submitted a position on the advice issues, they should be invited to do so promptly. However, the Regional Office must not communicate its recommendation to the parties.

With regard to cases interregional in scope, the Regional Office should consult with the Division of Operations-Management prior to submitting the case to the Division of Advice.

In all cases pending in the Division of Advice, any subsequent developments (such as withdrawals, settlements and private adjustments) should be promptly reported by the Regional Office.

If any skip counsel issues arise during an investigation, the Regional Office's submission to the Division of Advice should note the information listed in Sec. 10058.

11750.2 Format and Content of Request for Advice

All issues submitted should be clearly posed in a memorandum captioned: Request for Advice. Although the Request for Advice should be transmitted to the Divisions of Advice and Operations-Management electronically, the entire file should be forwarded to the Division of Advice promptly thereafter. The Request for Advice should be arranged in the following order:

- Charge
- Issues: The Regional Office should clearly note the specific issues on which advice is sought.
- Facts: The Regional Office should set forth a concise statement of relevant facts including credibility resolutions. If a Regional Agenda Minute is sufficiently detailed, it can be submitted as an attachment to the Advice memo rather than repeating the facts in the Request for Advice.
- Regional Office's Position: The Regional Office should set forth its position on each issue, noting any dissents.
- Analysis: The Regional Office should set forth its analysis of the strengths and weaknesses of the arguments on either side.
- Related Cases.

11750.3 Requests by Division of Advice for Further Investigation

All cases in which the Division of Advice requests further investigation should receive priority treatment consistent with their categorization under Impact Analysis. The information requested should be transmitted by the most expeditious means. Advice should be notified of any undue delay and the reasons therefor, with an estimate of the additional time required.

11751 Suits Against the Agency and Requests for Intervention

The Regional Office should promptly inform the Special Litigation Branch whenever the Agency or its agent has been sued or upon a request that the Agency intervene in private litigation. Pleadings and papers, as received, should be forwarded as expeditiously as appropriate to the Special Litigation Branch with a copy to the Division of Operations-Management.

11752 Precomplaint Submissions to Division of Operations-Management

- Clearance 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. 10264.5.
- In cases in which the alleged unfair labor practices also arguably violate the Occupational Safety and Health Act, the Regional Office should refer to GC Memo 75-29 and GC Memo 79-4 for instructions regarding submission to the Division of Operations-Management
- In cases in which the alleged unfair labor practices also arguably violate the Federal Mine Safety and Health Act of 1977, the Regional Office should refer to GC Memo 80-10 for instructions regarding submission to the Division of Operations-Management
- In cases in which the alleged unfair labor practice charge also involves the Americans with Disabilities Act (ADA), the Regional Office should consult with the Division of Operations-Management
- Misconduct by attorneys or other representatives should, where appropriate, be referred to the Division of Operations-Management. Sec. 102.177(e), Rules and Regulations and OM Memos 97-2 and 01-80
- 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, Sec. 10592.4 and .8 of the Compliance Manual
    - Non-Board settlements in cases where the Regional Office has decided to issue complaint, Sec. 10592.4 and .8 of the Compliance Manual.

11753 Postcomplaint, Posthearing, and Compliance Submissions

11753.1 Postcomplaint Submissions

(a) *Division of Advice*

Authorization from the Division of Advice should be obtained before:

- Issuing postcomplaint investigative subpoenas in certain situations. See Sec. 11770.4 for more detailed guidance.
- Issuing trial subpoenas if there are foreseeable impediments to enforceability, such as where the witness may assert a recognized privilege
- Seeking subpoena enforcement where previously unforeseen impediments arise. Sec. 11790
- Denying a private party's request for subpoena enforcement. Sec. 11790.1

(b) *Division of Operations-Management*

Authorization from the Division of Operations-Management should be obtained before introducing or agreeing to the introduction of confidential Agency documents. Sec. 10398.

Misconduct by attorneys or other representatives should, where appropriate, be referred to the Associate General Counsel, Division of Operations-Management. Sec. 102.177(e), Rules and Regulations and OM 97-2 and OM 01-80.

11753.2 Posthearing Submissions

(a) *Division of Advice*

Authorization from the Division of Advice should be sought in the following matters:

- Before deciding whether or not to file exceptions where the Administrative Law Judge's decision raises previously unforeseen novel or complex policy issues. Sec. 10430.1
- Where complaint was authorized by the Division of Advice, the Regional Office should make a timely recommendation to Advice regarding exceptions
- Before requesting oral argument before the Board. Sec. 10438.6
- Where oral argument is ordered by the Board, to determine who will argue and the nature of the argument. Sec. 10442.

- Before filing a motion for reconsideration of a Board order. Sec. 10452
- Before filing an opposition to another party's motion for reconsideration where new or novel issues are involved. Sec. 10452

(b) *Office of Appeals*

Where complaint was authorized by the Office of Appeals, the Regional Office should make a timely recommendation to Appeals regarding exceptions.

11753.3 Compliance

For any issues regarding whether clearance is necessary from the Division of Operations-Management with respect to compliance with a settlement agreement, administrative law judge's decision, Board order or court judgment, the appropriate section in the Compliance Manual should be consulted.

11753.4 Equal Access to Justice Act (EAJA)

When a Region is uncertain regarding Agency policy with respect to an EAJA issue, the matter should be submitted to the Division of Advice.

11754 Representation Cases

11754.1 Generally

All requests for advice in representation cases except as set forth in Sec. 11754.2 should be directed to the Board through the Office of the Executive Secretary. Normally, requests for advice with respect to substantive law will not be submitted to the Board as the Regional Director is expected to apply Board precedent and to decide questions of statutory interpretation. Sec. 11273. In unusual cases presenting novel issues, the Regional Director may exercise discretion and transfer such matters to the Board for decision.

Advice, clearance, or authorization should be sought from or notification given to the Board, the Executive Secretary or the Director of Representation Appeals in the following circumstances:

(a) Where no-raiding procedures are involved. Secs. 11018.1 and .2 and 11019

(b) Prior to any relaxation of the rule requiring a 30-percent showing of interest of petitioner. Sec. 11023.1

(c) If an officer or responsible agent of the petitioner was responsible for or had knowledge of and condoned submission of a forged showing and the remaining valid showing satisfies the interest requirement. Sec. 11029.3(b)

(d) Before treating exceptions or a request for review as a motion for reconsideration. Secs. 11100.3, 11274, 11364.8, and 11394.8

(e) Where a petitioner wishes to withdraw a petition after a valid election. Sec. 11116.1

(f) Where the validity of the showing of interest has been raised in a request for review. Sec. 11274

(g) Where the date of an election has been set and a request for review is filed with the Board. Secs. 11274 and 11302.1

(h) Where the date of an election has been set and a motion for reconsideration has been or is to be filed with the Board. Sec. 11282

(i) Before updating the eligibility list used in a runoff. Sec. 11350.5

11754.2 Authorization From Headquarters

Submission for clearance is not required before referring to other Federal or State agencies possible violations of other statutes, except there is a requirement of clearance when the potential violation concerns possible criminal conduct related to Agency proceedings. Examples are forgery of authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings. Similarly, there is a clearance requirement prior to referral if alleged unethical conduct of attorneys is involved.

(a) *Authorization from Advice and Special Litigation is required before:*

- Issuing investigative subpoenas in the limited circumstances set forth in Sec. 11770.4. But see Sec. 11770.2.
- Issuing hearing subpoenas if there are new or doubtful legal problems of enforceability. Secs. 11770.4 and 11772
- Denying request of private party for enforcement of subpoenas. Sec. 11790
- Seeking enforcement of subpoena, where, between the necessity to issue and necessity of enforcement, intervening circumstances created enforcement problems. Sec. 11770.6

(b) *Authorization from Advice is required before:*

- Filing a motion for reconsideration of a Board decision or an answer to such a motion filed by any other party that raises new or novel legal problems. Sec. 10452

(c) *Authorization from Operation-Managements is required before:*

- Preparing and conducting last-offer elections. Sec. 11520

- Notifying voters of an election by newspapers, radio, or television. Sec. 11314.7(b)
- Obtaining non-Board personnel to participate in the conduct of an election
- Requesting an Administrative Law Judge to handle a complex hearing on objections/challenges. Sec. 11424.1
- Consolidation of interregional cases. Sec. 11716
- Severance of interregional cases. Sec. 11718
- Payment of special fees for expert testimony

11770–11784 SUBPOENAS

Section 11(1) of the Act provides that the Board or any Member may issue subpoenas calling for attendance and testimony of witnesses or the production of evidence in any investigation or proceeding. Sec. 102.31(a) (for C cases) and Sec. 102.66(c) (for R cases), Rules and Regulations set forth the procedure for issuance of such subpoenas and provide that the Executive Secretary of the Board has the authority to sign and issue subpoenas on behalf of the Board.

11770 Investigative Subpoenas

During certain investigations, in both R and C cases, resort to subpoenas will be necessary in order to ascertain the facts on which to base an administrative decision on the merits.

Investigative subpoenas, however, are no substitute for a promptly initiated, dogged, and thorough pursuit of relevant evidence from cooperative sources. 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 or
- Making appropriate determinations in processing R cases

11770.1 Application for Investigative Subpoena

Upon Regional determination that it is necessary to issue an investigative subpoena, the Board agent assigned to the case should request such subpoena from the Regional Director. The application must be in writing and should contain a statement of

the scope of the information or documents sought and of their relevance. There is no right to an investigative subpoena available to parties other than the General Counsel.

11770.2 Scope of Regional Director's Discretion

The Regional Director has full discretion to issue precomplaint 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.[1] The Regional Director's discretion is subject only to limited clearance and recordkeeping requirements.

Subpoenas ad testificandum may compel testimony by affidavit, by oral testimony under oath before a court reporter or by response to written interrogatories.[2] Where the Regional Office reasonably anticipates that a subpoenaed witness may be uncooperative, an interview of such witness should normally be conducted under oath before a court reporter.

11770.3 Notification of Counsel or Representative

Board agents are reminded of ethical restrictions against bypassing counsel that may mandate the notification of counsel to a party or witness who is subject to a subpoena. Sec. 10058. However, there is no general requirement that counsel for a party be notified of a subpoena to a neutral witness.[3]

11770.4 Clearance by Headquarters

A Regional Director should obtain Headquarters' clearance prior to issuance of a subpoena where there is likely to be raised a serious constitutional defense, claim of privilege or other legal problem, or when the Regional Office wants to issue a subpoena subsequent to complaint and before issuance of a Board order. However, Section 11

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[1] *NLRB v. North Bay Plumbing, Inc.,* 102 F.3d 1005, 1008 (9th Cir. 1996). Accord: *Carolina Food Processors v. NLRB,* 81 F.3d 507, 511–512 (4th Cir. 1996). The courts have, in fact, interpreted Sec. 11 to permit the Board "to obtain everything it [could seek] from an order compelling discovery" under the Federal Rules of Civil Procedure. *NLRB v. Interstate Material Corp.,* 930 F.2d 4, 6 (7th Cir. 1991).

[2] See Compliance Manual, Sec. 10590.2. The Board's investigative authority under Sec. 11 includes the power to require responses to written questions (see *EEOC v. Bay Shipbuilding Corp.,* 668 F.2d 304, 306, 313 (7th Cir. 1981)*; EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 478–479 (4th Cir.), cert. denied 479 U.S. 815 (1986)); to compel the production of documents (see, e.g., *NLRB v. G.H.R. Energy Corp.,* 707 F.2d 110, 113–114 (5th Cir. 1982); *EEOC v. Maryland Cup,* supra at 476–478); and to require oral testimony before the investigator concerning the matters in question (e.g.*, NLRB v. North Bay Plumbing,* supra at 1008; *Link v. NLRB*, 330 F.2d 437, 438 (4th Cir. 1964*)*; cf. *FTC* v. *Standard American, Inc.,* 306 F.2d 231, 233–236 (3d Cir. 1962); *FTC v. Scientific Living, Inc.,* 150 F.Supp. 495, 497–499 (M.D. Pa. 1957), affd. 254 F.2d 598 (3d Cir. 1958), cert. denied 358 U.S. 867 (1959), rehearing denied 358 U.S. 938 (1959)). Such investigative subpoenas can be directed not only to the charged party, but to another party that might be derivatively liable for unfair labor practices (*NLRB v. CCC Associates,* 306 F.2d 534, 537–540 (2d Cir. 1962); *NLRB v. Thayer, Inc.,* 201 F.Supp. 602, 603–604 (D. Mass. 1962)); or indeed to any person having information relevant to the investigation (*Link v. NLRB*, 330 F.2d at 440)).

[3] See generally *S.E.C. v. O'Brien,* 467 U.S. 735 (1984).

subpoenas may be utilized, without clearance, where there is a postcomplaint need to investigate new allegations, where there is a need to investigate the possible dissipation of assets, where there is a need to preserve testimonial evidence as contemplated under Sec. 102.30, Rules and Regulations, or where there is a need to 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).

Thus, clearance should be secured prior to issuing a subpoena:

- Where a witness or entity may claim a constitutional protection or invoke a privilege, e.g., where the subpoena is addressed to a medical doctor or attorney or seeks evidence of communications between an attorney and any employee of the client
- Upon a member of the press to elicit testimony relating to information gained in his or her capacity as a member of the press or requiring the production of materials secured as a result of news gathering activities

Clearance may also be required in circumstances where an attorney of a party to the case also represents a third-party witness as an individual. See also Sec. 10058.4(c). Generally, in these cases, requests for clearance should be submitted to the Division of Advice and the Special Litigation Branch, which is primarily responsible for subpoena enforcement litigation. If the issue(s) under investigation involve 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.

11770.5 Financial Institution Records

The provisions of the Right to Financial Privacy Act (RFPA), 12 U.S.C. § 3401 et seq., must be observed if an investigative subpoena is to be served on a financial institution for financial records of individuals and small partnerships. Compliance Manual, Secs. 10590.2, 10593.6 and 10601.3.

The RFPA does not apply to the financial records of a corporation. Nor does it restrict in any way the issuance of administrative subpoenas to obtain financial or banking records of individuals or partnerships directly from such parties or from any entity other than a "financial institution." The RFPA does not apply, for example, to a subpoena for financial or tax records issued to an individual's accountant or CPA.[4]

[4] The RFPA also contains a "delayed notification" provision, 12 U.S.C. § 3409, pursuant to which the Government can request a district court to permit withholding of the required notice to an individual whose records are being sought for 90 days under exigent circumstances. The Region should consult with the Contempt Litigation and Compliance Branch regarding the availability and use of this provision. See Compliance Manual, Sec. 10601.3 for further information concerning the RFPA.

11770.6 Problems Regarding Enforceability; Reports to Headquarters

When problems of enforceability arise following issuance of investigative subpoenas, the Regional Director should report developments to the Division of Advice and the Assistant General Counsel for Special Litigation. If the issue(s) under investigation involve a compliance matter or possible violation of a Board order or court decree enforcing such an order, the Regional Director should also report developments to the Contempt Litigation and Compliance Branch.

In order to permit the continued oversight of Agency use of investigative subpoenas, Regional Offices should maintain reporting files, which may be in electronic format, that list, for each investigative subpoena issued, the name of the case, the name of the party or witness to whom the subpoena is directed, the evidence sought, the date of issuance, a brief description of the basis for issuance, and a notation of any petition to revoke and/or enforcement proceedings.

11772 Trial or Hearing Subpoenas

The need to subpoena testimony or the production of records at C or R Case hearings should initially be determined by the Board agent assigned, in consultation with supervision. Thus, Board agents may be required to notify supervision of the name of, and the need for, any subpoenaed person or document, along with a description of such document.

In determining whether to issue a subpoena, the Regional Director should consider both the necessity for the subpoena and the enforceability of the subpoena. The subpoena should not be requested if it appears that it cannot be enforced in the event of noncompliance. If there are foreseeable impediments to enforceability, the matter should be submitted to the Division of Advice and the Special Litigation Branch prior to issuance of the subpoena. If the issues(s) under investigation involve a compliance matter or possible violation of a Board order or court decree enforcing such an order, the Regional Director should also notify the Contempt Litigation and Compliance Branch.

Application for a subpoena made prior to the hearing (whether by a Board agent or by other parties) should be made to the Regional Director; one made at the hearing should be made to the Administrative Law Judge or hearing officer, as the case may be, and may be made ex parte. See Sec. 102.31(a), Rules and Regulations, for C Cases and Sec. 102.66(c) for R Cases. These rules require only a written application for subpoenas; neither the name of the witness nor the description of the documents need be included.

Upon receipt of a request for a subpoena from a private party, the Regional Director should grant the application for the requested subpoena. However, the Regional Director retains discretion in granting an application from a Board agent.

11774 Persons Subpoenaed

Generally, witnesses that the trial attorney expects to use at the hearing should be subpoenaed. However, absent unusual circumstances, an exception should be made

where the witness has a definite personal interest or stake in the outcome; e.g., a charging party, or its agents, or alleged discriminatees.

Pursuant to Sec. 102.118 Rules and Regulations, Board agents are prohibited from testifying at formal proceedings without authorization from the appropriate agency official.

11776 Subpoenas Duces Tecum

A subpoena duces tecum should seek relevant evidence and should be drafted as narrowly and specifically as is practicable. The use of the word "all" in the description of records should be avoided wherever possible. For example, the phrase "the corporate records showing total purchases" might be substituted for the phrase "all books, records, documents, and other writings that will show total purchases." Under some circumstances, the subpoena may provide for alternatives in lieu of physical production. In such instances the subpoenaed party may furnish a sworn affidavit setting forth the desired evidence or an admissible summary of that evidence, provided that pertinent records are made available to the Board agent to ensure accuracy.

The subpoena duces tecum should be addressed to the entity with control of the records sought, whether the entity is a corporation, partnership, or labor organization. Subpoenas directed to a sole proprietorship or individual should be addressed to that individual.

Where the same person has control and knowledge of the records, the subpoena duces tecum may be addressed to the entity, attention to that person. Where the agent who can explain the records is unknown, a subpoena duces tecum should be addressed to the entity itself and a subpoena ad testificandum should be served on a person who is known or believed to be familiar with the records.

11778 Service of Subpoenas

Sec. 102.113(c), Rules and Regulations requires that subpoenas be served personally, by registered or certified mail, by telegraph, or by delivery at the principal office or business address of the person being served. Also see Sec. 11(4) of the Act. Absent unusual circumstances, such service should be by certified mail or hand delivery with a copy served by regular mail, hand delivery, or by facsimile on any attorney or other representative of the party or witness. If a party or witness is represented by more than one attorney or representative, service on any one of such persons, in addition to the party or witness, satisfies this requirement. However, as a matter of courtesy, an effort should be made to serve all attorneys or representatives of a party or a witness. See Secs. 11842.2–.3 and Sec. 102.113(f), Rules and Regulations.

A claim form for payment of fees and mileage may in appropriate circumstances be enclosed with the subpoena if it is mailed or given to the witness if it is hand delivered.

There is no obligation on the part of the General Counsel (as opposed to outside parties) to tender witness fees at the time of service. In cases of need or emergency, travel accommodations, where authorized by the Regional Director, may be provided in advance. Where necessary, tickets may be obtained in advance through the Agency travel account.

Although no particular period of notice is prescribed, the service and return date for the following types of subpoenas should, where circumstances allow, normally be as follows:

- Investigative Subpoenas – served with a prompt and reasonable return date under all the circumstances.

- Trial Subpoenas – served at least 2 weeks prior to the return date at hearing, but, at any rate in sufficient time to allow 5 days after receipt of the subpoena to petition to revoke the subpoena. See Sec. 11782.4.

- Representation Case Subpoenas – served with a prompt and reasonable hearing return date under all the circumstances.

11780 Witness Fees

Witnesses subpoenaed by a Board agent should be advised that they are entitled to appearance fees and travel expenses, if they make the appropriate claim. Where appropriate, witnesses are also reimbursed for travel, lodging and meal expenses. Since the amounts and terms of these reimbursements may vary from time to time, refer to the latest Administrative Policy Circular or GC Memoranda for current terms and rates.

Witnesses subpoenaed by the Board agent expected to make a claim should complete and sign a claim form promptly after appearance at the proceeding, upon release from the subpoena. Approval of a witness fee claim is the responsibility of the Board agent.

Although private parties may elect to compensate witnesses for lost income while appearing and testifying, there is no like compensation paid by the Government.

If it comes to the Board agent's attention that a private party refuses to pay appropriate fees to an employee witness, the witness and the party should be advised that such failure could violate the Act. *Howard Mfg. Co.,* 231 NLRB 731 (1977).

11782 Petition to Revoke

Secs. 102.31(b) (C cases) and 102.66(c) (R cases), Rules and Regulations set forth procedures regarding petitions to revoke subpoenas. Such rules provide that a subpoenaed person who does not intend to comply with the subpoena, whether ad testificandum or duces tecum, may file a petition to revoke within 5 days after the date

the subpoena is received. Although not required by the Rules and Regulations, a copy of the subpoena should be attached to the petition to revoke.

Petitions to revoke may be based on the ground that the subpoena does not relate to any matter under investigation or at issue in a hearing, does not describe the evidence sought with sufficient particularity or if for any other reason sufficient in law the subpoena is otherwise invalid.

11782.1 Filed Prior to Hearing

A petition to revoke filed prior to a hearing is filed with the Regional Director. If the subpoena under attack is an investigative subpoena in a C case, the Regional Director should refer it to the Board for ruling; if it is a hearing subpoena in a C case, the petition should be referred to the Administrative Law Judge with a copy of the subpoena attached. If it is either an investigative or hearing subpoena in an R case, the Regional Director may rule on it or refer it to the hearing officer.

11782.2 Filed at Hearing

A petition to revoke filed at a hearing should be filed with either the Administrative Law Judge or hearing officer, who should then rule on it.

11782.3 Notice of Filing

Notice of the filing of the petition to revoke (which need not have been served on all parties) should be given timely by the Regional Director, Administrative Law Judge, or hearing officer, as the case may be, to the party at whose request the subpoena was issued.

11782.4 Five-Day Period

Section 11(1) of the Act and Secs. 102.31(b) and 102.66(c), Rules and Regulations provide that petitions to revoke shall be filed within 5 days from the service (i.e., receipt) of a subpoena. There is case authority which holds that the 5-day period is a maximum and not a minimum. Absent a showing of prejudice, the subpoenaed party may be required to file and argue its petition to revoke and, if ordered by the Administrative Law Judge or hearing officer, produce subpoenaed testimony and documents at hearing in less than 5 days from receipt of the subpoena. See *Packaging Techniques, Inc.,* 317 NLRB 1252, 1253–1254 (1995) and *NLRB v. Strickland,* 220 F.Supp. 661, 665–666 (D.C.W. Tenn., 1962), affd. 321 F.2d 811, 813 (6th Cir. 1963).

11782.5 Not a Part of the Record

Actions and documents in connection with petitions to revoke, including rulings, are not part of the record, unless the aggrieved person specifically requests it.

11784 Witness Claims of Privilege Against Self-Incrimination

Sec. 102.31(c), Rules and Regulations addresses claims of privilege against self-incrimination. The rule provides that whenever a witness at any proceeding before the

Board claims such a privilege, any party may request the Board to issue an order compelling testimony. It is necessary for the Board to obtain the U.S. Attorney General's approval before issuing an order compelling the witness claiming such privilege to testify or provide other information.

Before seeking a Board order to compel testimony from a witness claiming a privilege against self-incrimination, the Regional Office should submit a request for clearance, along with supporting reasons, to the Division of Advice. If the issue(s) under investigation involve a compliance matter, possible violation of a Board order or court decree enforcing such an order, a copy of the request for clearance should also be sent to the Contempt Litigation and Compliance Branch.

A witness who claims the privilege against self-incrimination will not be required, or permitted, to testify or give other information covered by the claim of privilege until the Board has issued the requested order.

11790–11808 ENFORCEMENT OF SUBPOENA

11790 Enforcement of Subpoena

Since the issuance of a subpoena includes prima facie authority to enforce, clearance to enforce is not normally necessary. However, when previously unforeseen impediments create enforcement problems, the matter should be referred to the Division of Advice and Special Litigation Branch for clearance and consultation. If the issue(s) under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

11790.1 Issued at Request of Private Parties

Section 11(2) of the Act provides that subpoena enforcement proceedings must be instituted "upon application by the Board." Sec. 102.31(d), Rules and Regulations provides that proceedings for enforcement of subpoenas issued at the request of a private party shall be instituted by the General Counsel in the name of the Board "on relation of such private party," unless, in the Board's judgment, the enforcement of such subpoena would be inconsistent with the law or the policies of the Act.

If a Regional Office is in doubt regarding whether the enforcement of a subpoena satisfies the above-noted criteria, it should submit the matter to the Division of Advice and Special Litigation Branch for clearance. If the subpoena involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

Prior to filing the application, the Regional Office must advise the requesting party that it bears the responsibility for prosecuting the subpoena enforcement proceeding and that the Regional Office will not assume responsibility beyond the filing of the application. Sec. 102.31(d), Rules and Regulations. Exceptions to this policy arise when

the respondent questions the Board's jurisdiction, its power to issue the subpoena or the validity of the issuance. Under these limited circumstances, the General Counsel may seek to retain control of the case, since the issues raised relate to the Board's basic authority and an adverse decision may affect other cases.

After institution of a subpoena enforcement proceeding, the Regional Office should inform Advice and Special Litigation if unusual circumstances arise. If the issue(s) under investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, the matter should also be referred to the Contempt Litigation and Compliance Branch.

If there is noncompliance with an enforced subpoena, upon the request of the party on whose behalf the subpoena was issued and enforcement proceedings were instituted, the Regional Office must initiate contempt proceedings in the appropriate U.S. district court, unless contempt proceedings would be inconsistent with law or the policies of the Act.

Absent a request by the party on whose behalf the subpoena was issued, contempt proceedings need not be instituted by the Regional Office. *Best Western City View Motor Inn,* 325 NLRB 1186 (1998).

11790.2 Issued at Request of the General Counsel

Enforcement proceedings with respect to subpoenas requested by the General Counsel are handled by the Regional Office involved.

11790.3 Notification to Headquarters

In cases where clearance has been obtained from Headquarters, the Regional Office should forward, if requested, copies of the pleadings, briefs and any orders that issue to the Division of Advice and Special Litigation Branch and, if the investigation involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, also to the Contempt Litigation and Compliance Branch.

11790.4 Appeal Proceedings

Appeal proceedings will be handled by the Special Litigation Branch. If the Regional Office's enforcement application is denied in full or in part, the Regional Office should promptly notify and make a recommendation to the Special Litigation Branch as to whether an appeal should be taken to the circuit court. Upon receipt of a notice of appeal made by another party, the Regional Office should promptly advise and provide all relevant papers to the Special Litigation Branch. If the appeal involves a compliance matter or possible violation of a Board Order or court decree enforcing such an order, notice should be also given to the Contempt Litigation and Compliance Branch.

11790.5 Stays Pending Appeal

After an Agency subpoena has been enforced, any request for a stay pending appeal should be referred to the Special Litigation Branch. If the appeal involves a compliance matter or possible violation of a Board Order or court decree enforcing such

an order, a copy of the stay request should also be forwarded to the Contempt Litigation and Compliance Branch.

11792 Subpoena Authority of the Board/Court Jurisdiction

11792.1 Authority of Board to Issue Subpoenas

Section 11(1) of the Act grants statutory authority to the Board for the exercise of subpoena power, which is similar to that of other administrative agencies. The intent of Congress to confer such authority is clear. S.Res. 573, 74th Cong., 1st Session; Sec. 6(c) of the Administrative Procedure Act, 5 U.S.C. § 556(c)) and the courts have long upheld the power of administrative agencies to issue subpoenas. *Oklahoma Press Publishing Co. v. Walling,* 327 U.S. 186 (1946); *NLRB v. North Bay Plumbing,* 102 F.3d 1005, 1007 (9th Cir. 1996).

Section 11 of the Act, 29 U.S.C. § 161, grants to the Board and its agents broad investigatory authority, including the power to subpoena any evidence "that relates to any matter under investigation or in question." 29 U.S.C. § 161(1); *NLRB v. Interstate Material Corp.,* 930 F.2d 4, 6 (7th Cir. 1991) (describing the Board's broad Section 11 powers); *NLRB v. Steinerfilm, Inc.,* 702 F.2d 14, 15 (1st Cir. 1983) (same); *NLRB v. G.H.R. Energy Corp.,* 707 F.2d 110, 113 (5th Cir. 1982) (same). This broad subpoena power enables the Board "to get information from those who best can give it and who are most interested in not doing so." *U.S. v. Morton Salt Co.,* 338 U.S. 632, 642 (1950). Thus, such subpoenas may be directed to any person having information relevant to an investigation. See, e.g., *Link v. NLRB,* 330 F.2d 437, 440 (4th Cir. 1964). See also Sec. 11770.2 above.

11792.2 Jurisdiction of Courts to Enforce Subpoenas

The district courts receive their power to order enforcement of subpoenas issued by the Board by virtue of Section 11(2) of the Act. The granting of such power has been approved and exercised repeatedly by the courts. Consistent with the bounds of reasonableness, subpoena enforcement may be sought in any district where the investigation is undertaken or where the subpoenaed person is found, resides or transacts business. *NLRB v. Ronny Line,* 50 F.3d 311, 313–314 (5th Cir. 1995); *NLRB v. Alaska Pulp Corp.,* 149 LRRM 2682, 2684 (D.D.C. 1995); *NLRB v. Brooklyn Manor Corp.,* 1999 WL 1011935 (E.D.N.Y.).

11792.3 Collateral Proceedings

Since the Board has the power to make the initial determination of its jurisdiction in any case pending before it (*Oklahoma Press,* 327 U.S. at 209–214), a court in a subpoena enforcement proceeding lacks the authority to decide that issue. In *NLRB v. Barrett Co.,* 120 F.2d 583 (7th Cir. 1941), the court enforced the Board's subpoena seeking commerce data. See also *Oklahoma Press,* 327 U.S. at 214; *Endicott Johnson Corp. v. Perkins,* 317 U.S. 501 (1943); *NLRB v. Northern Trust Co.,* 56 F.Supp. 335, 337–338 (D.C. Ill. 1944), affd. 148 F.2d 24, 27 (7th Cir. 1945). Cf. *Myers v. Bethlehem Shipbuilding Corp.,* 303 U.S. 41, 50 (1938), where *Bethlehem* challenged the Board's

jurisdiction in an injunction proceeding. If the subpoenaed party argues that the Board's jurisdiction is plainly lacking as a matter of law, the Special Litigation Branch should be consulted consistent with Sec. 11770.4.

11794 Relevance

The testimony or documentary evidence sought by enforcement of a subpoena must be relevant to the matter under investigation or in question before the Board. The application should assert that the evidence is relevant to the petition, charge, complaint, or notice of hearing, which is attached to the application as an exhibit. *Oklahoma Press Publishing Co.,* 327 U.S. at 214–215. See also *NLRB v. Carolina Food Processors,* 81 F.3d 507 (4th Cir. 1996).

"For purposes of an administrative subpoena, the notion of relevancy is a broad one . . . . So long as the material requested 'touches a matter under investigation,' an administrative subpoena will survive a challenge that the material is not relevant." *Sandsend Financial Consultants, Ltd. v. Federal Home Loan Bank Board,* 878 F.2d 875, 882 (5th Cir. 1989) (citation omitted) and cases cited therein; *NLRB v. Alaska Pulp Corp.,* 149 LRRM 2684, 2689 (D.D.C 1995); accord: *NLRB v. Carolina Food Processors,* 81 F.3d at 511. An investigative subpoena may properly seek evidence regarding all issues under investigation, including potential defenses. *NLRB v. North Bay Plumbing,* 102 F.3d at 1008. A party seeking to have a subpoena quashed must establish that "the subpoena is intended solely to serve purposes outside the purview of the jurisdiction of the issuing agency." *NLRB v. Interstate Dress Carriers, Inc.,* 610 F.2d 99, 112 (3d Cir. 1979).

11796 "Fishing Expedition" as a Defense

The Board agent should carefully draft subpoenas in order to avoid potential arguments that the subpoena constitutes a "fishing expedition." The subpoena should describe all documents sought with respect to content and time period. The *Oklahoma Press* decision is especially instructive regarding whether a subpoena constitutes a "fishing expedition."

However, the Board is entitled to obtain all relevant information requested, as long as compliance with the subpoena does not impose an "undue burden" on the recipient. With respect to assertions of "undue burden," the courts have made clear that "[s]ome burden on subpoenaed parties is to be expected and is necessary in the furtherance of the agency's legitimate inquiry and the public interest . . . . The question is whether the demand is *unduly* burdensome or *unreasonably* broad." *FTC v. Texaco,* 555 F.2d 862, 882 (D.C. Cir. 1977), cert. denied sub nom. *Standard Oil of California v. FTC,* 431 U.S. 974 (1977) (emphasis in original). The burden of demonstrating unreasonableness or undue burden clearly rests with the party asked to produce the information and "[t]hat burden is not easily met where . . . the agency inquiry is pursuant to a lawful purpose and the requested documents are relevant to that purpose." Id. at 882 and cases cited there. In order to show that a subpoena is unduly burdensome, the

subpoenaed party must show that the subpoena seriously disrupts regular business operations. See *EEOC v. Maryland Cup Corp.,* 785 F.2d 471, 477 (4th Cir.), cert. denied 479 U.S. 815 (1986); *NLRB v. Carolina Food Processors,* 81 F.3d at 513.

11798 Subpoena Enforcement Procedures

11798.1 Order to Show Cause Procedure

Under Section 11(2) of the NLRA, subpoena enforcement proceedings are commenced by the filing of an application by the Board. The courts repeatedly have held that subpoena enforcement proceedings need not be commenced by service of a summons and complaint normally required to commence a civil suit pursuant to Rule 4 of the Federal Rules of Civil Procedure. *Goodyear Tire & Rubber Co. v. NLRB,* 122 F.2d 450, 451 (6th Cir. 1941); *Cudahy Packing Co. v. NLRB,* 117 F.2d 692, 694 (10th Cir. 1941); *NLRB v. D. L. Baker,* enfd. mem. 166 F.3d 333 (4th Cir. 1998) (unpublished disposition).

The local rules for the U.S. district court in which the application for enforcement will be filed should be reviewed so that the application conforms to the procedural requirements of that court.

The Manual contains patterns to be used in subpoena enforcement proceedings. Sec. 11800.1. The order to show cause set forth in Sec. 11806.1 as Pattern 53, when signed by the court, will provide explicit authorization for service to be accomplished pursuant to Rule 5 of the Federal Rules or by certified mail. Absent such a signed order to show cause, personal service of the application and supporting papers should be obtained in order to avoid unnecessary disputes concerning the validity of service.

11798.2 Motion Procedure

Alternatively, an application for enforcement can be treated by the Regional Office as a motion, without obtaining an order to show cause. In such circumstances, the Regional Office should obtain personal service of the application and supporting papers in order to avoid unnecessary disputes concerning the validity of service.

While this approach may be used in any such subpoena enforcement action, it can be particularly useful in situations where (a) the local district court rules permit a moving party to set the hearing date at the time a motion is filed and (b) the Regional Office is seeking summary enforcement of a subpoena, based upon the failure of the subpoenaed party to file with the Board a timely petition to revoke the subpoena. But see Sec. 11800.2(c) below, noting cases where subpoenaed parties have been permitted to raise for the first time in court constitutional and privilege defenses.

Advice and assistance on the use of this motion procedure may be obtained from the Special Litigation and Contempt Litigation and Compliance Branches. The Contempt Litigation and Compliance Branch has had experience in treating the application as a motion and can supply sample pleadings.

11800 Subpoena Enforcement Documents

Pattern documents suitable for general use in subpoena enforcement matters are set forth below.

11800.1 Patterns Provided

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- Pattern 51 Application for order enforcing subpoena ad testificandum (Sec. 11802.1)
- Pattern 52 Application for order enforcing subpoena duces tecum (Sec. 11804.1)
- Pattern 53 Order to show cause (Sec. 11806.1)
- Pattern 54 Notice of institution of proceeding to enforce subpoena ad testificandum (Sec. 11808.1)
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11800.2 Procedural Issues

(a) *Service by Certified Mail:* For language setting out service of subpoena by certified mail, see paragraph d of Pattern 52.

(b) *Personal Service:* For language setting out personal service, see paragraph c of Pattern 51.

(c) *Failure to Petition to Revoke:* Paragraph e of Pattern 52 sets out the statutory procedure for administrative revocation of the subpoena and alleges that respondent failed to utilize this procedure. This allegation will support a contention that the respondent is estopped from questioning the validity of the subpoena or the relevancy of the evidence requested. Such a contention was sustained in *NLRB v. Frederick Cowan,* 522 F.2d 26, 28 (2d Cir. 1975); *Maurice v. NLRB,* 691 F.2d 182, 183 (4th Cir. 1982); *American Motors v. FTC,* 601 F.2d 1329, 1332–1337 (6th Cir. 1979). But see *EEOC v. Cuzzins of Georgia, Inc.,* 608 F.2d 1062, 1063 (5th Cir. 1979) (constitutional defense not waived); *NLRB v. Midland Daily News,* 151 F.3d 472, 474 (6th Cir. 1998) (same); *NLRB v. Detroit News,* 185 F.3d 602 (6th Cir. 1999) (privilege defenses not waived); *EEOC v. Lutheran Social Services,* 186 F.3d 959 (D.C. Cir. 1999) (strong presumption of need to exhaust administrative remedies is not jurisdictional and exhaustion requirements may be waived by court in particular circumstances).

(d) *Petition to Revoke Denied:* If respondent petitioned to revoke the subpoena and the petition was denied, use paragraph d of Pattern 51. Paragraph e of Pattern 52 alleges that respondent did not appear in answer to the subpoena.

(e) *Refusal to Testify or Produce Records:* If respondent did appear at the hearing but refused to testify or produce the required records, see paragraph e of Pattern 51.

11802 Pattern 51, Application for Order Enforcing Subpoena ad Testificandum

This form is designed to be used where the subpoena issued at the request of a private party and was directed to an individual; for situations where the subpoena was issued at the request of the General Counsel or where respondent is a corporation, see Pattern 52 (Sec. 11804.1). (Whenever an ex rel. proceeding is brought, Pattern 54, which is the notice to the relator or his attorney, should be used.)

11802.1 Pattern 51

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
ON BEHALF OF LOCAL 1, UNITED
SQUIBB WORKERS OF AMERICA, U.S.W., IND.
Applicant

v. **Civil No. 13579**

JOHN DOE
Respondent

APPLICATION FOR ORDER ENFORCING
SUBPOENA AD TESTIFICANDUM

The National Labor Relations Board, an administrative agency of the Federal Government, on behalf of Local 1, United Squibb Workers of America, USW, Ind. (herein Local 1) applies to this Court for an order enforcing a subpoena ad testificandum issued by the Board and served on Respondent John Doe by Local 1. This application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application, the Board urges as follows:

a. This Court has jurisdiction of the subject matter of the proceeding and of the person of Respondent by virtue of Section 11(2) of the Act

(29 U.S.C. 161(2)). That is, the unfair labor practice hearing to which Respondent was subpoenaed to appear occurred within this judicial district [add or substitute any other criterion applicable under 11(2), such as that Respondent resides or does business within this judicial district**].**

b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board, pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge Local 1 filed in Case 42–CC–233 that alleged that Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing and answer are attached as exhibits A, B and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of 29 C.F.R. Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have been published in the Federal Register (24 F.R. 9095), pursuant to the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

c. In order to procure testimony in the hearing before the administrative law judge, Local 1 requested and received a subpoena ad testificandum from the Board. On December 26, 20__, Local 1 issued the subpoena ad testificandum directing Respondent to appear at the hearing before the administrative law judge on January 7, 20_, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations. The subpoena was served on Respondent by personal service on him, as provided for in Section 11(4) of the Act and Section 102.113 of the

Board's Rules and Regulations. Copies of the subpoena and the affidavit of service are attached as exhibits D and E, respectively.

d. On January 2, 20__, Respondent filed a petition to revoke subpoena, as provided by Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations. Respondent's petition to revoke was denied by Administrative Law Judge Ringer S. Williams in an order dated January 7, 20_. Copies of the petition to revoke the subpoena and the order denying the petition to revoke are attached as exhibits F and G, respectively.

e. Respondent appeared at the hearing before ALJ Williams on January 28, 20_ and was sworn as a witness. Counsel for Local 1 propounded questions to Respondent but he refused to answer the questions on the ground of irrelevancy. ALJ Williams ruled that the evidence sought was relevant to the issues in the unfair labor practice hearing before him and directed Respondent to answer. Respondent refused to comply with the ruling of ALJ Williams, withdrew from the witness stand and left the hearing room. Thereafter, ALJ Williams determined that the testimony of Respondent was necessary and pertinent to a resolution of the issues pending before him and adjourned the hearing to permit the Board to institute these proceedings to compel Respondent to testify. A copy of the pertinent portion of the transcript from the hearing is attached as exhibit H.

f. Respondent's refusal to testify as required by the subpoena ad testificandum and as directed by the ALJ, who concluded that Respondent's testimony is relevant to the issues in the unfair labor practice proceeding, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board and is preventing the Board from carrying out its duties and functions under the Act.

In view of Respondent's contumacious conduct, the Board requests:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order and to show

cause why an order should not issue directing him to appear before ALJ Williams in Board Case 42–CC–233 at such time and place as ALJ Williams may designate and to give testimony and answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before Administrative Law Judge Ringer S. Williams, at a time and place to be fixed by ALJ Williams, and to give testimony and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and

3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated: February 7, 20__.

National Labor Relations Board

By: [GC's name], General Counsel
[RA's name], Regional Attorney

[signature of attorney]
Attorney for Applicant
Region 42
4 Mammoth Drive
Zenith City, NE

11804 Pattern 52, Application for Order Enforcing Subpoena Duces Tecum

This form is designed to be used where the subpoena issued at the request of the General Counsel or his agent and was directed to a corporate respondent; for situations where the subpoena was issued at the request of a private party or where respondent is an individual, see Pattern 51 (Sec. 11802.1).

11804.1 Pattern 52

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
Applicant

v. **Civil No. 13579**

GOODWILL R. R. CO.
Respondent

APPLICATION FOR ORDER ENFORCING SUBPOENA DUCES TECUM

The National Labor Relations Board, an administrative agency of the Federal Government, applies to this Court for an order compelling compliance with a subpoena duces tecum that the Board issued and served on Respondent Goodwill R.R. Co. This application is made under Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 151 et seq.), (herein the Act). In support of this application the Board states as follows:

a. This Court has jurisdiction of the subject matter of the proceeding and of Respondent by virtue of Section 11(2) of the Act (29 U.S.C. 161(2)). The subpoena was issued within this judicial district and Respondent is a domestic corporation chartered under the laws of the United States and licensed to do business in the State of Nebraska, with an office at 25 Omnibus Avenue, Zenith City, Nebraska. Respondent is engaged in business in this district.

b. This application arises as a result of events in an unfair labor practice proceeding currently pending before the Board pursuant to Section 10(b) of the Act. The Board process leading to that proceeding began with a charge filed by Local 1, United Squibb Workers of America, U.S.W Ind. in Case 42–CC–233, which alleged that Fireworks Machinery Corp. violated the Act. After that charge was investigated by the Regional Office of the Board, the Regional Director of Region 42 of the Board issued a complaint and notice of hearing alleging that Fireworks Machinery violated the Act and setting the matter for a hearing before an administrative law judge of the Board. Fireworks Machinery filed an answer to the complaint denying that it violated the Act. Copies of the charge, complaint and notice of hearing and answer are attached as exhibits A, B and C, respectively. Each of these documents was prepared, filed and served consistent with the requirements of Section 10(b) of the Act and of 29 C.F.R. Sections 102.9, 102.10, 102.15 and 102.20 of the Board's Rules and Regulations. These Rules and Regulations have been issued pursuant to Section 6 of the Act (29 U.S.C. 156) and have been published in the Federal Register (24 F.R. 9095), pursuant to

the Administrative Procedure Act (5 U.S.C. 552). See 29 C.F.R. 102. This court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. 1507.

c. In order to procure evidence for the hearing before the administrative law judge, a representative of the General Counsel made a written request for and received a subpoena duces tecum from the Board. On December 26, 20__, a representative of the General Counsel issued the subpoena duces tecum directing Respondent to appear at the hearing before the administrative law judge on January 7, 20_, at 1:00 p.m. in the hearing room of the Board located at 4 Mammoth Drive, Zenith City, Nebraska to give testimony and to produce certain records and papers more fully described as follows:

> **Records and papers in the possession of the Goodwill R. R. Co., including bills of lading, consignments, receipts or other documents showing shipment of goods via Goodwill R. R. Co., to and from Fireworks Machinery Corp., Zenith City, Nebraska for the calendar year 20__.**

A copy of the subpoena is attached as exhibit D. The issuance of this subpoena is consistent with the requirements of Section 11(1) of the Act and Section 102.31(a) of the Board's Rules and Regulations.

d. The subpoena described above in paragraph c was served on Respondent by addressing and sending it by certified mail to John Doe, superintendent of the Zenith City Division of Respondent, at the offices located at 25 Omnibus Avenue, Zenith City, Nebraska 44422. Respondent acknowledged receipt of the subpoena on December 28, 20__. Service and receipt complied with Section 11(4) of the Act and Section 102.113 of the Board's Rules and Regulations. 29 C.F.R. 102.113 A copy of the return post office receipt is attached as exhibit E.

e. Section 11(1) of the Act and Section 102.31(b) of the Board's Rules and Regulations provide for a period of 5 days after service of a

subpoena within which any person served may petition the Board to revoke the subpoena. Respondent has not at any time filed a petition to revoke the subpoena. Nevertheless, Respondent failed to appear at the hearing on January 7, 20_ or to produce the documents as required by the terms of the subpoena. At no time on or since January 7, 20__ has Respondent produced the subpoenaed documents.

f. Respondent's refusal to appear and to produce the subpoenaed documents, which are relevant to the issues in the proceeding before the Board, constitutes contumacious conduct within the meaning of Section 11(2) of the Act. Furthermore, Respondent's conduct has impeded and continues to impede the unfair labor practice proceeding before the Board and is preventing the Board from carrying out its duties and functions under the Act.

In view of Respondent's contumacious conduct, the Board requests:

1. That an order to show cause issue directing Respondent to appear before this Court on a date specified in the order and to show cause why an order should not issue directing him to appear before Administrative Law Judge Ringer S. Williams in Board Case 42–CC–233 at such time and place as ALJ Williams may designate and to produce the subpoenaed records described above, to give testimony and to answer any and all questions relevant to the matters in question at the Board's unfair labor practice hearing;

2. After considering arguments in response to the order to show cause, that this Court issue an order requiring Respondent to appear before ALJ Williams, at a time and place to be fixed by ALJ Williams, and to produce the records, give testimony and answer any and all questions relevant to the matters in question in the unfair labor practice proceedings before the Board; and

3. That the applicant, National Labor Relations Board, have such other and further relief as may be necessary and appropriate.

Dated: February 7, 20__.

National Labor Relations Board

By: [GC's name], General Counsel
[RA's name], Regional Attorney

_____[signature of attorney]_____
Attorney for Applicant
Region 42
4 Mammoth Drive
Zenith City, NE

11806 Pattern 53, Order to Show Cause

This Pattern, which applies to an application for enforcement of a subpoena duces tecum involving a corporate respondent, may be used with appropriate modification in proceedings involving other types of respondents or to enforce a subpoena ad testificandum.

Note that service on respondent of the Order to Show Cause may be made by serving any officer or agent, either by certified mail or in any manner provided for in Rule 5 of the Federal Rules of Civil Procedure.

11806.1 Pattern 53

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD
Applicant

v. **Civil No. 13579**

GOODWILL R. R. CO.

Respondent

ORDER TO SHOW CAUSE

The National Labor Relations Board filed an application with this Court for an order enforcing a subpoena duces tecum properly served on Respondent Goodwill R. R. Co. and good cause appearing therefor, it is hereby

ORDERED that:

1. Respondent Goodwill R. R. Co. appear in Room 200, United States Courthouse, Federal Square, City of Zenith, State of Nebraska on the _ day of April 20__ at 9 o'clock a.m. and show cause, if any exists, why an order of this Court should not issue directing Respondent to appear before the designated administrative law judge of the Board, at such time and place as the administrative law judge may determine, and produce the books, papers, records and other data described in the subpoena duces tecum served on Respondent, and give testimony in connection with the proceeding in 42–CC–233 now pending before the Board pursuant to Section 10 of the National Labor Relations Act, as amended (29 U.S.C. 160).

2. On or before the _ day of March 20_, service be made on Respondent of a copy of this Order to Show Cause and of the Board's application. Service on Respondent may be made on any officer or agent of Respondent.

3. Respondent shall file and serve its answer to the application not later than April __ 20_.

4. Service of a copy of this order, the application and the Respondent's answer, made in any manner provided for by Rule 5 of the Federal Rules of Civil Procedure of the United States or by certified mail, shall be deemed good and sufficient service.

/s/ D. W. Brown
United States District Court Judge

Dated, Zenith City, Nebraska,
March ___, 20____.

11808 Pattern 54, Notice of Institution of Proceeding to Enforce Subpoena ad Testificandum

Section 11(2) of the Act provides that a proceeding to enforce a subpoena issued by the Board must be instituted "upon application of the Board." Sec. 102.31(d), Rules and Regulations provides that when the subpoena was issued at the request of a private party, enforcement proceedings shall be instituted by the General Counsel in the name of the Board "but on relation of such private party." The same section further provides that "neither the General Counsel nor the Board shall be deemed thereby to have assumed responsibility for the effective prosecution" of the enforcement proceedings. Pattern 54 is designed to put relators on notice that they are primarily responsible for prosecuting the case before the court and will also serve to establish their standing in the court to participate in the proceedings. This form should be issued to relators or their attorneys in every ex rel. proceeding and copies should be served on respondent and filed with the court.

11808.1 Pattern 54

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEBRASKA

NATIONAL LABOR RELATIONS BOARD, ON
RELATION OF LOCAL 1, UNITED SQUIBB
WORKERS OF AMERICA, U.S.W., IND.

Applicant

v. **Civil No. 13579**

JOHN DOE

Respondent

To: Joan Smith, Esquire

Address

City

Attorney for Relator

Local 1, UNITED SQUIBB WORKERS

OF AMERICA, U.S.W., IND.

NOTICE OF INSTITUTION OF PROCEEDING TO ENFORCE SUBPOENA AD TESTIFICANDUM

Please take notice that the General Counsel of the National Labor Relations Board, in the name of the Board, but on behalf of Local 1, United Squibb Workers of America, U.S.W., Ind., has petitioned the Court for an order enforcing a subpoena ad testificandum issued by the Board at the request of Local 1, United Squibb Workers of America, U.S.W., Ind. Attached are copies of the order to show cause and the application for order enforcing subpoena ad testificandum, filed with the court on _____, 20 _.

This proceeding has been instituted at your request pursuant to the provisions of Section 11(2) of the National Labor Relations Act, as amended (29 U.S.C. 161(2)), and of Section 102.31(d) of the Rules and Regulations, Series 8, as amended, of the National Labor Relations Board (29 C.F.R. 102.31(d)). We specifically call your attention to that portion of Section 102.31(d) of the Rules and Regulations that provides that by bringing this proceeding "neither the General Counsel nor the

Board shall be deemed thereby to have assumed responsibility for the effective prosecution of the same before the Court."

Dated: March 20, 20__.

National Labor Relations Board

By: [GC's name], General Counsel
[RA's name], Regional Attorney

[signature of attorney]
Attorney for Applicant
Region 42
4 Mammoth Drive
Zenith City, NE

11820–11828 DISCLOSURE OF AGENCY DOCUMENTS AND SUBPOENAS OF, AND TESTIMONY BY, AGENCY PERSONNEL

11820 Policy on Disclosure of Documents and Board Agent Testimony

Generally, it is the policy of the General Counsel to preserve the confidentiality of statements and materials contained in Agency investigatory files and to prohibit Board agents from testifying or providing information or investigative documents concerning the processing of cases. See Sec. 11824 for certain exceptions to this policy. As set forth below, this policy has been upheld in numerous cases.

It has consistently been held that the Act does not compel the Board to provide for discovery in its proceedings and that the unavailability of discovery is not a prejudicial denial of due process. See, e.g., *NLRB v. Robbins Tire & Rubber Co.,* 437 U.S. 214 (1978); *Wellman Industries v. NLRB,* 490 F.2d 427 (4th Cir. 1974); *NLRB v. Automotive Textile Products Co.,* 422 F.2d 1255, 1256 (6th Cir. 1970); *North American Rockwell Corp. v. NLRB,* 389 F.2d 866, 871–873 (10th Cir. 1968); *NLRB v. Movie Star, Inc.,* 361 F.2d 346 (5th Cir. 1966); *Raser Tanning Co. v. NLRB,* 276 F.2d 80 (6th Cir. 1960). In addition, the General Counsel has no obligation to disclose any exculpatory evidence contained in investigatory files. *Erie County Plastic Corp.,* 207 NLRB 564, 570 (1973), enf. mem. 505 F.2d 730 (3d Cir. 1974); *North American Rockwell,* supra.

Notwithstanding the above, pursuant to Sec. 102.118(b)(1), Rules and Regulations, upon request, certain statements and material must be made available by the General Counsel after a witness has testified at a hearing. Sec. 10394.7.

The Agency policy of restricting Board agent testimony is required since the highly sensitive and delicate role of a Board agent in processing cases would be seriously impaired if a real likelihood existed that the agent would become a witness in litigation or if confidential investigative information would become public. *Sunol Valley Golf & Recreation Co.,* 305 NLRB 493 (1991) and *G. W. Galloway Co.,* 281 NLRB 262 fn. 1 (1986). In this regard, the limited evidentiary privilege for informal deliberations of all prosecutorial agencies and branches of Government has also been recognized in the courts as applying to internal Agency documents and agent testimony. *Stephens Produce Co. v. NLRB,* 515 F.2d 1373 (8th Cir. 1975); *J. H. Rutter Rex Mfg. Co. v. NLRB,* 473 F.2d 223, 230 (5th Cir. 1973).

In addition, internal deliberative memoranda are protected from disclosure based upon the historic privilege against disclosure of intra-agency memoranda and communications. *NLRB v. Sears, Roebuck & Co.,* 421 U.S. 132, 149–152 (1975); *Davis v. Braswell Motor Freight Lines,* 363 F.2d 600, 603 (5th Cir. 1966). Further, such materials are privileged from disclosure as attorney work product. *Hickman v. Taylor,* 329 U.S. 495 (1947).

11822 FOIA Disclosure of Documents

Sec. 102.117, Rules and Regulations describes, generally, which Agency documents, records, and materials are open to public inspection and sets forth Agency procedures for the disclosure of information under the Freedom of Information Act (FOIA).

Additional direction with respect to FOIA and documents contained in case files is provided in the NLRB FOIA Manual that issued in March 2008. This Manual supercedes all prior GC and OM memoranda dealing with FOIA. It is available on the Agency's web site at www.nlrb.gov/FOIA/E-Reading_Room.aspx.

11824 Subpoena of Agency Documents and Personnel

Sec. 102.118, Rules and Regulations sets forth Agency procedures with respect to requests for the production of documents, other than those required under FOIA, and the testimony of Agency personnel. Sec. 102.118 provides that Board agents shall not produce any Agency documents or testify with respect to information coming to their attention in their official capacity in any court or Board hearing, whether in response to a subpoena or otherwise, without the written consent of the Board, its Chairman or the General Counsel, whoever has supervision of the Board agents or control of the documents.

11824.1 Delegation of General Counsel Authority

As set forth below and in detail in GC Memos 98-9, 98-7, and 94-14, the General Counsel has delegated the authority to permit Board agent testimony and disclosure of documents under Sec. 102.118, Rules and Regulations. In considering such requests, the appropriate General Counsel memoranda should be carefully reviewed to insure consistency with General Counsel policies and that appropriate written records are maintained. A summary of the delegation of Sec. 102.118 authority is set forth below.

(a) *Regional Director Authority:* Regional Directors may consider and decide whether or not to approve requests for authorization under Sec. 102.118 in the following circumstances, in the name of the General Counsel:

- When compliance officers testify at compliance proceedings
- When a party to a representation case alleges that Board agent conduct has interfered with the conduct of an election and Board agent testimony regarding the issues is necessary to develop a complete record
- When Board agent testimony is necessary to authenticate the signature of a deceased or unavailable witness for whom the agent prepared an affidavit or to establish that the General Counsel made a good faith effort to locate the unavailable witness
- When Board agent testimony is necessary to establish that a respondent has failed to perform an affirmative act pursuant to a court enforced Board Order or
- When a request for access to Regional Office files unaccompanied by a subpoena is made by an official of a Federal, State, or local Government agency in connection with law enforcement activities

(b) *Specific Regional Director Authority to Deny:* In circumstances other than those set forth above, Sec. 102.118 requests from outside parties or counsel for nonpublic file documents or Board agent testimony, unaccompanied by a subpoena, normally should be denied by the Regional Director in the name of the General Counsel.

(c) *Associate General Counsel for Enforcement Litigation Authority:* The Associate General Counsel for the Division of Enforcement Litigation has Sec. 102.118 authority with respect to ongoing litigation in the courts and relative to bankruptcy proceedings.

(d) *Associate General Counsel for Operations-Management:* The Associate General Counsel for the Division of Operations-Management has Sec. 102.118 authority to decide any remaining requests that do not specifically fall within the above areas of previously delegated authority.

11824.2 Steps to be Taken on Receiving Subpoena

When a subpoena is received by a Regional Office, the Region should immediately:

- In the case of a subpoena ad testificandum, ascertain, if possible, the nature of the testimony being sought
- Notify the party on whose behalf the subpoena is being served of the existence of Sec. 102.118 and the Agency official to whom the request for authorization should be directed. The Board agent should not undertake to act as an agent in requesting the General Counsel's permission to testify
- Unless the matter falls within the delegated authority of the Regional Director, the Regional Office should apprise the appropriate Agency official of the facts, so that a request for permission to testify can be properly considered

11824.3 Witness Fees and Allowances

Agency employees who testify in their official capacity in private litigation are required to collect the authorized witness fees and allowances for expenses of travel. Since the employees remain in official duty status, such funds, with covering memo and certification of service, must be forwarded to the Finance Section.

11826 Agency Motion to Quash or Petition to Revoke

Absent authorization to comply with the subpoena, the Regional Office should file a motion to quash or a petition to revoke, whichever is applicable.

11826.1 Motion to Quash/Petition to Revoke—Non-Board Proceedings

With respect to non-Board proceedings, the Regional Office should consult the Assistant General Counsel for Special Litigation and review the rules of the local jurisdiction to prepare appropriate responsive pleadings.

11826.2 Petition to Revoke—Board Proceedings

With respect to Board hearings, a petition to revoke should be filed for either a duces tecum or ad testificandum subpoena. A supporting memorandum, consistent with Sec. 11820, should be filed. See Secs. 11782–11782.5 for details on petitions to revoke.

11826.3 Petition to Revoke Denied—Board Proceedings

If a petition to revoke in a Board proceeding is denied, a request for special permission to appeal to the Board should be made, if appropriate, after consultation with the authorizing Agency official. Sec. 11824.

If at the time of the trial or hearing, a petition to revoke has not been granted, the subpoenaed Board agent should appear, unless otherwise directed by the Board, the Chairman of the Board, or the General Counsel. The Board agent should take the oath and answer questions calling for name and occupation. In answer to further questions,

the agent should respectfully decline to answer or to produce records for the reasons that were previously asserted in the petition to revoke.

Should prior consent have been procured, the Board agent should testify or produce records to the extent covered by the consent. With respect to other matters, except those clearly not arising in an official capacity, the agent should decline on the grounds on which permission was denied.

11826.4 Instructions to Testify or Produce Records Without Permission in Non-Board Proceedings

Should a motion to quash or petition to revoke be denied and not reversed on appeal, should there have been insufficient time in which to file the motion or petition or should a motion to quash or its equivalent not be applicable in the jurisdiction involved, the subpoenaed Board agent should, unless otherwise directed by the Board, the Chairman of the Board, or the General Counsel, make an appearance at the trial or hearing. The Board agent should take the oath and answer questions calling for name and occupation. In answer to further questions, the agent should respectfully decline to answer or to produce records for the reasons that were previously asserted in the motion to quash or petition to revoke or that would have been asserted therein had one been filed.

Should prior consent have been procured, the Board agent should testify or produce records to the extent covered by the consent. With respect to other matters, except those clearly not arising in an official capacity, the agent should decline on the grounds on which permission was denied.

Should the Board agent be ordered to give information or produce records in violation of Sec. 102.118, the attorney representing the Board agent should request that action be delayed for a short time in order to consult with Special Litigation Branch.

11828 Production of Documents in Formal Proceedings

The following Manual sections should be consulted with respect to motions made at hearing for the production of pretrial statements and other documents:

- Sec. 10394.7—Production of witness statements
- Secs. 10398 and 11820—Confidentiality of intragency documents
- Sec. 10400—Request to produce affidavits, statements or documents by opposing counsel
- Sec. 10622.6, Compliance Manual—Disclosure of factual information relevant to backpay computation

11840–11846 SERVICE, FILING, AND COMMUNICATIONS WITH PARTIES

11840 Service and Filing of Documents

Secs. 102.111–.114, Rules and Regulations provide comprehensive guidance for the requirements of service and acceptable methods of filing and service of documents. These Sections address the following:

- Sec. 102.111—Time computation
- Sec. 102.112—Date of service; date of filing
- Sec. 102.113—Methods of service of process and papers by the Agency; proof of service
- Sec. 102.114—Filing and service of papers by parties; form of papers; manner and proof of filing or service

The requirements for service of a particular pleading or other document are contained in the Rules and Regulations concerning that pleading or document.

Most documents may also be filed electronically at the Agency's website. To file documents electronically, proceed to the website at www.nlrb.gov and select the E-Gov tab and click on E-Filing. Then select the appropriate office site, i.e., "Board/Office of the Executive Secretary," "Division of Judges," "General Counsel's Office of Appeals," or "Regional, Subregional & Resident Offices." Each office site sets forth the documents which can and cannot be filed electronically on that site with instructions how to navigate to the appropriate site and place for document filing. Additionally, each site provides instructions on filing, receipt and service requirements.

11840.1 Computation of Period of Time

Sec. 102.111(a), Rules and Regulations provides that in computing time for filing or service of documents, the time period begins to run the day after the day of the triggering act, event, or default. The last day of the period so computed is included, except when it falls on a weekend or a legal holiday. In such circumstance, the period continues until the official closing time of the receiving office on the next business day. When the period of time is less than 7 days, intermediate weekends and holidays are excluded from the computation.

11840.2 Date of Service and Proof

The date of service shall be the day of personal delivery or receipt of facsimile transmission, where allowed, or day of depositing either in the mail or with a private delivery service, whichever is applicable. Sec. 102.112, Rules and Regulations.

Although proof of service is desirable in all cases, failure to furnish such proof does not affect the validity of the service. Sec. 102.114(e), Rules and Regulations. With regard to electronic filings, rules of service are set forth at the appropriate office site on the Agency's website.

11840.3 Receipt of Documents and Postmark Rule

Sec. 102.111(b), Rules and Regulations sets forth requirements for the timely receipt of documents, including representation petitions and objections to elections, filed with the Agency. The Board will accept as timely documents delivered to the receiving office on or before the official closing time of the last day for filing. Also considered timely are those documents sent to the receiving office that are postmarked at least 1 day prior to the due date. Documents received late that are postmarked on or after the due date are untimely.

Sec. 102.111(c), Rules and Regulations permits a party to file a motion that briefs, answers, motions, and exceptions in ULP proceedings be filed after the filing date in the following limited circumstances:

- Upon good cause shown based on excusable neglect and
- When no undue prejudice would result
-

The party filing such a motion must strictly adhere to the procedures set forth in Sec. 102.111(c), including submitting sworn affidavits by individuals with personal knowledge of the facts setting forth the extenuating circumstances.

The Board will not permit such a late filing because of miscalculation of a filing date, inattentiveness or carelessness, absent a showing of extenuating circumstances. *Elevator Constructors Local No. 2 (Unitec Elevator Services Co.),* 337 NLRB 426 (2002).

The appropriate office site on the Agency's website sets forth the rules regarding timely receipt of electronic filings. Electronically filed documents must be received at the appropriate office site by the official closing time of the receiving office on the due date. A failure to timely file a document electronically will not be excused on the basis of the claim that transmission could not be accomplished because the receiving machine was off-line or unavailable, the sending machine malfunctioned, or for any other electronic-related reason. See Sec. 11846.4.

11840.4 Receipt of Documents—Exceptions to Postmark Rule

Sec. 102.111(b), Rules and Regulations lists four exceptions to the above rule regarding postmarked documents. Accordingly, to be timely the following documents must be delivered to the receiving office on or before the official closing time of the last day for filing:

- Charges filed pursuant to Section 10(b) of the Act. See also Sec. 10052.2
- Applications for awards, fees, and other expenses under the Equal Access to Justice Act (EAJA)
- Petitions to revoke subpoenas
- Requests for extensions of time to file any document for which such an extension may be granted

In addition to the requirement that requests for extension of time must be received no later than the due date, Sec. 102.111(b), Rules and Regulations requires that those requests filed within 3 days of the due date "must be grounded on circumstances not reasonably foreseeable in advance."

11842 Service by the Regional Offices

11842.1 Service of Charge by the Regional Office

The responsibility for proper and timely service of a charge rests with the charging party. Sec. 102.14, Rules and Regulations and Sec. 10012.8. However, the Regional Director will, as a matter of courtesy, cause charges and amended charges to be served by regular mail on the person against whom the charge is made. Sec. 10040.5. When serving a copy of the charge on the charged party by regular mail, the Regional Office should record service by an affidavit of service. This affidavit should be modeled on Form NLRB-877. The affidavit should list the names and addresses to which the charge was mailed, the date of mailing, and the name of the individual performing the mailing. Form NLRB-877 must be modified to state that the service was by regular mail. This affidavit of service should be placed in the investigative file so that the Board agent assigned to the investigation can ensure that the form has been completed. The affidavit of service could be used, if necessary and upon proper authentication, to prove service of the charge.

11842.2 Service of Other Formal Documents

Complaints, compliance specifications, amendments to either, notices of hearing in C cases, final Board Orders, Administrative Law Judge decisions, and subpoenas must be served personally, by registered or certified mail, by telegraph, or by leaving a copy at the principal office or place of business of the person on whom service is sought. Sec. 102.113(a)–(c), Rules and Regulations.

To establish necessary proof of service, return receipts must be requested when complaints, compliance specifications, and amendments thereto are served on respondents by certified mail. Subpoenas served by certified mail should also require a return receipt. Although return receipts are a practical necessity in the above circumstances, the rules do not require that return receipts be obtained. Accordingly, to save expense, return receipts should not be requested for certified mail delivery of complaints, compliance specifications, and amendments thereto to charging parties, parties to the

contract, and parties of interest. Attorneys or representatives should be served by regular mail. Other documents may be served by any of the foregoing methods, as well as by regular mail or private delivery service, or, with the permission of the person receiving service, by facsimile transmission. Sec. 102.113(d), Rules and Regulations.

Note: If a party is represented by an attorney or other representative, the instructions regarding service set forth in Sec. 11842.3 must also be followed.

11842.3 Service on Attorney or Other Representative

If a party's or person's representative is an attorney, all documents and correspondence including e-mail must be addressed to and served exclusively on the attorney unless:

- Direct contact with a party or person is authorized by the attorney,[5]
- Service of documents and correspondence on the party has been authorized by the attorney, for example by checking the appropriate box on a Notice of Appearance, Form NLRB-4701 (See Sec. 10058.1(b)), or
- One of the exceptions set forth below in subparagraphs (a), (b), or (c) applies

If a party's or person's representative is not an attorney, all documents and correspondence including e-mail should be addressed and served on the representative and copies may also be sent to the party or person unless one of the situations set forth below in subparagraphs (a), (b), or (d) applies.

For oral and e-mail communications with parties, see Sec. 11844.

(a) *Service on Party or Person with Copy to Attorney or Representative:* The following documents and/or correspondence should be addressed to and served on the appropriate party(ies) or person(s) with a copy(ies) to their attorney(s) or representative(s) and, if appropriate, with copies to other parties and their attorneys or representatives:

- Charges, amended charges, and standard service letters (see Sec. 10040)
- Petitions, amended petitions, and standard service letters (see Sec. 11009)
- Correspondence confirming agreed upon election arrangements, election notices, and letters requesting and supplying *Excelsior* lists accompanied by a copy of the approved consent or stipulated election agreement
- Objections and standard service letters (see Sec. 11392.9)

[5] For example, after the requirements of compliance have been agreed upon and the charged party/respondent through its attorney has advised the Regional Office of its intention to comply, documents necessary to accomplish compliance may, with the consent of the attorney, be sent directly to the party with copies to the attorney. Such documents may include notices for posting pursuant to a settlement agreement, an ALJ decision, or a Board Order; requests for a certification of posting; and instructions concerning the details of compliance.

- Subpoenas, related forms and instructions, and standard cover letters which do not convey substantive information or invite a response. However, if a party or person is represented by an attorney, written communications conveying substantive information or inviting a response which may accompany subpoenas must be addressed to and served exclusively on the attorney.

(b) *Service on All Parties, Persons, Attorneys or Representatives:* The following documents should be served on all parties and persons and their attorneys or representatives:

- Complaints, compliance specifications, amendments to either, notices of hearing, final Board Orders and Administrative Law Judge decisions in unfair labor practice cases and in connection with 10(k) hearings, and cover letters which do not invite a response. However, if a party or person is represented by an attorney, written communications conveying substantive information or inviting a response which may accompany any of these documents must be addressed to and served exclusively on the attorney.
- Notices of hearing, decisions, orders, reports, supplemental decisions, and certifications in representation cases

(c) *Service on Attorney with Copy to Party:* The following documents and/or correspondence should be addressed to and served on the attorney(s) of the appropriate party(ies) with a copy(ies) to such party(ies) and with copies to other parties and their attorneys or representatives:

- Dismissal and withdrawal letters
- Final *Collyer*, *Dubo*, and administrative deferral letters
- Closing compliance letters

(d) *Service on Party Represented by a Non Attorney:* The following documents and/or correspondence should be addressed to and served on the appropriate party(ies) with a copy(ies) to such party's(ies') representative and with copies to other parties and their attorneys or representatives:

- Dismissal and withdrawal letters
- Final *Collyer, Dubo,* and administrative deferral letters
- Closing compliance letters

11842.4 Service on Multiple Attorneys or Other Representatives

If a party or person is represented by more than one attorney or representative, service on any one of such attorneys or representatives in addition to the party or person,

where appropriate, satisfies the requirements of Sec. 102.113(f). However, as a matter of courtesy, an effort should be made to serve all attorneys or representatives of a party or person.

11844 Oral and Electronic Communications with Parties or Persons

If a party or person is represented by an attorney, all oral and electronic communications should be directed exclusively to the attorney and copies of electronic correspondence should not be sent to the party or person unless direct contact is authorized by the attorney. If a party's or person's representative is not an attorney, all oral and electronic communications should be directed to the representative, however, copies of electronic correspondence may also be sent to the party or person. For service of documents and written communications see Sec. 11842.3. For more specific guidance regarding communications with attorney and non attorney representatives in unfair labor practice cases, see Sec. 10058.

11846 Filing and Service by Parties

Filing by hand delivery, by registered or certified mail, or by private delivery service satisfies the requirements for filing with the Board, the General Counsel, Regional Offices, or Administrative Law Judges. Sec. 102.114, Rules and Regulations. In addition, filing electronically or by facsimile transmission may be used in certain circumstances, as set forth below.

11846.1 Facsimile Filing Permitted

Parties may file unfair labor practice charges, representation petitions, objections to elections, and requests for extension of time by facsimile transmission, if transmitted to the facsimile machine of the appropriate office of the Agency. Receipt of such facsimile transmission by the Agency constitutes filing. Sec. 102.114(f), Rules and Regulations.

11846.2 Facsimile Filing Permitted only with Consent

The filing by facsimile transmission of documents other than those set forth above, except those specifically prohibited as set forth in Sec. 11846.3, will be accepted by the appropriate office of the Agency, only with the advance permission of the receiving office. Sec. 102.114(g), Rules and Regulations.

11846.3 Facsimile Filing Prohibited

Sec. 102.114(g), Rules and Regulations prohibits the filing by facsimile of a showing of interest, requests for review, and appeals from dismissal of petitions in representation cases; appeals from dismissal of unfair labor practice charges; objections to settlements; answers to complaints; exceptions, cross-exceptions and briefs; Equal Access to Justice Act (EAJA) applications and a variety of motions. See Sec. 102.114(g) for a complete list of exclusions from filing by facsimile transmission.

11846.4 Electronic Filing and Service

Sec. 102.114(i), Rules and Regulations provides that certain documents may be filed with the Agency electronically notwithstanding any contrary provisions elsewhere in the Board's Rules and Regulations. The rules governing such filings are set forth at the Agency's website at www.nlrb.gov.

(a) *Electronic Filings with the Agency:* As noted in Sec. 11840, most documents may be filed electronically at the Agency's website. To file documents electronically, proceed to the website at www.nlrb.gov and select the E-Gov tab and click on E-Filing. Then select the appropriate office site, i.e., "Board/Office of the Executive Secretary," "Division of Judges," "General Counsel's Office of Appeals," or "Regional, Subregional, & Resident Offices." Each office site sets forth the documents which can and cannot be filed on that site with instructions how to navigate to the appropriate site and place for document filing. Additionally, each site provides instructions on filing, receipt and service requirements.

(b) *Service on the Regional Director, Hearing Officer or Counsel for the General Counsel:* The General Counsel's policy outlined in OM Memo 07-07 (Revised) dated November 15, 2006, provides that documents may be served on a Regional Director, Hearing Officer, or Counsel for the General Counsel by utilizing the E-Filing form on the Agency's website. However, service on other parties to the case must still be accomplished by means allowed under the Board's Rules and Regulations. See Sec. 102.114(i), Rules and Regulations and Sec. 11846.5.

(c) *Receipt of Electronically Filed Documents:* Electronically filed documents must be received at the appropriate office site by the official closing time of the receiving office on the due date. A failure to timely file a document electronically will not be excused on the basis of the claim that transmission could not be accomplished because the receiving machine was offline or unavailable, the sending machine malfunctioned, or for any other electronic-related reason. See Sec. 11840.3.

(d) *Electronic Filing Prohibited:* The following documents may not be filed electronically with any Agency office:

- Unfair Labor Practice Charges
- Representation Petitions
- Petitions for Advisory Opinions

11846.5 Service by Party on Other Parties

Where service of documents by a party on other parties is required, such service may be made personally or by registered mail, certified mail, regular mail, or by private delivery service. Service of documents by a party on other parties by any other means, including facsimile or electronic transmission, is permitted only with the consent of the party being served. In general, service on all parties shall be in the same manner as that utilized in filing the document with the Board or in a more expeditious manner. See Secs. 102.114(a) and (h), and (i) Rules and Regulations for specific applications.

11850–11860 CASE FILES AND DOCUMENTARY EVIDENCE

11850 Case Files

The paper case file should reflect all action taken in the investigation and be kept up to date. It must be sufficiently complete and current to permit appropriate supervisory review on an ongoing basis and, if necessary, to allow another agent to continue the investigation with a minimum of duplication. Although the Agency has ongoing pilot projects utilizing electronic case files, the paper case file remains the official case file for Agency purposes.

In all unfair labor practice and representation cases, Regional Offices must also maintain electronic file folders for each case consistent with the Agency's revised Standard Storage and Naming Convention Protocol for Electronic Documents and the policies related to E-discovery rules under the Federal Rules of Civil Procedure (FRCP) as set forth below:

(a) *Standard Storage and Naming Convention Protocol for Electronic Documents:* As Regional Offices are brought onto the centralized servers, they should comply with guidance set forth in OM Memos 07-55, 08-04 and 08-33 as to naming and storage conventions for electronic documents. Thus, Regional Offices will set up electronic file folders for each case which will allow Regional managers and supervisors and Headquarters office personnel to access the files.

(b) *FRCP E-Discovery Rules*: Sec 11862, GC Memo 07-09 and OM 07-64 provide guidance for managing electronically stored information to ensure compliance with the FRCP E-Discovery Rules. Since such rules apply to the Board in any civil proceeding in federal district court and it cannot be determined which cases may ultimately be subject to civil litigation, all Regional case files must be maintained in a uniform manner consistent with the appropriate instructions in this area.

11850.1 Organization of Paper Case Files

Paper Case Files should be so organized that specific material may be easily found. No special sectional breakdown is required. The need for organization will often depend on the case and on the extent of the work already done, but a desirable breakdown would consist of sections devoted to the (1) formal (public) documents, (2) memos and correspondence, (3) affidavits and statements, and (4) other documents. Normally, the affidavits and statements should be arranged alphabetically and other documents chronologically.

11850.2 File Should Contain Complete History of Case

There should be no gaps in the case file. Where an item inserted in the file speaks for itself, it is unnecessary to recite the surrounding facts in a memo, but, for example, an unsuccessful interview attempt should be documented in a memo; in this way, the file will show the point has not been overlooked.

From time to time, if the case is long and involved, the Board agent assigned should, by memo, bring the circumstances up to date and signify further steps to be taken.

11860 Documentary Evidence

The term documentary evidence means any paper whether in written, printed, graphic, electronic or other visual form, containing facts germane to the case that might be necessary to introduce at a hearing. Documentary evidence includes correspondence to the Regional Office, other letters, e-mails and attachments, records, charts, pictures, affidavits, and other signed statements.

All documentary evidence should be retained in the original form if possible; otherwise, such evidence should be photocopied. E-mails and electronically supplied documents must be printed and placed in the file. See Sec. 11862, GC Memo 07-09 and OM Memo 07-64 for specific guidance for managing electronically stored information.

Unless the source and circumstances of receipts of a document are self-explanatory, they should be recited in a file memorandum.

No marks should be made on documentary evidence. Notes, questions, remarks, or instructions should be inserted on separate sheets and not on the face of the document. This is particularly applicable to the practice that sometimes exists of writing on the document the name(s) of the person(s) in the Regional Office to whom it is to be routed; separate routing slips should be used for this purpose.

11862 E-Discovery and Guidance for Managing Electronically Stored Information

The Federal Rules of Civil Procedure (FRCP) address discovery requests in civil litigation covering all types of information including information that is electronically stored. These discovery rules apply to Regional Offices as well as to the rest of the Agency in civil proceedings before the federal courts. Examples of such litigation include case handling matters involving injunctions and contempt, and special litigation matters involving personnel and procurement related litigation. GC Memo 07-09 and OM Memo 07-64 address electronic discovery (E-Discovery) requests and set forth comprehensive guidance and best practices which should be followed for managing electronically stored information.

NOTE: The guidance set forth in GC Memo 07-09 and OM Memo 07-64 concerning the storage of electronic documents applies to the handling of all cases from initial filing through the conclusion of each case. Regional Offices must be able to describe and follow their records storage and retention policy and be able to identify, locate, and preserve relevant electronic documents. Accordingly, each Regional Office is responsible for implementing and following a written policy for records storage and retention of electronic documents.

OM Memo 07-64 briefly explains the E-Discovery amendments to the FRCP, the impact of such amendments on Regional Offices, and specifies steps Regions must take to ensure their ability to comply with such amendments. The memorandum also sets forth best practices regarding what electronic documents must be kept and where they should be kept as well as the procedures which must be followed during a "litigation hold."

11863 Litigation Hold

A litigation hold is a directive to suspend normal disposition procedures and preserve documents, including electronically stored information, which may be relevant to pending or reasonably foreseeable litigation. See OM Memo 07-64. Such requires preservation of all relevant documents, both paper and electronic, in the form they existed when the litigation hold issues as well as the preservation of any relevant paper or electronic documents created after issuance of the litigation hold. A litigation hold may be implemented by the Regional Office, Special Counsel, or other General Counsel branches within the Agency. The Regional Office should implement a litigation hold whenever it recommends initiating or decides to initiate proceedings that may result in litigation in a federal district court or circuit court. Situations requiring Regional implementation of a litigation hold include:

- Determination to file a 10(l) petition – see Sec. 10242
- Recommendation to institute 10(j) proceedings – see Sec. 10310.3(b)
- Recommendation to institute 10(e) injunction proceedings in circuit court – see Sec. 10320
- Recommendation to institute contempt proceedings – see Sec. 10632.1 of the Compliance Manual

GC Memo 07-09 provides specific information and guidance involving litigation on behalf of the Board in federal courts with respect to the discovery of electronically stored information. See also OM Memo 07-64.

11870 REPORTING SERVICE

11870 Official Reporting Service

Contracts, based on competitive bids, are awarded annually for reporting the Agency's hearings. Regional Directors and officers-in-charge are notified in advance of the beginning of the fiscal year as to the selected contractor for the coming year and the rates and fees stipulated under the contract. The contractor notifies Agency field offices of its designated local subcontractor or agent for reporting service in each field office.

11870.1 Notification of Hearing Schedule

Notification of all hearing schedules must be sent to both the contractor and the local subcontractor. It is very important that this information be issued promptly and accurately in every case. The current contract should be consulted for time limitations for notification of hearing schedules.

11870.2 Coordination with the Local Reporter

Regional Offices should cooperate with the reporting service to the extent possible to coordinate the number and locations of hearings in order to permit the economic use of the service's resources without sacrificing the Agency's commitment to quality and timely service to the public.

11870.3 Scheduling Hearings

Although there are other considerations relative to the scheduling of hearings, the Regional Office should make an effort to schedule hearings in the Regional, Subregional, or Resident Office city since this usually results in better delivery time of the transcript, savings in staff time and travel expense and, under some contracts, a lower reporting rate.

11870.4 Timely Notification of Cancellations or Postponements

Pursuant to the court reporting contract, the Agency is charged a cancellation fee if the reporting service is not notified of the cancellation or postponement of a hearing sufficiently in advance of the hearing date. These fees can usually be avoided by notification to the reporting service by a designated time on the last business day before the hearing date. Since these fees constitute a significant expense, all staff members, particularly those involved in obtaining election stipulations, must be alert to notify the appropriate Regional Office personnel of any cancellations or postponements.

The reporting service and/or subcontractor should be notified of such action by telephone as soon as possible. The current reporting contract should be consulted for time limitations for notification of cancellations or postponements.

11870.5 Report of Obligated Cost of Hearing, Form NLRB-4237

It is the responsibility of the hearing officer in an R case and the trial attorney in a C case to complete this form immediately upon the close of the hearing or as of the last day of the month, if the hearing continues into the subsequent month. Likewise, if the hearing is postponed or canceled at the hearing site, this form must be completed by the respective hearing officer or trial attorney.

A hearing that is adjourned for 5 or more calendar days is considered a complete hearing for purposes of attendance fees. Therefore, in such situations, this form must be completed and submitted to the Regional Office immediately upon such adjournment. A new Form NLRB-4237 should be completed for the reopened hearing. If the hearing officer or trial attorney is away from the Regional Office on the last day of the month,

he/she should inform the Regional Office of the estimated cost of hearing through that date.

11870.6 Sales of Copies of Transcript

A party seeking a copy of the transcript should order it from the reporting service. Such copy must be provided to the party at the actual cost of duplication. Pub. L. 92-463. Care must be exercised with respect to the use by the parties of Regional Office copies of the transcript. Although the transcript is part of the formal file and as such is accessible to the public, use of the transcript should not be volunteered. When a request is received to read or hand copy the Regional Office copy, it should be made promptly available under such circumstances as will not delay Board personnel in processing the case. Loan of the transcript for use outside the office is not permitted.

11870.7 Reporting Service Compliance with Contract

Inasmuch as the service provided by the court reporter is vital to many of the most important aspects of Agency work, it is imperative that the quality of the reporting service's performance be carefully monitored. Records should be maintained as to late arrival of reporters, poor or inaccurate transcripts and inappropriate or unprofessional behavior by reporters. Any such deficiencies should be relayed promptly to Division of Administration, Facilities and Services Branch.

11870.8 Other Contract Provisions

The current reporting service contract contains information relating to other provisions, such as:

- Fees—attendance fees, cancellation fees (for cancellations and postponements), and additional service fees
- Delivery of transcripts, appropriately formatted diskettes and copies—ordinary copy, expedited copy, prompt copy, and daily copy
- Timely delivery of transcripts
- Liquidated damages for delay in delivery of transcripts
- Receipt and processing of transcripts and exhibits
- Retention of stenographic notes and transcripts

11880–11886 COMMUNICATIONS AND TRAVEL

11880 Communication with Headquarters

If a direct communication is received by a Regional Office from another part of the Agency on a matter that should properly be routed through the Division of

Operations-Management, answers addressed to the individual initiating the communication should be sent through Operations-Management, along with copies of the original communication.

In submitting other than routine material to Operations-Management, such material should be identified.

Each of the Assistant General Counsels in Operations-Management is the focal point of contact between Washington and the Regional Offices assigned to the Assistant General Counsel. Serving as the General Counsel's representative, the Assistant General Counsel exercises general supervision over the Regional Office's casehandling, performance, personnel, and administration. The Assistant General Counsel participates in Washington agendas involving regional cases and assists in handling matters or problems involving the Assistant General Counsel's Regional Offices.

11881 Communication with the Board

All communications that are sent directly to the Board should be addressed to the Office of the Executive Secretary.

11882 Travel Beyond Regional Boundaries

Board agents are authorized to travel within their Region and to geographic areas in adjoining Regions in the performance of official duties.

11884 Communication With Other Agencies

Normally, a Regional Office's contacts with other agencies need not be cleared through the Division of Operations-Management. Thus, the Regional Office may directly contact field offices of other agencies in order to procure information (such as, in connection with an actual case) that is available through such offices. Likewise, Regional Offices, within the limitations of Secs. 102.117 and .118 of the Rules and Regulations and Secs. 11820–11828, should cooperate in furnishing to offices of other Government agencies such information as may be requested by them. With respect to possible violations of other Federal statutes, see Sec. 10070.

However, in limited circumstances, Regional Offices must seek clearance from Operations-Management before referral to other agencies, such as when the potential violation concerns possible criminal conduct related to Board proceedings (e.g., fraudulent authorization cards, perjury, or obstruction of justice in connection with NLRB proceedings). See Sec. 10070. Similarly, the clearance requirement applies prior to referral when alleged unethical conduct of attorneys is involved. See Secs. 10058.6 and 11754.2(a).

For more specific guidance pertaining to Occupational Safety and Health Act matters, refer to GC Memos 75-29, 76-14, and 79-4. With respect to the Mine Safety and Health Act, see GC Memo 80-10. See also Sec. 10070.2.

11886 Congressional Inquiries

11886.1 Reply by Regional Directors

Regional Directors have the authority to respond directly to members of Congress concerning inquiries about a status of a case or questions concerning the handling of a case. Courtesy copies of such letters are forwarded to the Division of Operations-Management so that Headquarters might be fully apprised of all matters in which congressional interest has been expressed.

11886.2 Reply by the Division of Operations-Management

Congressional inquiries concerning the following matters are referred to the Division of Operations-Management for consideration and response:

- Multiregional cases
- Regional or general operations casehandling procedures
- Cases pending in the Division of Advice
- Cases of national importance or widespread interest
- Proposed legislation with respect to changes in our Act
- The establishment of new Regional, Subregional, or Resident Offices
- The relocation of regional boundaries
- A change in the status of an existing office
- Any congressional inquiries of such a nature that a reply should be more appropriately made by the General Counsel