

AMERICAN BAR ASSOCIATION
SECTION OF LABOR AND EMPLOYMENT LAW
THIRD ANNUAL CLE CONFERENCE

NLRB REMEDIES TODAY

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Statutory Authority

The NLRB's remedial authority flows from Section 10 of the National Labor Relations Act. In relevant part, Section 10(c) of the Act provides:

If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of this Act: *Provided*, That where an order directs reinstatement of an employee, backpay may be required of the employer or labor organization, as the case may be, responsible for the discrimination suffered by him.... Such order may further require such person to make reports from time to time showing the extent to which it has complied with the order.... No order of the Board shall require the reinstatement of any individual as an employee who has been suspended or discharged, or the payment to him of any backpay, if such individual was suspended or discharged for cause.

The Board's authority under Section 10 is wholly remedial; the Board has no authority to issue punitive remedies.²

While outside the scope of this paper, it is important to note that the Act also grants the NLRB authority to seek provisional injunctive relief in the federal courts, pending issuance of a final Board Order. Thus, Section 10(j) of the Act provides:

The Board shall have power ... to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to

¹ The author gratefully acknowledges the research assistance of NLRB Honors Attorney Rachael M. Simon, who provided invaluable assistance in compiling information for this paper.

² *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941); *Republic Steel Corp. v. NLRB*, 311 U.S. 7, 10 (1940).

have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper

Section 10(j) is permissive; it authorizes the NLRB to seek injunctive relief in cases it deems appropriate. In contrast, Section 10(l) is mandatory; it *requires* the NLRB to seek an injunction in specified cases involving secondary boycotts, hot cargo agreements, or unlawful recognitional picketing:

Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e) or section 8(b)(7), the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney to whom the matter may be referred has reasonable cause to believe such charge is true and that a complaint should issue, he shall, on behalf of the Board, petition any United States district court within any district where the unfair labor practice in question has occurred, is alleged to have occurred, or wherein such person resides or transacts business, for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law....

Both Section 10(j) and 10(l) injunction decrees dissolve as a matter of law when the Board's final Order issues.³

³ See, e.g., *Barbour v. Central Cartage*, 583 F.2d 335, 336-37 (7th Cir. 1978); *Johansen v. Queen Mary Restaurant Corp.*, 522 F.2d 6 (9th Cir. 1975).

Traditional Remedies

The Board typically will order a Respondent to:

- Cease and desist from engaging the conduct found to be unlawful (e.g., cease and desist from interrogating employees.
- Cease and desist from violating the Act “in any like or related manner.”
 - In cases involving egregious conduct or a recidivist respondent, the cease and desist order will proscribe violating the Act “in any other manner.”⁴
- Take appropriate affirmative action (bargain in good faith, reinstate and make whole unlawfully discharged employees, expunge unlawful discipline, process grievances, rescind fines, etc.)
 - The General Counsel seeks quarterly compounding of interest on backpay and other monetary remedies.⁵
- Post a Notice to Employees (or, in Section 8(b) cases, a Notice to Employees and Members) for 60 days, informing employees of the proscriptive and affirmative terms of the Board’s Order. This Notice includes a recitation of employees’ Section 7 rights, and is to be written in “clear laypersons’ language.”⁶
 - Where a traditional posting will not reach affected employees, the Board will direct the Notices be mailed to all employees, at the Respondent’s expense.⁷

⁴ See *Hickmott Foods*, 242 NLRB 1357 (1979). See also *Federated Logistics and Operations*, 340 NLRB 255, 256-58 and n.9 (2003).

⁵ See NLRB Casehandling Manual (CHM) Sec. 10266.6 (included in Appendix 1, attached); General Counsel (GC) Memo 07-07 (copy attached as Appendix 2). Cited materials also are publically available on the NLRB’s website, www.nlr.gov.

⁶ *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001). See also Operations Management (OM) Memo 02-43 (copy attached as Appendix 3).

⁷ See, e.g., *Bill’s Electric*, 350 NLRB 292, 296 (2007).

- In appropriate cases, the Respondent will be ordered to post the Notice both in English and in other languages spoken by employees.⁸
- Notices typically are posted only at the facility at which the violation(s) occurred. Where, however, there is a “clear pattern or practice of unlawful conduct,” the Board may order a broader posting, regardless of the egregiousness of the violations.⁹
- In cases in which the Respondent communicates with its employees or members electronically, the General Counsel will seek an Order directing that copies of the Notice be publicized in the same manner (e.g., internet/intranet posting, broadcast e-mails, etc.).¹⁰ The Board has not directed use of an electronic posting remedy, though both Chairman Liebman and Member Schaumber have indicated they would do so in appropriate cases.¹¹

Extraordinary Remedies

Flagrant Violations/Recidivists

In addition to traditional remedies, the Board directs certain “extraordinary” remedies in some cases when it has found “the Respondent’s unfair labor practices are ‘so numerous, pervasive, and outrageous’ that such remedies are necessary ‘to dissipate fully the coercive effects of the unfair labor practices found.’” *Federated Logistics & Operations*, 340 NLRB 255, 256 (2003), quoting *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995). On occasion, the Board also has ordered the Respondent to pay for the litigation costs of the unfair labor practice

⁸ See, e.g., *Alstyle Apparel*, 351 NLRB 1287 (2007).

⁹ *Postal Service*, 339 NLRB 1162 (2003), and cases cited. See also *Electrical Workers Local 98 (Tri-M Group, Inc.)*, 350 NLRB 1104 (2007); *Beverly Health & Rehabilitation Services*, 346 NLRB 1319 (2006).

¹⁰ See CHM Sec. 10132.4(b); CHM Sec. 10266.4 (included in Appendix 1, attached). See also OM Memo 06-82 (copy attached as Appendix 4).

¹¹ See *Texas Dental Assn.*, 354 NLRB No. 57, at n.4 (2009), and cases cited.

proceeding, and/or to reimburse the union for excess organizational costs where the Respondent has caused “frivolous” litigation. See, e.g., *Tidee Products, Inc.*, 194 NLRB 1234, 1236-37 (1972). Specific examples of the various extraordinary remedies ordered by the Board, singly or in combination, follow:

- Extension of the Certification Year¹²
- Reimbursement of Bargaining and/or Litigation Expenses¹³
- Notice Reading by Respondent officer/official or by Board agent¹⁴
- Special Access Remedies¹⁵
- Imposing a Bargaining Schedule¹⁶
- *Gissel* Bargaining Orders¹⁷
- Providing to Union Employees’ Names and Addresses¹⁸

First Contract Cases

In GC Memorandum 06-05 (copy attached as Appendix 5), issued on April 19, 2006, General Counsel Meisburg announced that a priority during his term as General Counsel would be to ensure that: (1) employees have freedom of choice based on a timely opportunity to vote in Board-conducted elections in an uncoerced atmosphere, and (2) their

¹² *Mar-Jac Poultry Co.*, 136 NLRB 785, 786-87 (1962). See, e.g., *American Medical Response*, 346 NLRB 1004, 1005-06 (2006); *Bridgestone/Firestone, Inc.*, 337 NLRB 133, 134 (2001).

¹³ *Dish Network Service Corp.*, 347 NLRB No. 69 (2006); *Teamsters Local 122 (August A. Busch & Co.)*, 334 NLRB 1190 (2001); *Frontier Hotel & Casino*, 318 NLRB 857, 859 (1995).

¹⁴ *Homer D. Bronson Co.*, 349 NLRB 512, 515 (2007); *Smithfield Foods*, 347 NLRB 1225, 1233 (2006); *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003).

¹⁵ *Federated Logistics & Operations*, 340 NLRB 255, 257 (2003); *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473-(1995).

¹⁶ *Harowe Servo Controls*, 250 NLRB 958, 1123-25 (1980).

¹⁷ *Evergreen America Corp.*, 348 NLRB 178, 179-82 (2006); *Concrete Form Walls*, 346 NLRB 831 (2006)..

¹⁸ *North Audubon Hospital*, 350 NLRB 648 (2006); *Federated Logistics & Operations*, 340 NLRB 255, 258 (2003) .

decision in an election is protected by the NLRB. He emphasized the importance of initial contract bargaining and organizational activity cases, observing the initial contract bargaining forms the foundation for the parties' future labor-management relationship. In furtherance of his first contract bargaining initiative, the General Counsel directed that all Regional Offices consider two types of relief in every merit case involving an initial contract bargaining violation: (1) Section 10(j) injunctive relief; and (2) seeking special remedies as part of the Board's Order. Specifically mentioned as remedies that "routinely" should be considered were: seeking a new full certification year; notice reading and publication; union access to bulletin boards; and other means of communication. Other remedies mentioned were periodic reports to the Region on the status of bargaining, and bargaining and/or litigation expenses. Finally, to ensure a consistent, nationwide approach to first contract bargaining cases, the Regions were instructed to submit all such cases to the Division of Advice, including the Region's recommendation and analysis regarding the need for the various special remedies.

On May 29, 2007, General Counsel Meisburg issued GC Memorandum 07-08 (copy attached as Appendix 6). He reviewed the Agency's 12-month experience with his first contract bargaining initiative, and found that additional remedial measures should be undertaken to adequately protect employee free choice in initial bargaining cases. In particular, the General Counsel posited that while the Board has ordered extraordinary remedies only occasionally, in egregious cases, the Regions should regularly seek them, and argue their necessity, based on the impact of the violations on the new bargaining relationship. The General Counsel identified the following additional remedies, beyond the standard bargaining order, to address the consequences of bad faith bargaining and other violations during first contract negotiations:

1. Requiring Bargaining on a Prescribed or Compressed Schedule. Such remedies could require the parties to meet at reasonable consecutive intervals, for a

minimum number of days per week, or for a minimum number of hours per week, until an agreement or good-faith impasse is reached.

2. Requiring Periodic Reports on Bargaining Status. The GC noted this remedy may be appropriate in cases where there is a reasonable concern that the respondent will repeat its unlawful conduct, as, for example, in situations where the respondent has previously violated a Board order or settlement agreement.
3. A Minimum Six-Month Extension of the Certification Year. The GC instructed Regions routinely to seek certification year extension of at least six months in cases where unlawful bargaining in first contract negotiations disrupted the relationship, even where this may require overall bargaining for more than 12 months. The GC stated that in his opinion six months is the minimum time necessary to reestablish a solid initial bargaining relationship that has been undermined by illegal bargaining tactics, while also adequately accommodating employees' right to seek to decertify a union they no longer want to represent them.
4. Reimbursement of Bargaining Costs. Recognizing that the Board historically has limited this remedy to cases of unusually aggravated misconduct, the GC noted that the crucial factor in cases involving violations during first contract bargaining is that the violations cause the other party to waste resources in futile bargaining efforts or efforts to enforce the bargaining obligation at a time when the new bargaining relationship is most vulnerable, and that such unlawfully-imposed costs may have long-term effect on the affected party's economic strength. The focus, therefore, should not be on the egregiousness of the violations but on the effect they have on the bargaining relationship and need for true make-whole relief. Thus, the GC found, reimbursement of bargaining costs is necessary to restore the parties to their lawful pre-violation position and to fully counter the effects of the violations on employees' ability to reach an agreement.

5. 10(j) Relief. Observing that Section 10(j) injunctive relief is often the most effective means of preventing potentially irreparable harm to bargaining relationships and restoring the status quo ante, the GC directed that Regions include in all first contract bargaining case submissions their recommendations regarding 10(j) relief. The GC further observed that cases involving breaches of first contract settlement agreements are particularly appropriate subjects for Section 10(j) relief.

GC Memorandum 08-09 (copy attached as Appendix 7), dated July 1, 2008, reported on the Agency’s experience under the first contract bargaining initiative. More recently, in March, 2009, the General Counsel responded to a question propounded by the ABA Labor Section’s Practice and Procedure Committee, providing the following statistics regarding his first contract bargaining initiative:

Ques: The Committee is interested in a detailed Regional status report on the First Contract Bargaining initiative and its implementation. For example, since the inception of the initiative in April 2006, how many Section 8(a)(5) charges were filed in first contract situations. How many were found to have merit. In the merit cases, how many settled? Were any of the special remedies described in the General Counsel Memoranda part of the settlement? How many such cases have gone to trial? Are there any ALJ decisions in which special remedies have been ordered? Are any first contract bargaining cases involving special remedies currently before the Board? What efforts have been made to determine whether a first contract has been achieved in settled cases?

Ans: The answer to this question is summarized by the following chart:

FY	# Bad Faith Bargaining 8(a)(5) Initial Contract Cases	# Bad Faith Bargaining 8(a)(5) All Contract Cases	% Initial Contracts	# Initial Contract Merit Cases	Initial Contract Merit Rate	# All Contract Merit Cases	All Contracts Merit Rate	# Initial Contract Cases Resulting in Settlement of Adjustment	Initial Contract Settlement Rate	# All Contract Cases Resulting in Settlement of Adjustment	All Contract Settlement Rate
2006	372	1,572	23.66%	170	45.70%	713	45.36%	140	82.35%	642	90.04%
2007	343	1,431	23.97%	164	47.81%	641	44.79%	143	87.20%	588	91.73%
2008	264	1,323	19.95%	119	45.08%	589	44.52%	95	79.83%	513	87.10%
Total	979	4,326	22.63%	453	46.27%	1,943	44.91%	378	83.44%	1743	89.71%

In addition, we advised that special remedies described in the General Counsel memoranda were authorized in 13 cases in fiscal year 2008. Of these cases, ten settled and three went to trial. Of the litigated cases, one case is pending before the ALJ; one case is pending before the Board after the ALJ granted the special remedy; and a Board default decision, ordering a special remedy, issued in another case. The Agency has been informally contacting Regional Offices to determine whether a first contract was achieved in FY 2008 settled cases. Of the ten FY 2008 settled cases, four cases resulted in contracts. In three cases, the parties were still bargaining, and in three cases, bargaining had ceased due to changed circumstances (e.g., facility closed).

Summary

As is readily apparent, the Agency internally is reexamining its approaches to determining the scope of appropriate remedies. Cease and desist orders, reinstatement and make whole relief, and traditional Notice postings certainly will continue. Whether the Obama Labor Board, once constituted, grants the updated and/or broader remedies being sought by the General Counsel and, if so, how those remedies will fare in the courts, is yet to be seen.

Wayne Gold
September, 2009

APPENDIX 1

10130.7 Insolvent Charged Parties

When there are several charged parties involved in a case and one or more becomes insolvent before paying its share, the unpaid amount should be solicited without delay from the other charged parties. (See Compliance Manual, Secs. 10596 and 10600 regarding issues of derivative liability and charged party's inability to comply, respectively.)

10130.8 Nonadmission Clauses

Nonadmission clauses should not be routinely incorporated in settlement agreements. A nonadmission clause may be incorporated in a formal settlement only if it provides for a court judgment. Sec. 10168, par. 10. It is Board policy that nonadmission clauses should not be included in notices. See *Independent Shoe Workers of Cincinnati, Ohio (U.S. Shoe Corp.)*, 203 NLRB 783 (1973). If it comes to the Regional Office's attention that the charged party intends to post a settlement agreement containing a nonadmission clause along with the notice, the Regional Office may wish to consider denying the charged party's request for the nonadmission clause. See *Bangor Plastics, Inc.*, 156 NLRB 1165 (1965), enf. denied 392 F.2d 772 (6th Cir. 1967). In the alternative, the Regional Office may require a clause in the settlement agreement that prohibits the Charged Party from posting such a settlement agreement with the notice.

10130.9 Position of Alleged Discriminatees

If the charged party wishes to know whether alleged discriminatees desire reinstatement and the amount of backpay due, every effort should be made to ascertain and convey this information. However, experience demonstrates that alleged discriminatees often defer taking a position on reinstatement until the charged party makes a bona fide offer of settlement. Moreover, no effort should be made to persuade the alleged discriminatees to waive reinstatement for the purposes of obtaining a settlement.

10131 Specific Remedies

Specific remedies may be appropriate in particular circumstances such as those described below.

10131.1 Remedies in First Contract Bargaining Cases

Serious harm to the collective-bargaining process may result from violations committed during initial contract bargaining and may warrant additional remedies. See GC Memo 06-05 and GC Memo 07-08. In order to directly and effectively address the consequences of bad-faith bargaining and other violations during first contract negotiations and restore the pre-violation conditions and relative positions of the parties, additional remedies should be considered, such as:

- Requiring bargaining on a prescribed or compressed schedule

- Requiring periodic reports on bargaining status
- A minimum six-month extension of the certification year
- Reimbursement of bargaining costs

10131.2 *Beck* Remedies

Cases involving *Beck* objectors, that is, nonmembers covered by a contractual union security clause who object to paying fees for union activities unrelated to collective bargaining, contract administration or grievance adjustment, often raise complex remedy issues. See e.g., *Communications Workers v. Beck*, 487 U.S. 735 (1988), and *California Saw & Knife Works*, 320 NLRB 224 (1995), enfd. sub nom. *Machinists v. NLRB*, 133 F.3d 1012 (7th Cir. 1998), cert. denied sub nom. *Stang v. NLRB*, 119 S.Ct. 47 (1998). The Regional Office should take care to follow the most recent Board decisions in formulating proposed settlements. See GC Memo 98-11 and any subsequent GC and OM Memos in this developing area.

10131.3 Exclusive Hiring Hall Remedies

In many instances, referrals to jobs pursuant to an exclusive hiring hall arrangement are made from a list based on seniority, the number of hours worked or other criteria. Careful consideration should be given to the hiring hall standing of the alleged discriminatee in settling this type of case. The settlement agreement, in addition to backpay, should provide that the alleged discriminatee be given credit in the hiring hall formula based upon the employment allegedly denied.

10131.4 Remedial Initiatives

The Agency has a responsibility to periodically reexamine and update its remedial strategies. Accordingly, the Regional Office should be alert to any remedial initiatives which the General Counsel has decided to pursue. Under most circumstances, before seeking a nontraditional remedy the Regional Office must first seek authorization from the Division of Advice. See GC Memos 00-03, 06-05, 07-07, and 07-08, and OM Memos 99-79 and 06-82.

10131.5 Decertification Petitions and Settlement Agreements

In settling unfair labor practice charges, Regional Offices should follow the guidance set forth below regarding pending or potential decertification petitions:

(a) Section 8(a)(5) Settlement and Affirmative Bargaining Provision: If a charge alleges a violation of Section 8(a)(5), particularly a unilateral change, and under the circumstances the remedy should include a reasonable period to bargain, the settlement agreement should require the employer to affirmatively bargain with the union. In the absence of such a requirement, the settlement may not serve as a basis for the dismissal of any decertification petition even if filed before the parties have had a reasonable period to engage in meaningful bargaining. See OM Memo 07-24.

(b) *Pending Decertification Petition and Taint*: Following the investigation of an unfair labor practice charge alleging that a pending decertification petition was tainted by employer conduct, such as a claim that the employer instigated the filing of the petition or solicited employees' support of the petition, the Regional Office should make an administrative determination as to the taint allegations. If the Regional Office decides that employer conduct tainted the petition, the Region should:

- Involve the petitioner in the settlement process in an attempt to obtain a withdrawal of the petition and/or
- Seek an admission of liability from the employer as a condition of settlement.

Absent withdrawal, the Regional Office should dismiss the petition setting forth the taint found in the administrative investigation. Such action is appropriate whether a settlement of the related unfair labor practice charge, with or without an admission of employer liability, is reached or the Regional Office issues a complaint. See OM Memo 07-69, Sec. 11733.2(a)(1), *Canter's Fairfax Restaurant*, 309 NLRB 883 (1992), and *Truserv Corp.*, 349 NLRB No. 23 (2007).

(c) *Pending Decertification Petition and Causal Nexus*: In the absence of taint, if the administrative investigation nevertheless establishes a causal nexus between a meritorious unfair labor practice allegation and a decertification petition, the Regional Office should:

- Involve the petitioner in the settlement process in an attempt to obtain a withdrawal of the petition and/or
- Seek an admission of liability from the employer as a condition of settlement.

If the settlement does not address the Regional Office's determination that the unfair labor practices were causally connected to the petition, the Region may decline to approve the settlement based on a finding that it would not effectuate the purposes of the Act. In such event, a subsequent *Saint Gobain* hearing to establish whether a causal nexus exists between the allegedly unlawful conduct and the petition may be necessary to determine whether the petition should be dismissed. Where a causal nexus has been administratively determined and the Regional Office intends to approve a settlement which would result in the processing of the petition, it should consult with Division of Operations-Management before approving the settlement. See OM Memo 07-69, Secs. 11730.3(c) and 11733.2(a)(3), and *Truserv Corp.*, 349 NLRB No. 23 (2007).

10132 Notices to be Posted

10132.1 Generally

Settlement agreements should provide for posting of a notice to employees or union members that reassures employees or employees and members of their rights under Section 7 and that outlines the action taken in connection with the settlement. The posting should be for 60 consecutive days, unless prior clearance has been obtained from the Division of Advice. GC Memo 00-03.

10132.2 Preparation and Forms

The notices to be posted should be prepared by the Regional Office on approved notice forms. OM 02-44. Posting of photocopies in lieu of the Agency furnished notice is not acceptable, as such would detract from the formality of the settlement.

Informal Settlement

Forms NLRB-4722 and 4724 (Notice to Employees)

Forms NLRB-4781 and 4782 (Notice to Employees and Members)

Formal Settlement

Forms NLRB-4727 and 4728 (Notice to Employees)

Forms NLRB-4758 and 4759 (Notice to Employees and Members)

The caption of a notice in a formal settlement should contain the following as appropriate:

“Pursuant to a stipulation providing for a Board Order” or
“Pursuant to a stipulation providing for a Board order and a
consent judgment of any appropriate United States Court of
Appeals”

10132.3 Notice Language

While there is considerable latitude in language to be used in the notice, Regional Offices should, in general, follow the substance of notices in Board orders in comparable cases. The notice language should be readily understandable to employees. See *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), and OM 02-43. Although it is proper to require the posting of a notice that declares publicly that a party will conform *in the future* to the mandates of the Act, it is improper to force a party to confess past guilt. *NLRB v. Express Publishing Co.*, 312 U.S. 426, 438–439 (1941). Thus, notices may not be phrased so as to require a charged party to admit a violation of the Act, either directly (e.g., “We violated the law when we fired John Smith.”) or by implication (e.g., “We will not fire anyone for union activity *again*.”).

10132.4 Posting/Dissemination of Notices

The appropriate method for traditional posting, electronic posting, mailing, and/or publication of notices depends on the type of charge and the circumstances as set forth below:

(a) *Traditional Posting*: During settlement discussions, the Board agent should obtain the charged party’s commitment to post the notices at specific places consistent

with posting requirements set forth in NLRB Form 4775, Settlement Agreement. The number of notices to be posted and the location of the posting will depend on various factors, including the size of the facility, the type of alleged violation and the extent to which knowledge of the alleged conduct was disseminated.

If the charged party is a union, notices should be posted by the union, both on bulletin boards located at its office and meeting halls, as well as at the facility of the employer involved, if possible. Signed copies of the notices should also be supplied for the employer to post at its facility, if willing.

Settlement agreements entered into in related CA and CB cases (where the employer and the union are jointly and severally liable) should provide for posting of both the charged union's notice and the charged employer's notice at the same places and under the same conditions.

(b) *Electronic Notice Posting:* In certain cases, it may be appropriate to seek electronic notice posting in addition to a traditional posting where the charged party customarily communicates with its employees or members electronically and/or where the charged party utilized its e-mail or intranet system in committing an unfair labor practice. OM Memo 06-82. Under such circumstances, the electronic posting would be considered an additional site where the charged party normally posts work-related notices. The following factors should be considered in this regard:

- The existence of a charged party's intranet and the frequency and types of postings included on that site
- The existence of a charged party's e-mail system, the frequency of the use of that system to make broadcast e-mails to groups of employees and the subject matters covered
- The number and accessibility of traditional notice-posting areas at the worksite and the degree to which employees work off-site or would otherwise be unlikely to see traditional notices

Such a posting would require the charged party to disseminate the notice electronically in the same manner as it communicates with employees or members. For instance, if the charged party routinely sends broadcast e-mails to employees or members it should notify all employees or members of the electronic posting via e-mail with the Board notice attached. If issues arise which require further analysis (e.g., the extent of an appropriate electronic posting where the charged party has multiple locations, all privy to same intranet, and the violations did not occur at all facilities), the Regional Office should contact the Division of Advice.

(c) *Mailing of Notice:* If it is apparent that a posting will not effectively reach the employees or members, consideration should be given to requiring the mailing of the notice to them at the charged party's expense.

(d) *Publication of Notice:* In unusual circumstances, the posting and/or mailing of the notice may be viewed as insufficient. Examples of such cases include an unlawful hiring hall that affected employment of persons who are widely scattered or unidentified, or where the unlawful activities involve general or widespread practices. In such cases, publication in a daily newspaper of general circulation, as opposed to publications serving only specialized groups of readers, should be required. Such publication should be at the charged party's expense and on 3 separate days within a 1-week period designated by the Regional Office. Such publication should be in addition to, not a substitute for, such other notice posting as is required by the circumstances.

10134 Parties to Informal or Formal Settlements

10134.1 Charged Party

The charged party is a necessary signatory to any informal or formal settlement.

10134.2 Charging Party

In all cases, it is desirable to have the charging party enter into a settlement, since a bilateral settlement reflects mutual satisfaction with resolution of the dispute and avoids delay in the implementation of the settlement resulting from dismissal of the charge and possible appeal.

If the charging party is unwilling to execute the proposed settlement agreement but the Regional Office nonetheless concludes that it is appropriate to accept it, the Regional Director or the Administrative Law Judge may approve a unilateral settlement. See Secs. 10150 and 10164.7 on informal and formal settlements, respectively.

A charging party which does not wish to enter into the agreement but has no real objections to the remedial action proposed may be willing to sign a separate document in which it acknowledges the contents of the agreement and that it has no objections to the agreement or will not appeal from a dismissal based on the settlement.

10134.3 Necessary Parties to Settlement

In every case in which the contemplated settlement provides for the disestablishment of a labor organization, or for the withdrawal and/or withholding of recognition from a labor organization, or for ceasing to give effect to part or all of an existing collective-bargaining agreement, both the employer and labor organization should be a party to the settlement. Thus, a necessary entity not charged in the case should execute the settlement as a party in interest.

Should such a party in interest decline to execute the settlement agreement, the agreement should not be approved unless:

(a) The party in interest files with the Regional Director a letter or other document stating that it has knowledge of the proceedings and of the contemplated settlement and that it waives any right to be a party to the proceedings or to contest the settlement or

(b) *Necessary Parties in CB Cases*: In the event a remedy is sought against an employer seeking reinstatement of an employee in the context of a CB complaint where no charge is filed against the employer, the employer must be named a party in interest and a prayer for remedial relief requesting reinstatement must be set forth in the complaint. *Teamsters Local 227 (American Bakeries)*, 236 NLRB 656 (1978).

10264.5 Naming Attorneys in the Complaint

Clearance from the Division of Operations-Management 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. 11752.

10266 Remedies and Circumstances Pled in Complaint

10266.1 Specific Remedies

When the remedy sought is in addition to that traditionally granted for the violations alleged, the complaint should contain a separate request for specific remedial relief in order to provide respondent adequate notice. See Secs. 10131, 10407.1, and 10410. Such a request should specifically reserve the General Counsel's right to subsequently seek, and the Board's right to ultimately provide, any other appropriate remedy.

10266.2 Strike Situations

In cases involving an unfair labor practice accompanied by a strike allegedly in protest thereof, the Regional Office should determine the nature of the strike. If the evidence supports a finding of an unfair labor practice strike, the Regional Office should allege such status in the complaint and seek an open-ended order requiring the reinstatement, on application, of all qualified striking employees.

Notwithstanding the above, the Regional Director has discretion not to plead and litigate the nature of the strike in a test of certification case where summary judgment is otherwise appropriate. Sec. 10282.1.

10266.3 Unlawful Fees, Dues, or Assessments

In cases where initiation fees, dues, or assessments are alleged to have been unlawfully collected, the complaint should describe the specific contract, arrangement, or practice by which the collections were made. An employer or union allegedly involved in such collection, but not named as a respondent, should be named as a party in interest in the complaint.

10266.4 Electronic Notice Posting

In certain cases, it may be appropriate to seek electronic notice posting in addition to traditional posting where the charged party customarily communicates with its employees or members electronically and/or where a charged party utilized its e-mail or intranet system in committing an unfair labor practice. OM Memo 06-82 and Sec. 10132.4(b).

10266.5 First Contract Bargaining Cases

In order to directly and effectively address the serious consequences of bad-faith bargaining and other violations during first contract negotiations and to restore the pre-violation conditions and relative positions of the parties, Regional Offices should consult GC Memos 06-05 and 07-08 and Sec. 10131.4 for remedies which should be sought and specifically pled where appropriate.

10266.6 Compound Interest on Board Monetary Remedies

In order to pursue the General Counsel's position that the Board should adopt a policy that incorporating quarterly compound interest on backpay and other monetary awards is necessary to fulfill the Act's remedial provisions of "make whole" relief, Regional Offices should follow the procedures set forth in GC Memo 07-07 in all future cases in which a monetary award is sought.

Thus, Regional Offices should plead a remedy of quarterly compounded interest in all such complaints and incorporate the model arguments in post-hearing briefs to the Administrative Law Judge and to the Board.

10266.7 Consolidating Compliance Issues

In appropriate circumstances, when consolidation will facilitate full resolution of a dispute, the Regional Director may consolidate compliance proceedings with underlying unfair labor practice proceedings. See Sec. 102.54(b) of the Board's Rules and Regulations and Secs. 10508.3 and 10646.3 of the Compliance Manual.

10268 Form and Service of Complaint

10268.1 Form of Complaint

The complaint is a formal document issued for the General Counsel by the Regional Director. Bearing the case caption, it sets forth the facts underlying the assertion of jurisdiction and the facts relating to the alleged violations by the respondent(s). The National Labor Relations Board Pleadings Manual-Complaint Forms, provides guidance in drafting complaints.

Where appropriate the complaint should contain a prayer for relief. Indeed, the complaint should set forth the requested remedy whenever any other than a routine remedy is sought. Where the Regional Office's determination of the need for a special remedy arises only after issuance of complaint, the respondent should receive prompt notification and the complaint should be amended.

APPENDIX 2

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-07

May 2, 2007

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

FROM: Ronald Meisburg, General Counsel

SUBJECT: Seeking Compound Interest on Board Monetary Remedies

The Board's current remedial policy includes requiring respondents to pay simple interest on the backpay and other monetary awards they must satisfy due to their unfair labor practices. In light of the fact that the Act's remedial provisions are designed to provide "make whole" relief, that policy is inadequate. This memorandum sets forth the new procedure Regions should follow in all future cases where a monetary award is being sought, which includes pleading a remedy of quarterly compounded interest in all complaints and incorporating certain model arguments into the briefs submitted to administrative law judges.

BACKGROUND

In Isis Plumbing & Heating Co., the Board first adopted a policy of charging interest on backpay awards to "bring[] its practice into conformity with general principles of law, . . . [and] achiev[e] a more equitable result."¹ The Board reasoned in part that such a policy served the equitable purpose of compensating a discriminatee for the lost use of his or her money.² Thus, the Board began to assess simple interest on backpay awards at an annual rate of six percent.³

Fifteen years later, in Florida Steel Corp., the Board decided that a flat, six percent rate of interest "no longer effectuate[d] the policies of the Act."⁴ The

¹ 138 NLRB 716, 720 (1962), enf. denied on other grounds 322 F.2d 913 (9th Cir. 1963).

² Id. at 718 (quoting United States v. United Drill & Tool Corp., 183 F.2d 998, 999 (D.C. Cir. 1950)).

³ Id. at 720-721. See also Seafarers Intl. Union, 138 NLRB 1142, 1142 fn.3 (1962) (Board extended policy of assessing interest at six percent per annum to other monetary remedies, which in this case involved employer-dominated union unlawfully exacting dues).

⁴ 231 NLRB 651, 651 (1977), enf. denied on other grounds 586 F.2d 436 (5th Cir. 1978).

Board noted that the six percent rate was below that charged by private lending institutions at the time and, therefore, a change was needed to “more fully compensat[e] discriminatees for their economic losses.”⁵ To accomplish this goal, the Board adopted the sliding interest scale used by the Internal Revenue Service (IRS) on a taxpayer’s overpayment or underpayment of Federal taxes.⁶ Because this new flexible interest rate more closely mirrored the private sector money market, it more suitably compensated discriminatees for the lost use of their money.⁷

Ten years later, in New Horizons for the Retarded, Inc., the Board changed its interest rate policy due to a change in IRS policy mandated by the Tax Reform Act of 1986.⁸ That Act uses the short-term Federal rate to calculate interest on the overpayment or underpayment of Federal taxes.⁹ The Board adopted the interest rate applicable to the underpayment of Federal taxes, i.e., the short-term Federal rate plus three percent.¹⁰ In doing so, it noted that this new rate had the same characteristics as the sliding interest scale adopted in Florida Steel, including the fact that it reflected, at least indirectly, the forces of the private money market.¹¹

In March 1992, the Board published a notice of proposed rulemaking that, among other things, sought to establish a policy of compounding interest on a daily basis for monetary remedies.¹² After receiving comments on the proposed rule, the Board declined to implement it.¹³

Since New Horizons, several General Counsels have recommended that the Board adopt a policy of awarding daily compounded interest. The Board

⁵ Id.

⁶ Id.

⁷ Id.

⁸ 283 NLRB 1173, 1173 (1987).

⁹ See 26 U.S.C. § 6621(a) (2000).

¹⁰ 283 NLRB at 1173.

¹¹ Id.

¹² See 57 Fed. Reg. 7897-7900.

¹³ See 63 Fed. Reg. 8890-8891 (1998) (officially withdrawing March 1992 notice of proposed rulemaking).

consistently has refused to change its policy, stating only that it is “not prepared at this time to deviate from our current practice of assessing simple interest.”¹⁴

THE GENERAL COUNSEL’S NEW POLICY

As one of my initiatives upon becoming General Counsel, I have taken a fresh look at Board remedies and considered whether they remain appropriate in the contemporary workplace. With specific regard to interest on judgments, I have examined the current practice of other agencies and courts that award monetary judgments for employment-related discrimination and have learned that, among other examples, the U.S. Department of Labor compounds interest on whistleblower protection claims, including those under the recently implemented Sarbanes-Oxley Act.¹⁵ Thus, I have concluded that the Board should also adopt a policy of compounding interest on all monetary awards. Such a policy is necessary to ensure that employees are properly compensated for the lost use of their money; since the common practice in private markets today is to assess compound interest on loaned funds,¹⁶ a Board order that includes only simple interest on a backpay award does not adequately compensate a discriminatee who borrowed funds from a private lending institution as a result of an unfair labor practice. A policy of compounding interest will bring the Board into line with the practice of other agencies and courts that enforce employment discrimination laws, including the recently implemented Sarbanes-Oxley whistleblower protection law.

¹⁴ Rogers Corp., 344 NLRB No. 60, slip op. at 1 (2005). See also Commercial Erectors, Inc., 342 NLRB 940, 940 fn.1 (2004); Accurate Wire Harness, 335 NLRB 1096, 1096 fn.1 (2001), enfd. sub nom. NLRB v. Accurate Tool & Mfg., Inc., 86 Fed. Appx. 815 (6th Cir. 2003) (unpublished decision); Alaska Pulp Corp., 300 NLRB 232, 232 fn.4 (1990), enfd. 944 F.2d 909 (9th Cir. 1991).

¹⁵ See Doyle v. Hydro Nuclear Services, 2000 WL 694384, at *15-16 (DOL Admin. Rev. Bd. May 17, 2000) (holding that quarterly compound interest is to be assessed on backpay awards due under whistleblower protection provisions of federal statutes administered by the Department of Labor), revd. on other grounds sub nom. Doyle v. U.S. Secretary of Labor, 285 F.3d 243 (3d Cir.), cert. denied 537 U.S. 1066 (2002). See also ALJD in Welch v. Cardinal Bankshares Corp., 2005 WL 4889000, at *20 (Dept. of Labor Feb. 15, 2005) (applying Doyle and requiring that interest be compounded quarterly on backpay owed to Sarbanes-Oxley discriminatee).

¹⁶ See S. Rep. No. 97-494(I), at 305 (1982), reprinted in 1982 U.S.C.C.A.N. 781, 1047 (“ . . . all interest payable under the internal revenue laws will be compounded daily. This adjustment will conform computation of interest under the internal revenue laws to commercial practice.”).

Therefore, Regions should begin seeking quarterly compound interest in all future unfair labor practice cases where a monetary award is available.¹⁷ Regions should plead this remedy in their complaints and should include in their briefs to administrative law judges a model brief section containing standard arguments in support of this new position. The model brief section will be supplied to Regions under separate cover. If a Region has any questions or concerns about this new policy, it should contact the Division of Advice.

/s/
R.M.

cc: NLRBU
Release to the Public

¹⁷ This policy is not to be applied retroactively. Furthermore, if a Region obtains an otherwise acceptable settlement offer but for the absence of quarterly compound interest, it may accept the settlement offer.

APPENDIX 3

public

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 02-43

March 11, 2002

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

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Plain Language In Board Remedial Notices

In *Ishikawa Gasket America, Inc.*, 337 NLRB No. 29 (December 20, 2001) the Board decided that the Board's notice language needed to be changed to more clearly and easily be understood by employees. Thus, the Board "embrace[d] the principle that notices will most effectively apprise employees of their rights, and of the unlawful acts of respondent employers or unions, when they are written in clear laypersons' language." *Id.*, slip op. at 2. However, as "neither the General Counsel nor the Charging Party ha[d] proposed . . . plain language they would have [the Board] adopt for the violations found," the Board did not award that remedy in that case. The Board did, nevertheless, "invite the General Counsel and other parties in future cases to suggest precise language as to the particular violations found." *Id.*, slip op. at 2, n. 8.

Accordingly, in all future cases, the Counsel for the General Counsel should affirmatively set forth in the brief the notice language that most clearly explains the alleged violations that are being remedied. The purpose of this memorandum is to provide guidance to Regional Offices as to what words and phrases are appropriate to be included in notices, in settlements and in proposed remedial notices in litigated cases ("Board notices"). The goal is to ensure that all notices are written in laypersons' language without legal jargon.

In many cases the Board already has adopted language that is tailored to the actions that were found to be violative and, therefore, more easily understood by employees. For example, in *Aluminum Casting & Engineering Co.*, 328 NLRB No. 2 (2000), the Board notice included language informing employees that the employer:

... WILL NOT ask that you report employees who "pressure" employees to support the Union.
... WILL NOT pay for damage to vehicles for employees who claim that the damage was caused by union supporters.
(Slip op. at 5)

Similarly, in *Branch 3126, National Association of Letter Carriers (United States Postal Service)*, 330 NLRB No. 85 (2000), and the notice included language stating that the union:

... WILL NOT refuse to sign Requests for Temporary Schedule Change for any employee because that employee is not a member of the union.
 ... WILL NOT instruct or attempt to cause the United States Postal Service to refrain from assigning penalty overtime to any employee because that employee is not a member of the union.

The virtue of these provisions is that they state clearly the precise nature of the unlawful conduct and the steps the employer or union will take to remedy that conduct, without phrasing it as a legal conclusion. The language in *Aluminum Casting & Engineering* is more informative than generalized statements that the employer will not interrogate employees about other employees' union activities, or that the employer will not, acting in a manner different from its past practice, grant unspecified benefits to encourage employees to accuse the Union of misconduct. The language in *Branch 3126, National Association of Letter Carriers* identifies specifically the nature of the unlawful conduct and, thus, is more informative than a general statement that the union will not discriminate against employees who are not members of the union.

Many other examples of plain language can be found in Board notices. What most have in common is their reliance on a specific and detailed description of the unlawful conduct, rather than statements phrased as general legal conclusions.

Although the Board often uses plain language in its notices, sometimes the notices depart from a description of the specific conduct prohibited to become mere general statements of legal principles. The above examples of a plain language notice may be contrasted with this language from the Board's notice in *Martech Medical Products, Inc.*, 331 NLRB No. 57 (2000):

... WE WILL NOT create the impression among our employees that their activities on behalf of the Union are under our surveillance.
 (Slip op. at 4.)

The plain language examples also contrast with the notice in *Communications Workers of America Local 3410 (BellSouth Telecommunications)*, 328 NLRB No. 135 (1999), which provided that the union:

... WILL NOT fail or refuse to process the grievance of [name of employee], or any other employee, for irrelevant, invidious, or unfair reasons.

These notices use terms that have specialized meanings, such as “surveillance” or “invidious,” and therefore are not the surest way to inform individual workers of the specific conduct that the Board order prohibits. The workers, who may not have access to the Board decision in which the misconduct is described, will be better served by notices that describe the particular conduct found unlawful. For example, the notice in *Martech Medical Products* could have said:

... WE WILL NOT create the impression that we are watching out for the union activities of our employees by telling employees we are aware that a list of union supporters is being passed around, by asking employees whether they know that a list of union supporters exists, or by telling employees that we are aware a large number of them support the Union.

The notice in *Communications Workers of America Local 3410* could have been written as:

... WE WILL NOT fail or refuse to process the grievance of [name of employee], or any other employee, because we dislike them, or because they opposed current officers of the union in a union election, or for any other unfair reasons.

Because the number of possible different notices is as broad as the variety of possible unfair labor practices, setting forth all, or even most, of the variations is not practical. However, the approach we are advocating is to tailor each remedial notice as much as possible to the particular facts of a case.

Despite this goal, there may be instances where general language is unavoidable. For example, there may be a case in which the number of violations of a particular type is so numerous that listing each would result in an unwieldy notice. Even in those cases, legalisms should be avoided. For example:

<u>Consider:</u>	<u>Instead of:</u>
“question” or “ask”	“interrogate”
“watch out for”	“engage in surveillance of”
“prevent employees from talking with one another about the Union”	“prohibit solicitation”
“refuse to give the Union information that it needs to represent you”	“refuse to furnish the Union with information that is relevant and necessary to its role as the exclusive representative of the unit”

	employees”
“fire”	“discharge” or “terminate”
“unfair” (accompanied by examples)	“irrelevant, invidious, or unfair.”

In drafting these notices one must be mindful that some legalisms, such as “interrogation,” “surveillance,” or “solicitation,” have taken on a specialized meaning in the context of years of Board decisions defining the terms. However, this need not discourage the use of plain language in Board notices. The Board *orders* define the legal rights and obligations of the parties, and need to contain certain formal expressions to ensure their proper enforcement. But this does not mean that the separate *notices* must be equally formal. Thus, the touchstone for using plain language is to tailor the language to the intended audience. A Board *order* being drafted for a formal settlement, or for an informal settlement that includes a provision for the automatic entry of a Board order and court judgment in the event of noncompliance, must be phrased so that it is susceptible to enforcement by the Circuit Courts of Appeals. However, the audience for a Board notice is the group of individuals to whom we are explaining legal rights. The Board explicitly recognized this distinction in *Ishikawa Gasket* when it observed that “while a Board Order must be precisely phrased so it can be enforced by a circuit court of appeals, a Board notice is directed at an audience that is better served by clear laypersons’ language.” *Id.*, slip op. at 2.

Also, the Board in *Ishikawa Gasket* expressly adopted the General Counsel’s recommendation “to substitute the following two paragraphs for the first two paragraphs currently used in Board notices:

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.”

Id., slip op. at 3.

Accordingly, all future Board notices should begin with that language. The Board also signified approval of a paragraph to be added to its notices that “describe[s] the function of the Board and its processes . . .” *Id.*, slip op. at 3. Regions should, therefore, include this language in each Board notice:

The National Labor Relations Board is an independent Federal Agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections

to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to an agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

[Insert address, phone number, and hours of operation of Regional Office in which the underlying charge was filed.]

Finally, the Board rejected the General Counsel's proposal to insert the following Spanish language statement in the Board notice in *Ishikawa Gasket*, but only on the basis that there was "no claim or showing in this case that this Spanish provision is needed to address the needs of the affected employees." *Id.*, slip op. at 3.

Si quiere, se puede hablar con un agente de La Junta Nacional de Relaciones del Trabajo en confianza. [A Board agent who speaks Spanish can be made available to speak with you in confidence.] La pagina electronica de red de la Junta Nacional de Relaciones del Trabajo tambien tiene informacion en espanol: www.nlr.gov. [Information in Spanish is also available on the Board's website: www.nlr.gov.]

In appropriate cases, the Region should propose the inclusion of this language, as well.

If you have any questions concerning this memorandum, the Region should contact the Division of Advice.

/s/

R. A. S.

cc: NLRBU
Release to the Public

MEMORANDUM OM 02-43

APPENDIX 4

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 06-82

August 15, 2006

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

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Electronic Notice-Posting

In Nordstrom, Inc., 347 NLRB No. 28, the Board recently denied the Charging Party's request for an intranet posting of the Board's notice to the employees, because the General Counsel and Charging Party had presented no supporting evidence at the unfair labor practice hearing that the Employer regularly communicated with its employees through its intranet. See also International Business Machines Corp., 339 NLRB 966 (2003) (observing that the Board's standard order, which requires a respondent to post notices "in conspicuous places including all places where notices to employees customarily are posted" has never been interpreted to require electronic posting, and declining to do so where the issue was not raised in the underlying proceedings).

The Nordstrom majority rejected Member Liebman's suggestion that the standard notice-posting language be modified to "require intranet posting when the employer communicates with its employees via an intranet," with the issue of whether in fact the employer so communicates being left to compliance proceedings. The majority noted that it wanted the benefit of a "concrete fact pattern" and full consideration of all arguments and pragmatic considerations, which would best be handled in an unfair labor practice proceeding, before determining whether the standard notice-posting remedy should be modified to require intranet or other electronic posting.

The Board specifically invited the General Counsel to propose such a modification in appropriate cases, and to adduce evidence in the unfair labor practice proceedings which demonstrates that the respondent "customarily communicates with its employees electronically."¹

Accordingly, Regions should investigate these issues when investigating the underlying case. Such evidence would include: (1) the existence of an employer intranet and the types of postings included on that site; (2) the existence of an employer e-mail system, any employer use of the system to make broadcast e-mails to groups of employees, and the kinds of subject matter covered in employer e-mails to employees;

¹ 347 NLRB No. 28, fn. 5.

and (3) the number and accessibility of traditional notice-posting areas in the employer's facility, and the degree to which employees work off-site or would otherwise be unlikely to see traditional notices. As usual, Regions should seek the employer's position on the propriety of electronic notice-posting in any case where it is being considered.

The Region may rely on affidavit testimony, but reasonable efforts should also be made to obtain more probative hard evidence (documentation) of the employer's intranet postings and e-mail usage. If the evidence in a particular case supports such a remedy, Regional Directors should specifically plead it as a requested remedy in the complaint and should adduce all relevant evidence at the hearings.²

Logistically, this remedy would require the Employer to publish the electronic notice in the same manner as it communicates with employees electronically. For instance, if the Employer routinely sends broadcast e-mails to employees it should notify all employees of the electronic posting via e-mail with the Board notice attached. The electronic posting would be in addition to the regular manual posting as it would be considered an additional site where employers normally post work-related notices. Also, if issues arise which require further analysis (e.g., the extent of an appropriate electronic posting where the employer operates multiple facilities, all privy to the same intranet, and the violations occurred at only one facility), the Regions should contact the Division of Advice.

/s/
R.A.S.

cc: NLRBU

MEMORANDUM OM 06-82

² In addition, Regions should continue to seek electronic notice-posting in all cases where the Employer utilized its e-mail system or an intranet in committing an unfair labor practice. See Public Service Co. of Oklahoma, 334 NLRB 487, 490-491 (2001).

APPENDIX 5

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 06-05

TO: All Regional Directors, Officers-in-Charge, and Resident Officers DATE: April 19, 2006

FROM: Ronald Meisburg, General Counsel

SUBJECT: First Contract Bargaining Cases

An important priority during my term as General Counsel will be to ensure (1) that employees have freedom of choice based on a timely opportunity to vote in Board-conducted elections in an uncoerced atmosphere and (2) that their decision in an election is protected by this Agency.

Initial contract bargaining constitutes a critical stage of the negotiation process because it forms the foundation for the parties' future labor-management relationship. As the Federal Mediation and Conciliation Service has observed, "[i]nitial contract negotiations are often more difficult than established successor contract negotiations, since they frequently follow contentious representation election campaigns."¹ And when employees are bargaining for their first collective bargaining agreement, they are highly susceptible to unfair labor practices intended to undermine support for their bargaining representative.² Indeed our records indicate that in the initial period after election and certification, charges alleging that employers have refused to bargain are meritorious in more than a quarter of all newly-certified units (28%). Moreover, of all charges alleging employer refusals to bargain, almost half occur in initial contract bargaining situations (49.65%). In addition, half of the Section 10(j) cases involving Categories 5 and 8, which deal with unfair labor practices that undermine incumbent unions, involve parties bargaining for first contracts.

In order to protect these new bargaining relationships, and therefore protect employee free choice, I am asking the Regional Offices to focus particular attention on remedies for violations that occur during the period after certification when parties are or should be bargaining for an initial collective bargaining agreement. As a major part of this remedial initiative, I want Regional Offices to consider two types of potential relief in cases involving initial contract bargaining violations: (1) Section 10(j) relief and (2) special remedies as part of the Board's order. I understand that these types of cases

¹ 57 FMCS Ann. Rep. 18 (2004).

² Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 373 (11th Cir. 1992). Accord: Ahearn v. Jackson Hospital Corp., 351 F.3d 226, 239 (6th Cir. 2003).

are sometimes not easy to prove, but I am committed to making the principle of employee free choice meaningful, and I ask for your input and support.

Concerning Section 10(j) relief, courts have long recognized the need for interim relief to protect the representational choice of employees. The Agency frequently has obtained temporary injunctions in cases involving violations of Section 8(a)(1), (3), and (5) during the period after certification. For example, in 2005, Region 29 successfully litigated a 10(j) case where, during negotiations for a first contract, the employer engaged in surface bargaining, discharged the union steward, and made promises of wage increases and promotions that were conditioned on employees voting to decertify the union. In another initial contract bargaining case in 2004, Region 20 won an injunction against an employer who engaged in surface bargaining, refused to provide requested information to the union, threatened employees with job loss, and discharged two open union supporters. Thus, the Section 10(j) program historically is well positioned to promote effective initial contract bargaining.

Special remedies can also be appropriate for unfair labor practices committed during initial contract bargaining. Regional Offices should routinely consider the possibility for special remedies for such cases, including seeking a new full certification year, notice reading and publication, union access to bulletin boards, and other means of communication. Other remedies could include periodic reports on the status of bargaining, and bargaining and/or litigation expenses.

The prelude to these first bargaining cases is the election, and we must do all in our power to assure that employees are able to vote promptly in elections in an atmosphere free from all unlawful interference and coercion. If interested parties must wait for a Board order to remedy violations committed during an organizing drive in order to have a fair election, the union's and the employer's right to conduct their respective campaigns will likely have been severely eroded, and the employees' right to make a fully informed choice on representation will likely have been undermined. Therefore, Section 10(j) relief should be considered in organizing campaign cases, especially where the union has filed an RC petition that is blocked by meritorious unfair labor practice charges. An interim injunction may restore the laboratory conditions needed to proceed to a timely election, pave the way to such an election, and even obviate the need for a Gissel bargaining order. In deciding whether §10(j) relief is appropriate in this type of case, Regional Offices should determine whether the organizing union is prepared to file a request to proceed to an election if the Board obtains appropriate 10(j) relief.

Finally, in order to assure consistent analysis and use of appropriate remedies in union organizing and initial contract bargaining cases, Regional Offices should submit the following cases for advice, with a copy to Operations-Management, for a six-month period ending on October 20, 2006:

1. All cases where Regional Directors have found merit to Section 8(a)(1), (3), or (5) or 8(b)(1)(A) or 8(b)(3) allegations after a union has been certified as the

bargaining representative of a unit and the union has requested bargaining for an initial collective bargaining agreement.³ The Regional Office should submit a memorandum that combines its analyses and recommendations concerning (1) what special remedies, if any, may be appropriate and (2) whether or not Section 10(j) relief is appropriate.

2. All meritorious cases where a union is actively engaging in an organizational campaign and the unfair labor practice activity has undermined employees' right to make a free and informed choice. These cases should be submitted for Section 10(j) consideration, with the Region's recommendation as to whether or not interim relief is appropriate.

If the Regional Office is recommending that Section 10(j) relief be authorized, it should submit the standard memorandum consistent with past practice. If the Regional Office is recommending against the authorization of Section 10(j) relief, it should submit a short memorandum explaining the basis for its recommendation and attaching the decisional documents (field investigative report, agenda outline, agenda minute) and the complaint. In first contract bargaining cases, these memoranda also should include a recommendation and analysis regarding the need for special remedies.⁴

If you have any questions concerning this initiative, please contact the Division of Advice. I greatly appreciate your efforts to accomplish the goals identified in this memorandum.

/s/
R.M.

cc: NLRBU
Release to the Public

MEMORANDUM GC 06-05

³ "Test of certification" Section 8(a)(5) cases should not be submitted. Rather, consistent with our Agency goals, they are to be processed as quickly as possible by means of summary proceedings. See OM 04-25, "Test of Certification Bargaining Order Summary Judgment Cases," February 12, 2004.

⁴ A Region need not submit merit cases in which the parties agree to a bilateral settlement before complaint issues.

APPENDIX 6

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-08

May 29, 2007

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

FROM: Ronald Meisburg, General Counsel

SUBJECT: Additional Remedies in First Contract Bargaining Cases

In GC Memorandum 06-05, I set forth a remedial initiative dealing with first contract bargaining cases intended to ensure that employees have freedom of choice on the issue of union representation, free of coercion by any party, and that their decision is protected by this Agency. As noted there, initial contract bargaining constitutes a critical stage of the negotiation process in that it provides the foundation for the parties' future labor-management relationship. Unfair labor practices by employers and unions during this critical stage may have long-lasting, deleterious effects on the parties' collective bargaining and frustrate employees' freely-exercised choice to unionize. For these reasons, GC Memorandum 06-05 instructed Regions to consider Section 10(j) relief and special remedies in first contract bargaining cases, and to submit to the Division of Advice all cases where Regional Directors found merit to post-certification Section 8(a)(1), (3), or (5), or 8(b)(1)(A) or 8(b)(3) allegations.

Our experience with these cases under GC Memorandum 06-05 has led me to conclude that additional remedial measures should be undertaken to adequately protect employee free choice in initial bargaining cases. This memorandum sets forth additional remedies that should regularly be considered in cases where unfair labor practices occur during first contract bargaining. By this memorandum, I am also extending for another six months the directive to submit all cases that involve violations during organizing campaigns or first contract bargaining to the Injunction Litigation Branch of the Division of Advice with a Regional recommendation on whether Section 10(j) relief is appropriate.

I. THE NEED FOR ADDITIONAL REMEDIES IN
INITIAL CONTRACT BARGAINING CASES

Where there are bad faith bargaining tactics or other violations in the initial bargaining process that substantially delay or otherwise hinder negotiations, merely ordering the parties to bargain may not return the parties to the status quo ante. I believe that additional measures are often necessary in these situations to truly restore the conditions and the parties' relationships to what would have existed absent the violations. With this object in mind, I instructed Regions in GC Memorandum 06-05 to consider special remedies in initial bargaining cases, such as seeking extension of the certification year, notice reading and publication, union access to bulletin boards, periodic reports on the status of bargaining, and bargaining/litigation expenses. Based on our experience under this remedial initiative, I have concluded that certain remedies specifically tailored to restore the pre-unfair labor practice status quo, make whole the affected parties, and promote good-faith bargaining should regularly be sought in initial bargaining cases where violations have interfered with contract negotiations.

The Board has in the past imposed remedies which, if uniformly applied, could assist in returning the parties to the pre-unfair labor practice status quo. The Board considers these remedies to be extraordinary relief, and has traditionally focused in its analysis on the egregiousness of the respondent's conduct, rather than the impact of the violations on employees' Section 7 rights and the collective-bargaining relationship. I believe that, in first contract bargaining cases, the primary focus should be on the need to restore the status quo and on tailoring make-whole remedies to restore the process of collective bargaining at this critical stage. Therefore, although the Board has so far applied additional remedies only occasionally, and then based on the egregiousness of the violations, we should seek them, and argue their necessity, based on the impact of the violations on the new collective-bargaining relationship.

In identifying which first contract bargaining cases may warrant additional remedies, Regions should focus on the effect of the unfair labor practices, whether committed by employers or by unions, on the bargaining process and the parties' relative bargaining strengths. Regions should consider whether first-contract bargaining violations are likely to irrevocably stymie the bargaining process by unduly delaying negotiations, unlawfully increasing the bargaining expenses of the other party, undermining the union's support, or otherwise causing a decline in a party's bargaining strength. High impact violations during first contract bargaining may include:

- Outright refusals to bargain or overall bad-faith bargaining that may be tantamount to a repudiation of the bargaining relationship.
- Refusals to meet at reasonable times, the use of bargaining agents without adequate bargaining authority, refusals to provide information that is critical for negotiations to proceed, or other tactics that prolong bargaining. By causing undue delay in negotiations, these violations unlawfully increase the other party's bargaining expenses and eventually erode their bargaining strength.
- Unilateral changes that inject extraneous issues into the negotiations. These unlawfully created issues distract from the legitimate issues dividing the parties at bargaining, making it more difficult for the parties to achieve a contract. Unilateral changes may also force unions to bargain from a position of disadvantage, render the unions powerless in the eyes of unit employees, and tend to erode employee support for the union at a time when the union has not had adequate opportunity to establish a strong relationship with the represented employees.
- Unlawful discharges of union supporters. Discharges may also significantly hamper negotiations by removing key supporters from the workplace where they serve as a source of information and communication between the unit and the Union. Discharges that involve employee-negotiators may impact bargaining not only by removing key individuals from the bargaining unit, but also by discouraging other employees from stepping into the discriminatees' bargaining role.

The probable result of these high-impact violations is a seriously damaged collective-bargaining relationship that is less likely to achieve the good-faith bargaining necessary to reach a first contract.

II. APPROPRIATE ADDITIONAL REMEDIES

The serious harm to the collective-bargaining process that may result from violations such as those committed during initial contract bargaining warrant remedies beyond the standard bargaining order. I believe that the remedies discussed below can directly and effectively address the consequences of bad-faith bargaining and other violations during first contract negotiations so as to more adequately restore the pre-violation conditions and relative positions of the parties. Accordingly, they should be considered by Regions in all appropriate cases:

1. Requiring Bargaining on a Prescribed or Compressed Schedule

Specific bargaining schedules have been used against recidivist employers, particularly in contempt proceedings, to bring them into compliance with their bargaining obligations. In this context, the Board, with judicial approval, has alternatively demanded that the parties meet at reasonable consecutive intervals,¹ for a minimum number of days per week,² or for a minimum number of hours per week,³ until an agreement or good-faith impasse is reached. These specific-schedule bargaining orders go further than traditional bargaining orders to minimize the potential for further delay, and help to secure a meaningful opportunity for bargaining.

These scheduled bargaining orders have not been generally sought in unfair labor practice complaints. Where they have been sought, administrative law judges or the Board have rejected them without substantive discussion.⁴ Nevertheless, I believe that these scheduled bargaining orders directly address the problem of improving the diminished chances of a bargaining unit attaining a first contract where there has been unlawful delay and bad-faith tactics. A specific bargaining schedule provides an effective and unburdensome means of improving employees' chances of achieving a first contract. While the exact nature of the bargaining schedule requested may vary depending on the particular circumstances of the case and will be determined in consultation with the Division of Advice, in recommending specific bargaining schedules in first contract bargaining cases Regions should consider the types of bargaining schedules granted in contempt situations.⁵

¹ See, e.g., NLRB v. Johnson Mfg. Co. of Lubbock, 511 F.2d 153, 156 (5th Cir. 1975); NLRB v. Metlox Mfg. Co., 1973 WL 3146 (9th Cir. Apr. 18, 1973).

² See, e.g., Straight Creek Mining, Inc. v. NLRB, 2001 WL 1262218 (6th Cir. May 11, 2001) (ordering bargaining at least one day per week); NLRB v. H&H Pretzel Co., 1991 WL 111249 (6th Cir. June 25, 1991) (three days per week).

³ See, e.g., NLRB v. Schill Steel Prods., 480 F.2d 586, 598 (5th Cir. 1973) (15 hours, unless the union agreed to less).

⁴ See, e.g., People Care, Inc., 327 NLRB 814, 827 (1999); Professional Eye Care, 289 NLRB 1376, 1376 fn.3 (1988).

⁵ See cases cited above, fns. 1-3.

2. Periodic Reports on Bargaining Status

In GC Memorandum 06-05, I discussed remedies requiring the respondent to provide to the Board periodic reports on the status of bargaining. While I believe that requiring bargaining according to a prescribed schedule will help to remedy the consequences of bargaining delays in initial contract bargaining, as discussed above, the additional requirement of periodic reports on bargaining status may be appropriate in cases where there is a reasonable concern that the respondent will repeat its unlawful conduct. It may be an appropriate remedy, for example, where the respondent has previously violated a Board order or settlement agreement.

3. A Minimum Six-Month Extension of the Certification Year

It has long been Board policy to ensure that newly-certified unions have the opportunity to focus solely on bargaining for at least one full year.⁶ To that end, the Board will not allow a union's majority status to be challenged within one year of certification in order to provide the union with "a reasonable period in which it can be given a fair chance to succeed."⁷ Consequently, where an employer's unfair labor practices delay good-faith bargaining during that period, the Board retains the discretion to extend the certification year.⁸ Although the Board sometimes exercises its discretion to extend the certification year for a full 12 months, even where there may have been some period of good faith bargaining,⁹ it frequently rejects such an extension.¹⁰ Rather, the Board considers the context of any particular refusal to bargain in deciding whether to grant a certification year extension, and if so, for how long, particularly taking into account "the nature of the violations; the number, extent, and dates of the collective bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations."¹¹

⁶ Brooks v. NLRB, 348 U.S. 96, 101-03 (1954); Kimberly Clark Corp., 61 NLRB 90, 92 (1945).

⁷ Centr-O-Cast, 100 NLRB 1507, 1508 (1952) (quoting Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944)).

⁸ Mar-Jac Poultry Co., 136 NLRB 785, 786-87 (1962).

⁹ Northwest Graphics, Inc., 342 NLRB 1288, 1289-90 (2004), enfd. mem. 156 Fed.Appx. 331 (D.C. Cir. 2005) (citing Glomac Plastics, 234 NLRB 1309 fn.4 (1978), enfd. in rel. part 592 F.2d 94, 101 (2d Cir. 1979)).

¹⁰ See, e.g., St. George's Warehouse, 341 NLRB 904 (2004) (extension of certification year not warranted where employer committed Section 8(a)(5) violations but did not engage in surface bargaining); Mercy, Inc., 346 NLRB No. 88, slip op. at 3-4 (2006) (granting only a 3 month extension where the record contained no explanation as to why the union did not seek bargaining during the first 10 months of the certification year); United Electrical Contractors Assn., 347 NLRB No. 1 (2006) (certification year extended only for a "reasonable period" after employer failed to provide relevant information).

¹¹ Mercy, Inc., 346 NLRB No. 88, slip op. at 3 (citing Northwest Graphics, 342 NLRB at 1289; Wells Fargo Armored Services Corp., 322 NLRB 616, 617 (1996)). Current Board members have emphasized that "the length of such an extension is not necessarily a simple arithmetic calculation." Northwest Graphics, Inc., 342 NLRB 1289. See also id.

The Board has recognized, however, that when unlawful bargaining has disrupted the bargaining relationship, parties need a reasonable period of time to resume their relationship.¹² Accordingly, it has often granted six-month extensions to remedy unlawful bargaining even where there has been lawful bargaining for more than six months during the certification year. In keeping with this approach, Regions should routinely seek minimum certification year extensions of six months in cases where unlawful bargaining in first contract negotiations disrupted the relationship, even where this may require overall bargaining for more than 12 months. I believe six months is the minimum time necessary to reestablish a solid initial bargaining relationship that has been undermined by the effects of the illegal bargaining tactics. At the same time, extending the period by six months, as opposed to a full year, would adequately accommodate employees' right to seek to decertify a union they no longer want to represent them. Certification year extensions of six months generally should be particularly valuable, especially when combined with prescribed bargaining schedules that may require more bargaining in a shorter timeframe.

Of course, in cases where there has been no meaningful bargaining post-certification, or where the unfair labor practices have eliminated any progress made during any period of good-faith bargaining, we will continue to seek 12-month certification year extensions to return the parties to the status quo ante.

4. Reimbursement of Bargaining Costs

The Board has ordered respondents in bad-faith bargaining cases to reimburse the other party for bargaining costs in order to restore the status quo ante. However, the Board has limited this remedy to cases of "unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies."¹³ The Board has applied this standard to both employers¹⁴ and unions¹⁵ that engaged in bad-faith bargaining, where there was

at 1291 (Chairman Battista, in dissent, stating that an extension's length "is not necessarily to be decided by arithmetic reasoning")

¹² See, e.g., Colfor, Inc., 282 NLRB 1173, 1175 (1987), enfd. 838 F.2d 164 (6th Cir. 1988) ("It is unreasonable to conclude that these parties could resume negotiations at the point where they left off over 2 years ago, or that fruitful negotiations could take place during a mere 2 months of bargaining after such a hiatus."); see also Beverly Health and Rehabilitation Services, 325 NLRB 897, 902-03 (1998), enfd. 187 F.3d 769 (8th Cir. 1999) (granting 6 month extension despite 9 months of good faith bargaining during the certification year); Dominguez Valley Hospital, 287 NLRB 149, 151 (1987), enfd. 907 F.2d 905 (9th Cir. 1990) (same).

¹³ Dish Network Service Corp., 347 NLRB No. 69, slip op. at 53 (2006) (quoting Unbelievable, Inc., 318 NLRB 857, 859 (1995), enforcement denied in part 118 F.3d 795 (D.C. Cir. 1997)).

¹⁴ Regency Service Carts, Inc., 345 NLRB No. 44, slip op. at 8-9 (2005).

¹⁵ Teamsters Local Union No. 122, 334 NLRB 1190, 1194-95 (2001), enfd. mem. 2003 WL 880990 (D.C. Cir. Feb. 14, 2003).

deliberate misconduct that was “calculated to thwart the entire collective-bargaining process and forestall the possibility of the Respondent ever reaching agreement.”¹⁶ Reimbursed costs have included employee negotiating committee members’ lost wages and union agents’ salaries, as well as mileage, meals, and lodging expenses incurred by the bargaining representatives in getting to the bargaining table.¹⁷

Under this rationale, reimbursement of bargaining costs is particularly appropriate where violations that amount to a complete repudiation of the employee-chosen bargaining relationship occur at a time when that relationship has not had an opportunity to establish itself and employees’ relationship with their chosen union is in a nascent stage.¹⁸ Due to the especially vulnerable status of a new collective-bargaining relationship, such unfair labor practices necessarily “infect the core of the bargaining process” to such an extent that their effects cannot be remedied by a mere bargaining order.

However, as mentioned above, I believe that the appropriate focus should be not on the egregiousness of the violations, but on the effect they have on the bargaining relationship and need for true make-whole relief. Thus, the critical factor in cases involving violations during first contract bargaining is that the violations cause the other party to waste resources in futile bargaining or efforts to enforce the bargaining obligation at a time when the new bargaining relationship is most vulnerable. These unlawfully-imposed costs may have long-lasting effect on the affected party’s economic strength.

Although the Board has stated that it “do[es] not intend to disturb the Board’s long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations[,]”¹⁹ a bargaining order alone may be insufficient to restore the status quo ante where cumulative illegal tactics significantly stall a newly-formed bargaining relationship.²⁰ A bargaining order alone will not make up for the unlawful costs on the affected party, who is forced to expend time and resources arranging, planning for, and participating in fruitless meetings. In such circumstances,

¹⁶ Unbelievable, Inc., 318 NLRB at 858.

¹⁷ See, e.g., NLRB v. Newton-New Haven Co., 1979 WL 4857 (2d Cir. June 18, 1979); NLRB v. Mr. F’s Beef and Bourbon, 1977 WL 4297 (6th Cir. Aug. 29, 1977); NLRB v. Johnson Mfg. Co., 511 F.2d 153, 157 & fn.4 (5th Cir. 1975).

¹⁸ It is well established that newly certified unions are very vulnerable to employer misconduct. See generally Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 373 (11th Cir. 1992), and Ahearn v. Jackson Hospital Corp., 351 F.3d 226, 239 (6th Cir. 2003). A bargaining order alone will not overcome the harm to the union, and its ability to reach a first contract, which result from employer failures to bargain in the critical post-election period.

¹⁹ Regency Service Carts, 345 NLRB No. 44, slip op. at 9 (citing Unbelievable, Inc., 318 NLRB at 859).

²⁰ In contrast, where parties have been able to continue negotiations, despite an employer’s unlawful unilateral changes, the Board has found that reimbursement of negotiating costs was not appropriate. Visiting Nurse Services of Western Mass., 325 NLRB 1125, 1133 (1998), enfd. 177 F.3d 52 (1st Cir. 1999).

reimbursement of bargaining costs is necessary to restore the parties to their lawful pre-violation position and fully counter the effects of the violations on employees' ability to reach an agreement. Where the investigation discloses bad-faith bargaining from the outset, we will seek negotiation costs for the full period of negotiations, rather than confining the requested order to the six month 10(b) period.²¹

III. SUBMISSION OF CASES TO THE DIVISION OF ADVICE

In order to assure consistent analysis and application of these additional remedies in initial contract bargaining cases, Regional Offices should submit to the Division of Advice all cases involving unfair labor practices during bargaining for, or attempts to bargain for, an initial contract. Because our prior experience has shown that Section 10(j) injunctive relief is often the most effective means of preventing potentially irreparable harm to bargaining relationships and restoring the lawful status quo ante, I am also directing the Regions to include in their submission their recommendation regarding Section 10(j) relief. Finally, our review of cases submitted for Section 10(j) consideration under our prior memorandum has led us to conclude that cases involving breaches of first contract settlement agreements are particularly appropriate subjects for Section 10(j) relief.

In short, for a period of six months after the date of this Memorandum, Regions should submit to the Division of Advice, with a copy to Operations-Management:

1. All meritorious cases involving unfair labor practices during bargaining for, or attempts to bargain for, a first contract.²² Regional submissions to the Division of Advice should include a summary of the violations to be alleged, a discussion of the impact of the violations on the bargaining relationship, the Region's recommendation on which, if any, of the additional remedies discussed herein are appropriate and why, and the Region's recommendation on whether Section 10(j) relief is appropriate.

As was the case with GC Memorandum 06-05, if the Region is recommending that Section 10(j) relief be authorized, it should submit the standard "go" 10(j) recommendation memorandum. If the Region is recommending against both 10(j) and any of the remedies discussed here, it should submit a short memorandum explaining the basis for its recommendation and attach the decisional documents (field investigative report, agenda outline, agenda minute) and the complaint. Recommendations to seek the final remedies discussed here should be treated as standard Advice submissions, including the parties' positions, if any, on the recommended remedies.

2. In continuation of GC Memorandum 06-05, all meritorious cases where a union is actively engaged in an organizing campaign and the unfair labor practice activity has undermined employees' right to make a free and informed choice should be submitted for Section 10(j) consideration, with the Region's recommendation on whether injunctive relief is appropriate.

²¹ The Board recently has indicated that this could well be appropriate in cases where "it may not be readily apparent until long after the negotiations have begun that bargaining has been in bad faith from the inception." Regency Service Carts, 345 NLRB No. 44, fn. 14.

²² A Region need not submit test of certification cases or other merit cases in which the parties agree to a bilateral settlement before complaint issues.

3. In crafting their recommendations regarding Section 10(j) relief for cases in either of the above categories, Regions should be cognizant that cases where there has been a breach of a settlement agreement may be particularly appropriate vehicles for injunctive relief.

/s/
R.M.

cc: NLRBU
Release to the Public

APPENDIX 7

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 08-09

July 1, 2008

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

FROM: Ronald Meisburg, General Counsel

RE: Submission of First Contract Bargaining Cases to
the Division of Advice

In GC Memorandum 06-05 dated April 19, 2006 and GC Memorandum 07-08 dated May 29, 2007, I set forth a remedial initiative dealing with first contract bargaining cases intended to ensure that employees have freedom of choice on the issue of union representation, free of coercion by any party, and that their decision in an election is protected by this Agency. In order to ensure consistent analysis and use of appropriate remedies in union organizing and initial contract bargaining cases, both memoranda instructed Regional Offices to submit certain cases, with a Regional Office recommendation, to the Division of Advice.

During the approximately 20-month period in which these two memoranda were in effect, the Division of Advice evaluated nearly 200 first contract initiative cases in which Regional Offices made recommendations concerning the appropriateness of additional remedies and/or Section 10(j) proceedings.¹ Although the number of cases in which the Division of Advice disagreed with the Regional Office recommendations was small, the review enabled further development of this initiative and refinement of the appropriate cases that warrant additional interim and final remedies.

As a result of this review, in first contract cases the Division of Advice authorized seeking Mar-Jac extensions from 6 to 12 months, bargaining schedules, multi-facility posting, union access to bulletin boards, payment of union negotiation expenses (including lost employee wages), and bargaining progress reports to the Region. Of these remedies, specific bargaining schedules were authorized in cases involving refusals to meet at reasonable times. In one case where the employer's contract with the Air Force had only a few months left to run, we sought a bargaining schedule of 12 hours per week in an effort to minimize the possibility that a change-over to a new contractor would occur without a bargaining relationship in place.² Similarly, the Division of Advice authorized that a specific bargaining schedule be sought in two cases where the employers engaged in some of the following conduct: repeatedly ignored

¹ In GC Memorandum 08-08, "Report on First Contract Bargaining Cases," dated May 15, 2008, I reported on our initial experience with this initiative.

² The case settled before Board authorization.

union requests to schedule bargaining sessions, cancelled sessions, arrived to sessions late, insisted that the union read its proposals aloud at the table, interrupted sessions with lengthy caucuses, and left sessions early. In one case, the Region was authorized to seek a bargaining schedule of 15 hours per week, including back-to-back sessions, and in another Advice authorized the Region to seek a minimum of two full days of bargaining per month. In both of these cases, we also sought reimbursement of bargaining expenses to the union as part of the Board's order. These unfair labor practices caused each union to expend resources in futile fruitless bargaining and amounted to a complete repudiation of the collective bargaining relationship.

The Division of Advice also authorized seeking the remedy of union access to employer bulletin boards. In one case, the employer made numerous threats of discharges and promises of benefits, and solicited employee signatures on an anti-union petition after the union was certified. The employer then closed and created an alter ego, which discharged all the employees and refused to recognize the union. Union access to bulletin boards was needed to increase the union's ability to communicate with the reinstated and new employees. The Board authorized the same access remedy in the Section 10(j) case.

From these examples and our review of the first contract initiative cases, several analytical principles emerged. First, the same investigative tools and analysis should be applied to Regional determinations concerning the need for additional remedies as to the determination concerning the need for Section 10(j) relief. Second, when the impact of unfair labor practices on the collective bargaining process requires additional remedies, those same impacts normally would warrant Section 10(j) relief as well. For example, if the adverse impact of a chronic refusal to meet is so significant as to warrant a bargaining schedule as part of the Board order, the same impact creates the need for a bargaining schedule now under a Section 10(j) injunction.³ Finally, in considering the impact of the allegations on collective bargaining and statutory rights, the Regions should consider the well established inferences of harm upon which courts have relied to grant Section 10(j) relief.⁴

In order to assure that the first contract initiative continues to be effective, for a period of six months after the date of this Memorandum, Regions should submit to the Division of Advice, with a copy to the Division of Operations-Management, first contract bargaining cases in which merit has been found involving the following unfair labor practices:

³ There may be unusual situations in which certain additional remedies sought in a complaint would not be warranted in a Section 10(j) case, particularly where the additional remedies address certain unfair labor practices not being alleged in the Section 10(j) proceeding.

⁴ Examples of situations where these inferences are particularly appropriate, with case citations, are described in GC Memorandum 07-01, "Submission of §10(j) Cases to the Division of Advice," December 15, 2006, pp. 2-3.

- Chronic delay in meeting or outright refusal to meet at reasonable times
- Refusal to provide information needed for bargaining
- Surface bargaining
- Unilateral changes
- Discharge of union leaders/negotiators/key supporters
- Mass discharges
- Discriminatory or otherwise unlawful subcontracting of bargaining unit work that decimate or eliminate the unit itself
- Tainted withdrawal of recognition at the end of the certification year
- Breaches of settlement agreements during initial contract bargaining

Except for the submissions requirements outlined above, other mandatory submissions set out in GC Memorandum 06-05 are no longer required.⁵ Regional submissions to the Division of Advice should include a summary of the violations to be alleged, a discussion of the impact of the violations on the bargaining relationship and/or employee support for the union, the Region's recommendation on which, if any, additional remedies are appropriate and why, and the Region's recommendation on whether Section 10(j) relief is appropriate.

If the Region is recommending that additional remedies and Section 10(j) relief be authorized, it should submit the standard 10(j) recommendation memorandum. If the Region is recommending against both 10(j) and additional remedies, it should submit a short memorandum explaining the basis for its recommendation and attach the decisional documents (field investigative report, agenda outline, agenda minute) and the complaint. Recommendations to seek additional remedies should be treated as standard submissions to the Division of Advice, including the parties' positions, if any, on the recommended remedies.

If you have any questions concerning this memorandum, please contact the Division of Advice.

/s/
R.M.

cc: NLRBU
Release to the Public

MEMORANDUM GC 08-09

⁵ As stated in GC Memo 06-05, "test of certification" Section 8(a)(5) cases should not be submitted. Rather, consistent with our Agency goals, they are to be processed as quickly as possible by means of summary proceedings. See OM 04-25, "Test of Certification Bargaining Order Summary Judgment Cases," February 12, 2004. In addition, a Region need not submit merit cases in which the parties agree to a bilateral settlement before complaint issues.