10590 Settlements

10590.1 Overview

The Board and the Office of the General Counsel share a commitment to resolve disputes through negotiated settlements whenever possible. ULP Manual Section 10124.1. Settlements benefit all parties by eliminating the expense and uncertainty of litigation. Settlements conserve Agency resources, effectuate basic goals of the Act and tend to reduce conflict and improve relations. Thus, Regions should pursue settlement of disputed compliance issues in all cases.

Although settlement of disputed compliance issues is desirable, Regions should only make concessions that are warranted by the circumstances of the case. The concept of settlement recognizes that in some cases there are reasonable differences about the amount of the make-whole remedy when comparing the maximum, which may reasonably be claimed for the claimant, and the minimum, which may in good faith be fairly argued by respondent.

10592 Settlement Standards Regarding Backpay

Although settlement of disputed compliance issues is desirable, Regions should only make concessions that are warranted by the circumstances of the case. With regard to backpay, the concept of settlement recognizes that in some cases there are reasonable differences about the amount of the make-whole remedy when comparing the maximum, which may reasonably be claimed for the claimant, and the minimum, which may in good faith be fairly argued by respondent. There may also be legitimate room for compromise with regard to other issues, such as extent of posting and implementation of the status quo ante.

10592.1 Authority of Regional Directors to Accept Settlements

Backpay is the most frequently disputed, as well as the most complex compliance issue. In all cases (informal settlement of unfair labor practices, administrative law judge's decisions, Board orders or court judgments) Regional Directors have the authority to accept settlements of backpay without authorization from Division of Operations-Management if the terms of the settlement meet the following criteria:

- The backpay computation is based on an appropriate method and the backpay settlement will constitute at least 80 percent (Section 10592.4) but not more than 100 percent (Section 10592.8) of full backpay and interest due.
- All parties, and nonparty discriminatees with significant stakes, agree to the settlement.
- There are neither issues regarding recidivism nor pending unfair labor practice charges that will not be resolved by the terms of the settlement.
- All discriminatees entitled to reinstatement have received valid offers of, or have waived, reinstatement.
- All other compliance requirements have been or will be met.

- The Regional Director believes that the settlement effectuates the purposes of the Act.

10592.2 Authorization Required From Division of Operations-Management

If one or more of the criteria above are not met, the Region must obtain authorization from Division of Operations-Management in order to accept a settlement. When necessary, clearance may be obtained by telephone or electronically. A request for clearance should include the full amount of backpay, the amount to be paid under the settlement, the positions of the respective parties and any nonparty discriminatees, and the Region's recommendation and reasoning for accepting the proposal.

10592.3 Settlement Reached by Some or All Parties

Depending on the stage of the case, the Compliance Officer or other Board agent designated as responsible for the case should take an active role in settlement discussions. Occasionally, a charged party/respondent negotiates directly with a charging party or discriminatee, and arrives at a settlement that it presents to the Region for approval. Even so, the Region should arrive at its own conclusions concerning the acceptability of any proffered settlement, and seek agreement to changes that the Region deems appropriate. It should be kept in mind, however, that the Board retains ultimate authority to approve compliance settlements involving Board orders and that it may accept a settlement reached by the parties notwithstanding an objection from the Region.

In evaluating whether to accept a settlement in the face of a Region's objection, the Board will consider the position of the Region, as well as the following factors:[137]

- Whether the terms are reasonable in light of the violations, the uncertainty inherent in litigation, and the current stage of litigation.
- Whether all parties, including the respondent, the charging party, and all affected employees agree to be bound by the settlement.
- Whether there is any indication that agreement was reached through coercion, fraud, or duress.
- Whether there is any respondent history of violations or breach of previous unfair labor practice settlement agreements.

10592.4 Settlements Based on Less Than 80 Percent of Backpay

Regions should strive to obtain 100 percent of the backpay that the Region determined to be due or that it would allege to be due if it issued a compliance specification.[138] Any compromise from this standard must be warranted by the facts, law, and circumstances of the case. Even with full agreement by the charging party, discriminates, and other affected employees, the Region must obtain authorization from

[137] See *Independent Stave Co.*, 287 NLRB 740 (1987); and *American Pacific Concrete Pipe Co.*, 290 NLRB 623 (1988). See also *Longshoremen ILA Local 1814 (Amstar Sugar)*, 301 NLRB 764 (1991), (post-ALJD non-Board settlement).

[138] After the Regional Director has found merit to a charge that involves a make-whole remedy, the Region must compute the amount due and document the basis for its determination in order to consider the appropriateness of a proposed settlement. Absent clearance from the Division of Operations-Management, the only circumstance that normally would excuse this computation is a determination that the charged party is financially incapable of making payment, or that the charging party (or claimant) indicates an unwillingness to cooperate in further proceedings.

Division of Operations-Management before accepting a settlement of backpay that represents less than 80 percent of what it has determined to constitute full backpay.

This requirement for clearance does not imply that settlements that constitute more than 80 percent but less than 100 percent of calculated backpay should be routinely accepted. The 80-percent figure constitutes nothing more than a trigger for the need to obtain clearance from Division of Operations-Management and should not be construed as authorizing settlements for less than 100 percent without good cause.

In the event that the settlement falls between 80 and 100 percent of calculated backpay but represents more than minor concessions, the Region should submit to Division of Operations-Management a copy of the closed case report showing the amount computed and the amount collected, along with a copy of any memorandum that the Division of Operations-Management issued authorizing settlement or closure of the case. Generally such authorization should be sought only if all the criteria set forth in Section 10592.1 have been satisfied.

10592.5 Settlement Based on Preliminary Estimates of Backpay

In backpay cases involving large numbers of discriminatees, long backpay periods or other complexities, as well as in any case where expeditious treatment is essential, the Region should prepare an estimate of backpay as a basis for settlement. Normally the computation should account for all pertinent facts and all components of gross backpay. In appropriate cases, the Region may utilize innovative approaches to generate a reasonable assessment of liabilities that may serve as a basis for immediate settlement of the case. For instance, it may be appropriate to use statistical sampling or other means to approximate gross backpay and/or interim earnings,[139] to exclude de minimis claims when many claimants are entitled to relatively small amounts of money[140] and to apply equitable rather than exact allocation of shares of a lump sum settlement.[141] The Region should clearly inform the parties if its computations are based on estimates or of any other deviation from standard practice. See Section 10548 for further discussion of these methods.

10592.6 Concessions Based on Mitigation Issues

Respondents frequently contend that a discriminatee has failed to meet his or her obligation to mitigate and that net backpay due should be reduced accordingly. Regions should refrain from resolving borderline willful idleness contentions against discriminatees. See Section 10558 regarding mitigation.

10592.7 Respondent Requests to Question Discriminatees

Respondent's counsel may request, as a prerequisite to agreeing to a settlement, that the Region make discriminatees available for questioning concerning their interim earnings and search for work. The Region should not agree, absent prior authorization from Division of Operations-Management. Among other reasons, this type of

[139] The Contempt Litigation & Compliance Branch can provide information about past application of these techniques and guidance regarding their applicability in any case currently being processed.

[140] Generally, this exclusion may apply to claims less than $100. When the Region wishes to apply a higher cutoff, it should first consult with its Assistant General Counsel or Deputy.

[141] If the parties agree, this might take the form of distribution of equal shares of a lump sum settlement, omission of consideration of interim earnings or other factors normally taken into account, or the use of a formula based on averages or samples.

investigation can be extremely demoralizing to the discriminatee and is better and more fairly conducted under the judicial safeguards of a hearing. If a respondent approaches a discriminatee directly with a request for information on these subjects, the Region should discourage the discriminatee from responding to respondent's request.

10592.8 Reinstatement

Most cases that involve backpay also require reinstatement. Respondents often propose backpay settlements conditioned upon the discriminatee's waiver of reinstatement. The Region should communicate such an offer but should not encourage a discriminatee to waive reinstatement. Rejection of a valid offer of reinstatement tolls but does not otherwise affect backpay. If, pursuant to a settlement, a discriminatee voluntarily agrees to waive reinstatement, his signed waiver must be obtained clearly in writing.

If a respondent offers a discriminatee more than 100 percent of backpay as an inducement for the waiver of reinstatement, the Region may relay the offer but should make it clear to respondent and discriminatee that it is serving only as a conduit for the offer, and is not advocating a premium above the make-whole remedy for any purpose whatsoever. In the event that respondent and the discriminatee agree to a payment that exceeds a full make-whole remedy, they may memorialize the agreement in a side letter separate from any of the documentation regarding the Agency's remedy. All settlements, including non-Board settlements, in which a discriminatee is to receive more than 100 percent must be approved by the Division of Operations-Management.

Occasionally, a respondent will offer convincing evidence of a discriminatee's unsuitability for employment. If such evidence persuades the Regional Director that the settlement need not provide for employment to effectuate the policies of the Act, he or she has authority to approve it after obtaining authorization from the Division of Operations-Management and, in post judgment cases, from the Contempt Litigation & Compliance Branch.

10592.9 Missing Discriminatees or Claimants

Particularly in cases involving more than one discriminatee, it is important not to delay resolution of the case because the Region cannot locate one or more discriminatees. The Region may calculate the backpay due missing discriminatees using the methods set forth in Section 10562.4.

In cases involving a missing discriminatee, the Region should arrange to obtain backpay in a form that places it in escrow, rather than as a check payable to the discriminatee. See Section 10580 regarding escrow accounts, and Section 10582.3 regarding disbursement of backpay from an escrow account when a missing discriminatee is located. See Section 10584 regarding the elimination of a missing discriminatee's backpay entitlement after the respondent has otherwise fulfilled its compliance obligations.

10592.10 Uncooperative Discriminatees or Claimants

In circumstances where the discriminatee does not cooperate, the Regional Director has authority to compromise or eliminate backpay and to forgo an offer of reinstatement if such resolution results in substantial compliance with a Board order or

with appropriate remedial standards. The Region may take this step only if it knows the address of the discriminatee, no evidence suggests that the refusal to cooperate serves to subvert the Board's processes and the discriminatee has been given written notice of the consequences of his or her refusal to cooperate.

10592.11 Discriminatee Waivers and Releases

Respondents may seek to have discriminatees and/or charging parties execute waivers or releases as part of or as an adjunct to, a compliance settlement. In determining the overall acceptability of such settlements, the Region should carefully evaluate the propriety of any waivers or releases, particularly when they could be read to foreclose the filing of unfair labor practice charges in future, unrelated matters.[142]

10592.12 Installment Payments

The Regional Director may accept backpay in installment payments when satisfied that the respondent's financial position would be jeopardized by full immediate payment. See Section 10636 for a detailed treatment of this subject; the requirements of this section should be observed before agreeing to installment payments.[143] As described therein, Regions should normally insist, as a condition of accepting installment arrangements, on such security provisions as are commonly required by creditors in ordinary business transactions to protect against default, insolvency, and bankruptcy.[144] Settlements providing for installment payments should also provide for payment of interest during the installment period. See also Section 10636, with respect to monitoring and investigating a respondent's ability to pay.

As an alternative or in addition to security provisions, installment payment plans create one of the circumstances in which a Region should consider adding default language to the settlement agreement. See Section 10594.8 for a more extensive discussion of default language.[145]

Under Section 547 of the Bankruptcy Code, in certain circumstances a transfer of funds from a charged party within 90 days before it filed a bankruptcy petition can be voided as a preference, resulting in return of the funds to the charged party. If it appears that the charged party's finances are unstable and that bankruptcy may be imminent, it would be prudent to advise any discriminatee who receives a monetary remedy of this possibility.

Protective Restraining Orders

Regions should consult with the Contempt Litigation & Compliance Branch regarding the possibility of obtaining a protective restraining order if it has reason to believe that during the terms of an installment plan:

- Assets have been, or are being siphoned off.

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[142] See *Copper State Rubber*, 301 NLRB 138 (1991).

[143] Appendix 12 contains the settlement agreement, Standard Form 4775, and various types of security for installment payment plans.

[144] Although collateral is always desirable to protect against default, a significant down payment against total liability and/or a brief installment payment plan lasting only several months might warrant forgoing security if respondent appears likely to meet its commitments.

[145] See Appendix 12 for sample default language.

- All income is not being reported.
- Respondent is acting to evade liabilities.

10592.13 Settlements Involving Joint and Several Liability

Generally, in cases involving more than one respondent and joint and several liability, the Region should seek payment on an equal share basis. When the joint and several liability of an employer and union pertains solely to a dues reimbursement remedy and they agree that the union alone shall make the reimbursement, unless there are unusual circumstances, the settlement should be accepted without efforts to obtain payment from the employer.

In cases where one respondent is willing to comply by paying its proportionate share, but the other respondent refuses to comply, the Region should accept the proffered compliance. The Region should condition its acceptance, however, on a stipulation that the complying party will be liable for the remainder due, should efforts to collect the remaining backpay from the other respondent fail.[146] Further, the Region should inform the complying respondent that if it becomes necessary to institute backpay proceedings, it will name the complying party as a party respondent.

If one respondent offers to comply by paying the backpay in full, the Region should accept the offer only after it has made efforts to obtain equal payment from all respondents. The Region may reject the offer if it appears appropriate to pursue payment from the other respondent for any reason. For example, the other respondent may have a history of unlawful conduct, or its payment of backpay may appear to have a more compelling remedial effect in the circumstances of the case.

In the event one respondent becomes insolvent, full payment of the liability from the other respondent is appropriate.

10592.14 Settlement Conference

The Region may suggest a conference as a means of resolving disputed backpay issues. To emphasize the importance of settlement efforts, the Regional Director or a designated manager may participate in the conference. At such a conference, respondent's contentions should be carefully assessed and, when they have merit, should form the basis of concessions. There is rarely only one way to approach to backpay computations, and reasonable points made by respondent should be considered in attempting to reach agreement as to amounts due.

10592.15 Settlement Discussions Should Not Delay Compliance Proceedings

Although settlement should be pursued at all stages of unfair labor practice proceedings, the Region should guard against a respondent's or charged party's efforts to delay proceedings in the guise of cooperation. Normally, the Region should make its inquiries in writing and with a deadline to respond. Failure to meet a deadline should lead to a firm and prompt written message from the Region. If respondent demonstrates a clear failure or refusal to comply, the Region should normally recommend enforcement or contempt, as appropriate, within the guidelines set forth in Section 10694.4.

[146] See Appendix 12 for sample stipulations.

In a formal case (where a Board order has issued) the Region should especially not tolerate unreasonable delay, but rather where settlements are on going, should prepare and issue a compliance specification in accord.

10592.16 Concessions Offered During Settlement Discussions Are Not Binding

In the event settlement fails, settlement discussions conducted by the Region do not bind the Region or the Board.[147] Thus, the Region may withdraw settlement proposals in the face of changing circumstances. When settlement efforts have failed, the Region should seek full backpay in further proceedings. Note in addition, however, that the Region's position on backpay issues should also reflect valid points made by respondent during the backpay investigation and settlement discussions.

10594 Informal Settlement Agreements

Every informal settlement agreement should clearly specify all required remedial actions. As soon as the Regional Director has approved an all-party informal settlement agreement, the Region should send compliance instructions to the charged party. See Section 10506.10 regarding procedures for initiating compliance when the charging party does not enter into an informal settlement agreement.

10594.1 Language and Format

Standard Form 4775 provides the format for informal settlement agreements. Memorandum OM 02-44 revised the basic form and presented numerous samples of optional paragraphs and attachments that may be adapted and added to an informal settlement as circumstances warrant.[148] The optional paragraphs and attachments deal with matters such as multiple charging parties, consolidated R and C cases, reservation of specific allegations from the settlement agreement, posting and/or mailing of notices, nonadmissions clauses, joint and several liability, signature box template for multiple charging parties, bankruptcy, default, backpay, installment payments and security, and a sample stipulation to set aside an election.

10594.2 Plain Language Notices

When drafting notice language, the Region should be guided by the Board's goal that the language used in a Notice to Employees communicate clearly and in a straight forward manner to employees.[149] Board notices do not necessarily need the degree of precision found in Board orders because in formal cases, the Board's order spells out legal rights and obligations. In informal settlement agreements, however, no order exists, and the charged party commits to comply with the terms of the notice. Accordingly, Regions need also to be mindful of the possibility of noncompliance, and therefore should ensure that, if appropriate, the settlement agreement may be set aside on the basis of subsequent unlawful conduct that might fall outside the literal meaning of the plain language.

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[147] See, for example, *NLRB v. Armstrong Tire Co.*, 263 F.2d 680, 681–682 (5th Cir. 1959), enfg. in part 119 NLRB 353, 354–356 (1957). See Rule 408, Federal Rules of Evidence.

[148] These forms and samples are available in Appendix 12.

[149] See *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), and Memorandum OM 02-43. For sample "plain language" notice provisions in English, see OM 03-40.

10594.3 Foreign Language Notices

The standard settlement agreement form provides the authority to the Regional Director to require the posting of notices in languages other than English. Therefore, prior to recommending a settlement agreement to the Regional Director for approval, it is helpful to explore the need to post the notice in other languages and to incorporate an express commitment to do so in the settlement signed by the parties.

To conserve Agency resources, Regions should take advantage of translations that have become available as a result of prior cases. Memorandum OM 99-18 provides a list of such foreign language notices and remedial provisions. Memorandum OM 03-86 provides Spanish translations of "plain language" notice provisions. Dos Idiomas-Una Lew, Two Languages–One Law. A Bilingual Guide, which the Agency published in March 2005, provides an additional resource for Spanish translations.

10594.4 Postings by Unions

A charged party union is required to post remedial notices at its place of business. In addition, a charged party union is required to post notices on bulletin boards that it maintains at the employers' facilities. The charged party union also is generally required to return signed and dated notices to the Region to forward to the employer for voluntary posting at the employer's premises. The Region should obtain a sufficient number of signed notices and transmit them to the employer.

10594.5 Mailing of Notices

The Board routinely orders a respondent to mail employees the signed notice if respondent has closed its facility. Where circumstances indicate the need for the mailing of notices, the mailing requirement should be identified and resolved as part of the settlement process. Such issues may include:

- the extent of the mailing (that is, present employees, former employees working on particular dates, or job applicants),
- who will bear the expense of duplicating and mailing the notices (typically respondent), and
- the verification procedure to insure that notices were mailed in accordance with the agreement (typically a "Certification of Mailing" submitted by respondent confirming date of mailing and list of names and address to which the notices were mailed).

Notice mailing is often necessary in the construction industry because a charged party may not have a place to post at a jobsite and few employees regularly visit the charged party's office. It also often arises when a union has no right to utilize bulletin boards at employer facilities, and few employees whom it represents often go to its office or hall. In that event, a mailing or publishing in the union's newsletter may be appropriate.

10594.6 Expunction of Records

The Board also routinely orders a respondent to remove from its files all references to unlawful terminations of discriminatees and to notify them in writing that

this has been done and that the unlawful terminations will not be used against them in any way. Where circumstances indicate that a respondent has communicated its unlawful discrimination of a discriminatee to a third party (particularly a third party that regulates or licenses a profession or provides employment histories of potential employees to interested employers), the expunction of such third party records should be identified and resolved as part of the settlement process. In such cases, respondents should be required to take all reasonable steps within their power to expunge records maintained by a third party where respondent has provided information regarding a discriminatee's unlawful discrimination.

10594.7 Reservation Language

In order to avoid settlement bar problems, a reservation clause is included in the Settlement Agreement Form and in the recommended language for the formal settlement stipulation. ULP Manual Section 10168. The language is designed in part to reserve the right of the General Counsel to litigate other cases that involve alleged presettlement conduct. It also includes an evidence provision to enable the Board and courts to make findings of fact and conclusions of law, but not to alter the related remedy, with respect to settled issues, if such findings and conclusions are necessary to support allegations being litigated. Notwithstanding the breadth of the reservation clause, a circumstance has arisen where the Board concluded that it would not permit the litigation of one portion of a union security clause when another portion of the same clause had been the subject of a settlement.[150] Accordingly, Regions should tailor the reservation language as appropriate. If other matters are pending against the same charged party, the Region should specify that the cases reserved from the settlement "include, but are not limited to, Case(s) _____." Regions may also modify or forgo the reservation clause entirely if that is necessary to effectuate a settlement and no adverse consequences will result. In the event of questions, Region should consult with the Division of Operations-Management or Advice.

10594.8 Default Language

Regions should include the following default language in informal settlement agreements where appropriate, such as when there is a substantial likelihood that the charged party/respondent will be unwilling or unable to fulfill its settlement obligations, the settlement agreement involves large sums of money and/or installment payments are involved:

(a) Where complaint has issued:

> The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent, the Regional Director may reissue the complaint dated [insert date] in this (or these) case(s). The General Counsel may then file a motion for default judgment with the Board on the allegations of the complaint. The charged party/respondent

[150] See *Ratliff Trucking Corp.*, 310 NLRB 1224 (1993), citing *Hollywood Roosevelt Hotel Co.*, 235 NLRB 1397 (1978).

understands and agrees that the allegations of the reissued complaint may be deemed to be true by the Board and its answer to such complaint shall be considered withdrawn. The charged party/respondent also waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

(b) Where complaint has not issued:

The charged party/respondent agrees that in case of non-compliance with any of the terms of this settlement agreement by the charged party/respondent and after 14 days notice from the Regional Director of the National Labor Relations Board of such noncompliance without remedy by the charged party/respondent the Regional Director may issue a complaint in this [these] case(s) alleging that the following actions violate the Act:

[List all meritorious allegations of the charge(s).]

The General Counsel may then file a motion for default judgment with the Board on the above-described complaint that will issue. The charged party/respondent understands and agrees that the allegations of such complaint may be deemed to be true by the Board. The charged party/respondent also waives the following: (a) filing of answer; (b) hearing; (c) administrative law judge's decisions; (d) filing of exceptions and briefs; (e) oral argument before the Board; (f) the making of findings of fact and conclusions of law by the Board; and (g) all other proceedings to which a party may be entitled under the Act or the Board's Rules and Regulations.

On receipt of said motion for default judgment, the Board shall issue an order requiring the charged party/respondent to show cause why said motion of the General Counsel should not be granted. The Board may then, without necessity of trial or any other proceeding, find all allegations of the complaint to be true and make findings of fact and conclusions of law consistent with those allegations adverse to the charged

party/respondent, on all issues raised by the pleadings. The Board may then issue an order providing a full remedy for the violations found as is customary to remedy such violations. The parties further agree that the Board's order and U.S. Court of Appeals judgment may be entered thereon ex parte.

Default language may not be necessary in the following situations:

- Charging party/respondent has provided security sufficient to guarantee the Board's ability to recover the full amount of backpay owed in the event of noncompliance with the terms of an installment payment plan.
- A formal settlement has been entered into by the charging party/respondent.
- A court judgment has issued liquidating the amount of backpay owed.

10594.9 Display of Nonadmissions Language

Where a nonadmissions clause is included in the settlement agreement, under no circumstances should such language be included in the notice.[151] Side posting of a settlement agreement that contains a nonadmissions clause (ULP Manual Section 10130.8) is discouraged and may constitute noncompliance if the nonadmissions clause is highlighted, circled, or otherwise emphasized.[152]

10594.10 Special Language for Informal Settlements in Cases With Outstanding 10(j) or 10(l) Injunctions

Any 10(j) or 10(l) injunctive order terminates by operation of law upon the Board's final disposition of the case. Occasionally, a respondent will resolve the underlying violations by means of an informal settlement agreement, precluding the issuance of Board order in the matter. The language in the settlement agreement form provides that approval will, among other things, constitute withdrawal of the complaint. To ensure that the Agency can argue that the force of the injunction remains in effect until closure on compliance, rather than until approval of the settlement agreement, and thus seek contempt sanctions, Regions must substitute the following language for the final sentence in the paragraph "Refusal to Issue Complaint" in the settlement agreement if it arises in the context of an outstanding 10(j) or 10(l) injunction:

The complaint and any answer(s) in [the captioned administrative cases and numbers] shall be withdrawn only upon closing of these matters on compliance. The respondent agrees not to move to vacate, modify, dissolve, clarify, or alter the injunction decree in [caption and case number of the Section 10(j) or 10(l) decree] on the basis that the settlement agreement has been reached. The closing of these matters on compliance will be considered the final adjudication of these cases before the Board for the purposes of [caption and case number of the Section 10(j) or 10(l) decree]. Until these matters

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[151] *Pottsville Bleaching & Dyeing Corp.*, 301 NLRB 1095 (1991).

[152] *Bingham-Williamette Co.*, 199 NLRB 1280 (1972). In one circumstance, however, when Respondent had fulfilled numerous other remedial obligations, the Board found that Respondent had substantially complied with the terms of the settlement agreement, and declined to set the settlement aside solely on the basis of a side-posting that cast the agreement as simply a means to save the time and money that Respondent would otherwise have had to spend litigating the issues. *Deister Concentrator Co.*, 253 NLRB 358 (1980).

have been closed on compliance, the injunction in [caption and case number of the Section 10(j) or 10(l) decree] will continue in full force and effect for all purposes.

If the Region obtained a Section 10(l) decree prior to issuance of the complaint, it should modify the special language of the settlement to reflect that it will hold dismissal of the charge in abeyance until the case closes on compliance.

In the event that a respondent is unwilling to execute the settlement agreement modified as set forth above, the Region should consult with the Injunction Litigation Branch about whether nevertheless to approve the proposed settlement.

10594.11 Closing Cases on Compliance With Informal Settlements

When the posting period has closed and it appears that the charged party has otherwise complied with the terms of the settlement agreement, the Compliance Officer should notify the charging party by letter of the Region's intent to close the case on compliance. This notification should give the charging party a short period of time, normally 1 week, to raise written objections and provide supporting evidence of non-compliance.

If the charging party does not object or if, after objections, the investigation of them confirms that compliance has been achieved, the Compliance Officer should submit the case to the Regional Director for closure on compliance. The closing process will include:

- **Notification**: The Region should normally notify the parties that the case has closed on compliance. This notification should caution that the closing is conditioned upon continued observance of the terms of the settlement agreement. See ULP Manual Section 10148.4.
- **Report**: The Region should complete and submit one copy of the Region's Closed Case Report, Form NLRB-4582, to the Case Records Unit, with a copy of the dated and signed notice attached. No covering memorandum or other material is required. The remarks section of Form NLRB-4582 may be used to explain any unusual circumstance or any other action not fully reported in other sections of the form.
- **Record**: The Region and the Division of Operations-Management shall record the case as closed as of the date that appears on the Region's Closed Case Report.
- **Exception**: When backpay has been deposited in escrow, notification of closure should be held in abeyance pending disbursement of all backpay.

10594.12 Noncompliance With an Informal Settlement Agreement

When a charged party subject to the compliance requirements of a settlement agreement allegedly engages in continuing or new unlawful conduct, the conduct may constitute noncompliance with the settlement or an independent violation of the Act. Complaints of noncompliance or of new unlawful conduct may be made during active compliance proceedings. Similarly, they may arise after the case has closed on

compliance, as provisions of settlement agreements remain in effect even after closure of the case.

If the investigation discloses that the charged party failed to comply with provisions of an informal settlement agreement, the Regional Director will normally withdraw approval of the agreement and issue or reissue complaint.[153] In this event, the Region will need first to be able to establish that the charged party did indeed breach one or more terms of the settlement; it then should pursue the complaint on the basis of the underlying allegedly unlawful actions. The passage of time, of course, can make successful prosecution of the alleged unfair labor practices more difficult. The Region can protect itself against this difficulty by incorporating default language in the settlement agreement that will constitute a waiver of the charged party's right to contest the validity of a related complaint, reserving its right only to defend against the allegation that it breached the settlement.[154] Such language is especially appropriate where the Region anticipates that respondent is likely to be unwilling or unable to fulfill its commitments, or the settlement provides for a substantial make-whole remedy and/or installment payments. Section 10594.7. ULP Manual Section 10152.

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[153] If the notice contains a provision that "WE WILL NOT in any [other] [like or related] manner interfere with your rights under Section 7 of the Act," the Region should consider setting aside the settlement even if subsequent conduct, though similar, does not violate the letter of one of the explicit provisions of the notice, but constitutes "like or related" conduct. In the alternative, inclusion of the broad Section 7 guarantees below the heading of the notice, followed immediately by the provision "WE WILL NOT do anything to prevent you from exercising the above rights" would also serve this purpose.

[154] See Appendix 12 for sample default language. The Board, by summary judgments, approved similar language in *SAE Young Westmont-Chicago, LLC*, 333 NLRB No. 59 (2001) (not reported in Board volumes), No. 01-2328 (7th Cir. 2001), and *Ernest Lee Tile Contractors, Inc.*, 330 NLRB No. 61 (2000) (not reported in Board volumes).