NLRB DIVISION OF JUDGES BENCH BOOK SUPPLEMENT—2005

(This is a supplement to the existing Bench Book and its September 9, 2001 page supplement, covering cases and materials through December 2005. Topics are pegged to section headings in the existing Bench Book)

SECTION 2-300—REGULATING THE COURSE OF THE TRIAL—In *University Medical Center*, 335 NLRB 1318 fn. 1, 1343 (2001), enf'd in part 335 F.3d 1079 (D.C. Cir. 2003), the Board recognized that, in the proper circumstances, it is appropriate for the judge to place time limits on the presentation of a party's case. Here, the judge imposed a time limit on the presentation of the Respondent's case in chief after concluding its case was taking too much time in proportion to the valid issues presented and there was no reasonable alternative except to impose such a limit.

SECTION 2-510—ALJ DISQUALIFICATION—GROUNDS ASSERTED FOR DISQUALIFICATION—In *Waterbury Hotel Management, LLC v. NLRB*, 314 F.3d 645, 650-651 (D.C. Cir. 2003), the Court rejected a respondent's contention that the judge deprived it of a fair hearing because of bias. The Court noted that a judge may not be disqualified simply because he presided over the remand of a case in which he previously ruled against the same employer; thus, in the instant case, it was not error for a judge not to recuse himself simply because he had ruled against the respondent's predecessor in an unrelated case. The Court also reaffirmed that adverse findings alone do not support a finding of bias. Finally, the Court held that it is not per se disqualifying for a judge to adopt one side's post-hearing brief "more or less verbatim," although this practice is frowned upon; in the instant case, the Board independently reviewed the entire record before affirming the judge. For a similar view on the adoption of briefs, see *Fairfield Tower Condominium Ass'n*., 343 NLRB No. 101 fn. 1 (2004).

But see *Dish Network Service Corp.*, 345 NLRB No. 83 (2005), where the Board found that the judge, who had previously been warned against this practice in *Fairfield Tower*, copied so extensively from the briefs of the General Counsel and the Charging Party that it created the appearance that the judge's decision was not impartial. According to the Board, the judge's extensive and verbatim copying gave the impression that the judge "failed to conduct an independent analysis of the case's underlying facts and legal

issues." The Board therefore set aside the judge's decision and remanded the case to a new administrative law judge for an independent review of the record and the preparation of a new decision. The Board took the same approach in *J.J. Cassone Bakery, Inc.*, 345 NLRB No. 111 (2005), another case involving the same judge. See also **SECTION 12-401**(new section), infra.

ALJ DISQUALIFICATION—GROUNDS ASSERTED FOR DISQUALIFICATION—JUDGE SHOULD AVOID INTEMPERATE COMMENTS TO GUARD AGAINST EVEN THE APPEARANCE OF BIAS—In *Victor's Café 52, Inc*., 338 NLRB 753, 756-757 (2002), the Board cautioned a judge against making intemperate comments about a witness and counsel for the General Counsel to avoid giving even the appearance of bias. In that case, the Board affirmed the judge's credibility determinations, but expressed its concern that such comments might compromise the integrity of the Board's decision-making processes.

See also *St. Mary's Acquisition Co*., 342 NLRB No. 100 (2004), where the Board, in response to a motion by the General Counsel to disqualify the judge, and by a 2-1 margin, cited a judge's erroneous ruling, adhered to after an initial remand, and allegations that the judge showed "irritation" and "impatience," in support of a second remand, this time to another judge. The Board did this in order to remove any suggestion of bias or prejudice, without specifically passing on the motion itself. See fn. 6 at slip op. 2.

SECTION 3-220—AMENDMENTS TO COMPLAINTS—WHEN AMENDMENTS ARE ALLOWED—CLEARLY RELATED DOCTRINE—SECTION 10(b)—In *Precision Concrete*, 337 NLRB 211 (2001), enforcement denied in pertinent part, 334 F.3d 88 (D.C. Cir. 2003), the Board reaffirmed and applied its *Redd-I* rule (290 NLRB 1115, 1118 (1988)) to find that an amended complaint allegation was closely related to an existing complaint allegation and therefore was not time-barred under Section 10(b) of the Act. The Board found that the otherwise untimely allegation involved the same legal theory as the timely allegation, it arose from the same factual situation or sequence of events and the respondent basically would raise similar defenses to both allegations. See also *Kentucky Tennessee Clay Co.*, 343 NLRB No. 102, slip op. 2 (2004).

SECTION 3-340—AMENDMENTS TO COMPLAINTS—DE FACTO AMENDMENTS—UNPLEADED BUT FULLY LITIGATED—In *Desert Aggregates*, 340 NLRB No. 38, slip op. at 4-5 (2003), modified on reconsideration, 340 NLRB 1389 (2003), the Board, citing relevant authority, set forth the following general principles: The Board "may find a violation not alleged in the complaint, even where the General Counsel has not filed a motion to amend, if the issue is closely related to the subject matter of the complaint and has been fully and fairly litigated." According to the Board, the fully litigated requirement is met if the respondent's witness testified to the facts giving rise to the unalleged violation, no party objects, and the respondent has had an opportunity to further explore the issue. However, the Board also considers whether the absence of a specific allegation precluded a respondent from presenting exculpatory evidence or whether respondent would have altered its conduct of the case at the hearing, had a specific allegation been made. Thus, an unalleged violation is not necessarily fully litigated simply because the facts giving rise to it emerge incidentally during the hearing. In *Desert Aggregates*, the Board denied the General Counsel's motion to amend made in a post-hearing brief because, in its view, the evidence about captive audience meetings, which contained a statement allegedly constituting a violation not contained in the complaint, emerged incidentally, the respondent did not have notice that the statement was at issue, and, thus, the failure to specifically allege a violation may have hindered respondent's defense. Accordingly, the Board found that the matter was not fully litigated.

In *Champion International Corp.*, 339 NLRB 672 (2003), the Board, in a 2-1 decision, declined to find that an unpleaded allegation of direct dealing had been fully and fairly litigated, although the complaint alleged, and the Board found, unilateral action in violation of the Act. The Board held that the facts supporting that violation would not support a separate finding of direct dealing, absent a specific complaint allegation or amendment to that effect. There was no full and fair litigation of the direct dealing theory, according to the majority, because the respondent was not made aware that the facts relevant to the unilateral change allegation were intended to prove a separate direct dealing allegation. The Board stated, "It is axiomatic that a respondent cannot fully and fairly litigate a matter unless it knows what the accusation is." 339 NLRB at 673. See also *Lamar Advertising of Hartford*, 343 NLRB No. 40, slip op. 5-6 (2004).

Compare *Airbourne Freight Corp.*, 343 NLRB No. 72 (2004), where the Board approved a judge's finding that a Section 8(a)(4) violation, which was not specifically alleged in the complaint, was fully litigated. The complaint alleged, and the judge found, based on an admission by a supervisor, that the respondent violated Section 8(a)(1) of the Act by telling an employee that he would not be transferred because he had filed charges; the complaint alleged, and the judge also found, that respondent in fact prevented the transfer for anti-union discriminatory reasons in violation of Section 8(a)(3) of the Act. The Board found that the supervisor's statement demonstrated that in preventing the transfer respondent was motivated not only by union considerations but also by the fact that the employee filed charges. According to the Board, although the judge's discussion of the Section 8(a)(4) violation focused on the supervisor's statement, it clearly covered the respondent's discriminatory actions, and the parties litigated the facts material to that issue "thoroughly and without objection in connection with the Section 8(a)(3) violation." Thus, the Board found that the judge "did not exceed his discretion in finding a violation of Section 8(a)(4), as to the statement, even absent a specific complaint allegation," citing *Pergament United Sales, Inc.*, 296 NLRB 333, 334-335 (1989), enfd. 920 F.2d 130 (2nd Cir. 1990). See also *Atlantic Veal & Lamb, Inc.*, 342 NLRB No. 37 at fn. 5 (2004), enf'd mem. 2005 WL 3309307 (D.C. Cir. October 27, 2005).

In *U.S. Postal Service*, 345 NLRB No. 100 (2005), the Board upheld a finding that the Postal Service and its union violated the Act by enforcing a contract provision against two employees that limited training instructor positions to union members. But the Board refused to remedy that violation by affirmatively and broadly ordering reinstatement for unidentified but similarly situated employees who were also denied those positions. The Board noted that the complaint alleged a violation only with respect to the two named employees and a broader violation was neither alleged nor fully and fairly litigated. It was not sufficient that a provision of the complaint sought the broader remedy for additional employees because, as the Board stated, that provision "did not address the threshold issue of what unfair labor practices the complaint alleged."

SECTION 3-500—ANSWER TO COMPLAINT—ADMISSIONS IN ANSWER—WAIVER OF AFFIRMATIVE AND OTHER DEFENSES—In *C.P. Associates, Inc.*, 336 NLRB 167 (2001), the Board reaffirmed that "an admission is in effect a confessory pleading and it is conclusive upon the party making it." Thus, the judge and the Board were entitled to rely on the

respondent's admission in its answers that it terminated an employee "on or about" a certain date. As the Board stated, "admissions contained in pleadings are binding even where the admitting party later produces contrary evidence." See also *Harco Trucking, LLC*, 344 NLRB No. 56 (2005), collecting cases. In *Harco*, respondent raised a corporate non-existence defense for the first time in its post-hearing brief to the judge, but had admitted its existence in its answer. Respondent did not seek to amend its answer at the hearing and it first raised the defense in its post-hearing brief to the judge. The Board found that to be untimely and ruled that the defense was waived in the circumstances. Accord: *Dayton Newspapers, Inc.*, 339 NLRB 650, 653 fn. 8 (2003), enfd 402 F.3d 651 (6th Cir. 2005) (Section 10(b) defense, an affirmative defense raised for the first time in a post-hearing brief to the judge, is waived). See also, infra, **SECTION 13-245**.

SECTION 3-650—REVIVAL OF WITHDRAWN OR DISMISSED CHARGE—DUCANE HEATING RULE PREVENTING REINSTATEMENT OF DISMISSED CHARGES AFTER PASSAGE OF 6 MONTHS—The rule in *Ducane Heating*, 273 NLRB 1389 (1985), enf. mem. 785 F.2d 304 (4th Cir. 1986), prevents the General Counsel from reinstating dismissed charges once 6 months have passed even if the charges were timely filed. See *Machinists v. NLRB*, 130 F.3d 1083 (D.C. Cir. 1997). But the situation is different if an appeal of the dismissal remains pending before the General Counsel when the charge is reinstated. In that case, the General Counsel may reinstate the dismissed charge because "there is no basis for concluding that 'dead' allegations were being revived." *Sioux City Foundry*, 323 NLRB 1071 (1997).

SECTION 3-720—OTHER AFFIRMATIVE DEFENSES—LACHES—In an unpublished order (*Gruma Corp.*, Cases 28-CA-17946 et al., March 15, 2005), the Board denied that part of a respondent's motion for summary judgment asserting that a complaint allegation should be dismissed because of laches. The Board stated that "laches may not defeat the action of a governmental agency in enforcing a public right," citing *Harding Glass Company, Inc.*, 337 NLRB 1116, 1118 (2002), enf'd in part 80 F.3d 7 (1st Cir. 1996). But it also recognized that laches could "apply against the Board for inordinate delay in bringing an action," provided that a party showed it was prejudiced by the delay, citing *Pleasantview Nursing Home, Inc. v. NLRB*, 351 F.3d 747, 765 (6th Cir. 2003) and other authorities. In *Gruma*, the Board found that the respondent had not made such a showing in the absence of a resolution of factual issues. In another unpublished order (*The*

Hardaway Company, 12-CA-19952, July 31, 2003), the Board found "genuine issues of material fact with respect to the reasonableness of the General Counsel's delay in issuing a complaint . . . and whether [the respondent] was unduly prejudiced by the delay." The Board thus ordered a hearing on only that issue, recognizing that such a bifurcated hearing was contrary to the Board's usual practice set forth in *F.M. Transport, Inc.*, 302 NLRB 241 (1991). The Board did so in *Hardaway* because of the particular circumstances involved, including the assertion that witnesses were deceased or unavailable, that respondent was no longer in business and that the hearing on the merits, which could be somewhat lengthy, was not scheduled to begin for several months.

SECTION 3-750—OTHER AFFIRMATIVE DEFENSES—RELITIGATION OF ISSUES—COLLATERAL ESTOPPEL—BOARD'S FINDINGS IN EARLIER CASE CAN BE USED AS FINDINGS IN SUBSEQUENT CASE—In *Great Lakes Chemical Corp.*, 300 NLRB 1024, 1025 and fns. 3 and 4 (1990), enf'd 967 F.2d 624 (D.C. Cir. 1992), the Board granted summary judgment on General Counsel's motion, holding that the Board's findings in an earlier case could be used as a basis for findings in a subsequent case involving the same parties. The respondent was collaterally estopped from relitigating the facts in the earlier case. See also, infra, **SECTION 9-850 (**new section**).**

SECTION 4-500—SERVICE OF DOCUMENTS—DETERMINING DATE OF SERVICE—FAX—In *Hardesty Company*, 336 NLRB 258, 259 (2001), enf'd 308 F.3d 859 (8th Cir. 2002), the Board found that the judge properly inferred that the union had served the employer with an information request by fax. The union's fax confirmation report, which was introduced in evidence, was sufficient to create a presumption that the employer's lawyer received the fax. The lawyer's non-testimonial denial at trial was not sufficient to rebut the presumption. See also, infra, **SECTION 13-236** (new section).

SECTION 6-302—REQUESTS FOR CONTINUANCE TO OBTAIN COUNSEL—WHEN COUNSEL OR PARTY LEAVES TRIAL AFTER REQUEST IS DENIED—In *Ethan Enterprises, Inc*., 342 NLRB No. 15 at fn. 2 (2004), enf'd mem. 2005 WL 3037451 (9th Cir., November 14, 2005), the Board approved the judge's decision to proceed with a hearing after respondent's attorney abruptly left in the middle of the hearing after an

adverse ruling. The attorney agreed to explain to his client that the hearing was going to proceed in his absence. See also, infra, **SECTION 7-220.**

SECTION 7-220—FAILURE OF PARTY TO APPEAR AT TRIAL—ABSENCE OF RESPONDENT'S ATTORNEY—See discussion at **SECTION 6-302**, supra, and **SECTION 11-350** (new section), infra.

SECTION 7-300—RIGHTS OF CHARGING PARTIES AND DISCRIMINATEES—ONLY GENERAL COUNSEL CONTROLS THEORY OF THE CASE AND CAN MOVE TO AMEND COMPLAINT—In *Local 282 Teamsters*, 335 NLRB 1253, 1254 (2001) the Board reaffirmed the principle that the General Counsel, not the Charging Party, determines the theory of the case. Citing *GPS Terminal Services*, 333 NLRB 968 (2001), the Board stated that a judge has no authority to amend a complaint in a manner that was neither sought nor consented to by the General Counsel, even where the record evidence would support the additional allegations.

SECTION 7-500—MISCONDUCT BY ATTORNEY, REPRESENTATIVE OR PERSON—In two recent cases, the Board has stated that judges, who observe or document what they think is actionable misconduct by an attorney or other person, should file, directly and separately, any recommendation for discipline with the Board's investigating officer, under Section 102.177(e) of the Board's Rules and Regulations. In those cases, the judges had recommended, in their decisions, that the Board refer the matter to the investigating officer and the Board did so, without passing on the recommendation. See *675 West End Owners Corp.*, 345 NLRB No. 27, slip op. 2-3 (2005); and *McAllister Towing & Transportation*, 341 NLRB No. 48, slip op. 5 at fn. 7 (2004), enf'd mem. 2005 WL 3263835 (2nd Cir. November 30, 2005). See also *Smithfield Packing Co.*, 344 NLRB No. 1, slip op. 14 at fn. 59 (2004) (In referring the matter, Board agreed with judge's recommendation).

In *675 West End Owners*, the Board also pointed out that the judge has the authority, under Section 102.177(b), to admonish any person for misconduct during a hearing. In that same case, the Board approved the judge's imposition of litigation costs on the offending party for misconduct (violation of the judge's instructions regarding subpoenas) that may have led to additional costs for the charging party and the General Counsel. 345

NLRB No. 27 at slip op. 3 and fn. 11. See also discussion of *675 West End Owners* in **SECTION 8-631**(new section), infra.

SECTION 8-110 (new section)—SUBPOENAS—In *Electrical Energy Services*, 288 NLRB 925, 931 (1988), the Board held that a charging party union cannot obtain by subpoena information it alleges the employer unlawfully withheld and is also the subject of the unfair labor practice complaint.

SECTION 8-210—GROUNDS FOR REVOKING SUBPOENAS—In *Brink's Inc.*, 281 NLRB 468 (1986), the Board set forth some general principles with respect to the grounds for revoking subpoenas and the interrelationship between the Board's rules on subpoenas and the Federal Rules of Civil Procedure. For example, in determining whether a subpoena should be revoked under the "any other reason sufficient in law" language of Rule 102.31(b) of the Board's Rules, the Board suggested that it would look to the Federal Rules of Civil Procedure for "useful guidance," even though the FRCP are not binding on the Agency.

A subpoena is not "unduly burdensome" simply because it requests a large number of documents. *McAllister Towing & Transportation Co*., supra, 341 NLRB No. 48, slip op. 4 (2004).

SECTION 8-330—SUBPOENAS—PROTECTING INTEGRITY OF MATERIAL—PROTECTIVE ORDERS—It is clear that Board administrative law judges have the authority to issue protective orders in appropriate circumstances. *Local 917, Teamsters (Peerless Importers)*, 345 NLRB No. 76 at fn. 7 (2005)

A party seeking a protective order in connection with subpoenaed documents that might arguably involve confidential material bears the burden of establishing good cause for such an order within the meaning of Rule 26(c) of the Federal Rules of Civil Procedure. Under Rule 26(c)(7), a protective order may be issued to preclude revelation of a trade secret or other confidential research or development information, or to provide that "commercial information not be revealed or be revealed in a designated way." If it is determined that such an order is appropriate, the judge may ask the party seeking the order to submit a proposed protective order. The judge can then tailor the order to meet the legitimate needs of the moving party and the possible objections of other parties. Protective orders generally limit

the persons who are to have access to the information and the use to which these persons may put the information. FRCP 26(c)(8) also provides that the protected documents may be placed in "sealed envelopes to be opened as directed by the court."

The following are examples of protective orders issued in Board cases:

(1) *AT&T Corp.*, 337 NLRB 689, 693, fn 1 (2002): "The exhibits in this proceeding are covered by a protective order issued by me, and no exhibits are to be furnished to outside sources pursuant to the Freedom of Information Act or pursuant to other requests."

(2) *National Football League*, 309 NLRB 78, 88 (1992): "It is ordered that the protective order entered into during the hearing prohibiting the parties from disclosing the contents of certain testimony be continued in full force and effect and that all exhibits introduced into evidence under seal will continue to be maintained under seal and that portions of the transcript of the hearing held during *in camera* sessions will not be open to the public."

(3) *United Parcel Service*, 304 NLRB 693, 693-694 (1991): The judge ruled that certain subpoenaed documents should be produced, over respondent's objection, but directed that "their use shall be limited to this hearing and shall neither be disclosed nor disseminated to other than counsel of record at this hearing." Two of the documents were later admitted into evidence. The issue in the case was whether the protective order was violated by use of the documents in another proceeding. The Board held that, because the judge did not order that the documents received in evidence be sealed and the respondent's attorney did not request a seal, their use, in another case, after the close of the hearing, by the charging party's attorney, was not improper. The Board noted that the judge "failed . . . to continue adequately the protection afforded by his extant order."

The *United Parcel* case, discussed above, also notes that the violation of a protective order may be enforced by processing a charge of misconduct under Section 102.177 of the Board's rules and regulations.

As *United Parcel* further illustrates, protective orders may also be used to restrict the use of documents that have been admitted into evidence. See **SECTION 13-237** (new section), infra.

SECTION 8-400—PRIVILEGED MATERIAL—Insofar as a party contends that material within the scope of the subpoena is privileged, the

material should be submitted to the judge for an in camera inspection before a ruling on a petition to revoke is made. *Brink's, Inc*, supra, 281 NLRB 468, 470 (1986). If the party refuses to submit the material for in camera inspection, an adverse inference may be drawn. *University Medical Center*, supra, 335 NLRB 1318, 1335 (2001).

SECTION 8-410—SUBPOENAS—ATTORNEY-CLIENT PRIVILEGE—The privilege applies only to communications and not to facts. A witness may not refuse to disclose facts within his own knowledge simply because he incorporated those facts into a communication with his attorney. *Sunland Construction Co.*, 311 NLRB 685, 699-700 (1993), quoting from *Upjohn Co. v. U.S.*, 449 U.S. 383, 396-397 (1981). The privilege may, of course, be waived, either deliberately or by inadvertence or failing to safeguard the material. Thus, in *Farm Fresh, Inc.*, 301 NLRB 907, 917 (1991), the Board held that the privilege did not apply when a document, arguably subject to the privilege, was stolen and given to the union. The respondent was required to safeguard the document. For an in-depth analysis of attorney-client and work product issues, see *Epstein, The Attorney-Client Privilege and the Work-Product Doctrine, Fourth Edition, ABA Section of Litigation* (2001). See also, infra, **SECTION 8-450** (new section).

In an unpublished order (*Tri-Tech Services*, 15-CA-16707 (July 17, 2003)), the Board set forth the following general principles and procedures for presenting and deciding attorney-client privilege issues: "A party asserting the attorney-client privilege bears the burden of demonstrating the essential elements of the privilege—that there was a communication between client and counsel, that the communication was intended to be and was in fact kept confidential, and that the communication was made for the purpose of obtaining or providing legal advice. See *U.S. v. Construction Products Research, Inc.*, 73 F.3d 464, 473 (2d Cir. 1996), cert. denied 519 U.S. 927 (1996)." The Board also set forth the requirement that the party asserting the privilege must provide an index, identifying the allegedly privileged documents and the parties to each of the communications and providing sufficient detail to permit an informed decision as to whether the document was at least potentially privileged, citing *Construction Products*, supra, and Fed. R. Civ. P. 45(d)(2). Specifically, the index must include "(1) a description of the document, including its subject matter and the purpose for which it was created; (2) the date the document was created; (3) the name and job title of the author of the document; and (4) if applicable, the name and job title of the recipient(s) of the document." The judge may, if

necessary, review the documents in camera to decide whether the documents fall within the privilege.

In *BP Exploration, Inc*., 337 NLRB 887 (2002), the Board found that a respondent need not provide a union with information to which it was otherwise entitled because that information was protected by the attorney-client privilege. The union sought certain health and safety reports that were prepared at the behest of respondent's attorney and in contemplation of litigation. Respondent offered a summary of the reports and also offered to discuss alternative ways to provide the information requested by the union. Since the union insisted on the reports themselves rather than the factual information in the reports, the Board found that there was no obligation to provide the reports or to bargain over an accommodation. The Board cited *Upjohn Co. v. U.S.*, 449 U.S. 383, 395-396 (1982), in explaining the distinction between the disclosure of attorney-client communications and disclosure of facts contained in the communication; and *In re Grand Jury Subpoenas*, 123 F.3d 695 (1st Cir. 1997), in explaining that the privilege applies if the information relates to facts communicated for the purpose of securing a legal opinion, legal services or assistance in a legal proceeding (337 NLRB at 889 fns. 5 and 6).

CRIME/FRAUD EXCEPTION TO ATTORNEY-CLIENT PRIVILEGE—In *Smithfield Packing Co.*, supra, 344 NLRB No. 1 (2004), the Board discussed several aspects of the attorney-client privilege. It discussed the policy considerations supporting the general rule that confidential communications between an attorney and his or her client are privileged. But the Board noted that "[w]hen the advice pertains to future wrongdoing . . . the policy considerations do not apply," thus providing the underpinning for the well established crime/fraud exception to [the] attorney-client privilege in federal law, although, as the Board also noted, this exception does not encompass violations of the Act. *Id*., slip op. 13. The Board approved the judge's action allowing testimony concerning an alleged attorney-client communication as an offer of proof, but did not address the issue directly because the judge did not use any of that testimony in his decision. *Ibid.* The Board also affirmed the judge on another attorney-client issue. The judge permitted testimony concerning conversations between a witness for the General Counsel and the respondent's attorney in the following circumstances. After the witness's direct testimony, counsel for the respondent attempted to impeach the witness by asking her questions about affidavits the witness had given to

respondent's attorney. After testimony was elicited suggesting that the affidavits were false, the judge determined that the attorney-client privilege did not apply because the respondent had raised the issue of perjury and the testimony raised the issue of possible subornation of perjury and knowing introduction of false statements of material fact. The judge properly concluded that the affidavits and the communications surrounding the taking of the affidavits were within the crime/fraud exception because the credited testimony of the witness "pertained to the alleged preparation of false affidavits and therefore involved future commission of one or more of the crimes identified by the judge." *Id.*, slip op. 14.

SECTION 8-440 (clarification)—SUBPOENAS AND STATE CONFIDENTIALITY RULES—The Board's ruling, approved in *Canova v. NLRB*, 708 F.2d 1498, 1501 (9th Cir. 1983) and set forth in the existing section of the Bench Book, is of questionable validity. In *Yuker Construction Co.*, 335 NLRB 1072 (2001), the Board left undisturbed a ruling by the judge that material subpoenaed by the General Counsel from the Michigan Unemployment Board, which were protected from disclosure by state law, were not privileged and were required to be produced. After discussing applicable more recent authorities, the judge concluded that "the better rule is that, where state privilege law conflicts with the enforcement of a federal statute and the privilege is not otherwise consonant with federal evidentiary law, state privilege law is not controlling." *Id.* at 1082. Accord: ALJ decision in *D.C. Scaffold, Inc*., Case No. 1-CA-41294 et al., JD-48-04, slip op. 16-17 (May 19, 2004), adopted by the Board in the absence of exceptions by order dated July 21, 2004; and see *Trinidad Logistics Co.*, Case No. 7-CA-44621 et al., ALJ order dated June 4, 2002, 2002 WL 1466281 (California confidentiality provision precluding the production of evidence of criminal convictions does not outweigh need of respondent to obtain such evidence through the subpoena process in order to use in impeaching an alleged discriminatee testifying in a Board proceeding).

SECTION 8-450 (new section)—SUBPOENAS—WORK PRODUCT DOCTRINE—POSITION STATEMENT OF CHARGING PARTY---In *Kaiser Aluminum & Chemical Corp*., 339 NLRB 829 (2003), the Board reversed a judge who had denied a charging party's petition to quash a subpoena *duces tecum* served on it by a respondent asking for the production of the charging party's position statements submitted to the General Counsel. The Board held that the work product doctrine, as reflected in Rule 26(b)(3) of the Federal Rules of Civil Procedure, applies to unfair labor

practice cases. Thus, the Board found that the position statements submitted by the charging party's attorney during the General Counsel's investigation amounted to attorney work product within the meaning of the Rule. The Board also found that the charging party did not waive the work product privilege by submitting the position statements to the General Counsel and that the respondent had not shown a "substantial need" for the position statements within the meaning of Rule 26(b)(3). See also, infra, **SECTION 13-215, 13-243** and **SECTION 13-275.**

SECTION 8-500—JENCKS STATEMENTS—In *National Specialties Installations, Inc.*, 344 NLRB No. 2 (2005), the Board held that a written notice from a third party to a witness, such as a notice from the witness's bank, is not a "statement made by said witness" within the meaning of Section 102.118(d), and, since the notice was not adopted by the witness, by withholding the document, the General Counsel did not violate the Jencks rule. The Board went on to rule that, while, as a general matter, the General Counsel's failure to produce the bank notice might have given rise to an adverse inference, the adverse inference rule is not mandatory. The Board found that, in the circumstances, the judge properly declined to make an adverse inference because the record evidence as a whole supported the judge's findings of a violation, notwithstanding the General Counsel's failure to produce the notice in question.

In *NLRB v. Doral Building Services*, 666 F.2d 432, 435 (9th Cir. 1982), the Ninth Circuit found reversible error in the General Counsel's failure to provide official translation of non-English language affidavits of its witnesses. The court found that it was not adequate to simply provide the original affidavits to the respondent after the witnesses testified and leave it up to the respondent to provide its own interpreter to translate the affidavits. Thus, the court refused to enforce the Board's order and remanded the case so that the respondent (and the administrative law judge) would be provided with an official English translation of the original Spanish statements. See also **SECTION 13-608** (new section), infra.

SECTION 8-620—SUBPOENAS—FAILURE TO PRODUCE DOCUMENTS—BANNON MILLS SANCTIONS FOR FAILING TO TIMELY COMPLY WITH SUBPOENA—In *McAllister Towing & Transportation*, supra, 341 NLRB No. 48 (2004), the Board, by a 2-1 majority, upheld a judge's imposition of limited *Bannon Mills* sanctions for the failure of a party to comply with a valid subpoena. The General

Counsel was permitted to use secondary evidence to prove matters as to which there was non-compliance and the respondent was not permitted to rebut that evidence; but the judge denied the General Counsel's request to limit cross-examination and to automatically draw adverse inferences on the relevant issues, explaining that she would do so only if appropriate. The facts, which showed a pattern of delay, lack of diligence and untimely compliance, were as follows: Although the subpoena was served some 2 weeks prior to the hearing and a motion to revoke was timely filed, the respondent did not supply even plainly relevant documents prior to the judge's conference call held the day before the hearing. In the conference call, the judge instructed counsel for respondent to "substantially comply" with the subpoena the morning of the trial, rejecting counsel's argument that there was no obligation to comply until the motion to revoke had been ruled on. At trial, the judge granted the motion to revoke only in part, but respondent complied only in a limited fashion with that portion of the subpoena that was not revoked. The General Counsel moved for sanctions for non-compliance, and, after further oral argument and deliberation, the judge granted the General Counsel's motion, citing the respondent's very limited compliance at trial and noting that respondent was wrong in asserting that it had no obligation to comply with the valid portion of the subpoena from the date of issuance until such time as the judge ruled on its motion to revoke. After the judge's ruling on the *Bannon Mills* sanctions, respondent's counsel for the first time indicated that some additional documents could be produced. The judge refused to alter her ruling, observing that respondent had resisted complying for 12 days, but saw fit to comply within an hour of her ruling on sanctions.

The Board affirmed the judge's ruling, stating that it was appropriate to impose sanctions for subpoena noncompliance, including permitting the party seeking production to use secondary evidence, precluding the non-complying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the non-complying party. The Board's authority to impose such sanctions flows from its inherent authority to maintain the integrity of the hearing process, and the exercise of this authority is committed in the first instance to the judge's discretion. The Board found that the judge did not abuse her discretion in this case. The Board noted that respondent did not comply with the subpoenas upon receiving them, even with respect to items that were clearly relevant and available, and that it did not begin to comply until after the judge disposed of its motion to revoke, and, even then, it sought additional time for

consultations, despite the judge's instruction to comply immediately. The Board specifically approved the judge's observation that "[a] subpoena is not an invitation to comply at a mutually convenient time." Slip op. at 4. Rejecting respondent's arguments that the subpoena asked for quite a few documents and that it made a belated attempt to comply, the Board noted that respondent had an obligation "to begin a good faith effort to gather responsive documents" upon service of the subpoenas. *Ibid.* The Board also observed that respondent's noncompliance was likely to prejudice the General Counsel's case and the overall proceeding, noting that the General Counsel had started his case-in-chief and respondent was just beginning its process of compliance. Moreover, there was difficulty in getting subpoenaed witnesses to attend the hearing. Thus, the failure to timely produce subpoenaed documents meant that the General Counsel would have had to recall witnesses, which would have further disrupted and prolonged the hearing.

In *Teamsters Local 917 (Peerless Importers)*, supra, 345 NLRB No. 76 (2005), the Board reversed a judge who had dismissed the General Counsel's complaint because the charging party failed fully to comply with the respondent's subpoena, finding that the judge had abused his discretion in so doing. The Board, citing *McAllister Towing*, supra, noted that there were other less drastic sanctions available to the judge, and observed that dismissing a complaint because of subpoena noncompliance would have been unprecedented.

See also, infra, **SECTION 13-235.**

SECTION 8-631 (new section)—IMPROPER USE OF SUBPOENAS; VIOLATION OF JUDGE'S INSTRUCTIONS—In *675 West End Owners Corp.*, supra, 345 NLRB No. 27, slip op at 3 and fn. 11 (2005), the Board approved the imposition of litigation costs against an individual respondent who disobeyed the judge's instructions that a revoked subpoena may not be served again and that issuance of a subpoena after the close of the hearing is "an abuse of Board process." The Board agreed with the judge's recommendation that a hearing be held to determine the litigation costs expended by the charging party and the General Counsel because of the misconduct of the individual respondent, citing applicable authorities under the "bad faith" exception to the American Rule against awarding litigation costs. See also discussion of *675 West End Owners* in **SECTION 7-500**, supra, and discussion of *McAllister Towing* in **SECTION 8-620**, supra

(*Bannon Mills* sanctions imposed because of delay in complying with subpoena in violation of judge's instructions).

SECTION 9-500—SETTLEMENTS—REJECTION OF—In *Alamo Rent-A-Car, Inc*., 338 NLRB 275 (2002) the Board affirmed the judge's rejection of a proposed settlement agreement, applying the general principles of *Independent Stave*, 287 NLRB 740 (1987). The Board noted that the General Counsel objected to the settlement, only one of the four individual discriminatees approved of it, and the settlement failed to remedy any of the Section 8(a)(1) allegations in the complaint and only partially remedied two of the Section 8(a)(3) and (1) allegations.

SECTION 9-550 (new section)—SETTLEMENTS—COMPLIANCE—SUMMARY JUDGMENT TO ENFORCE—In *Great Northwest Builders,* 344 NLRB No. 120 (2005), the Board granted the General Counsel's motion for summary judgment to enforce the terms of a settlement agreement. The agreement, by its terms, provided that, in case of non-compliance, the respondent's answer to the original complaint would be withdrawn and the General Counsel could obtain an order to remedy the allegations in the complaint by virtue of a motion for summary judgment. See also *John Pomaville Plumbing*, 344 NLRB No. 138 (2005).

SECTION 9-640—SETTLEMENTS—RELEASES—WAIVER AND RELEASE PROVISIONS IN SETTLEMENT AGREEMENTS—In *Clark Distribution Systems, Inc*., 336 NLRB 747 (2001), the Board found that broad waiver and release provisions limiting Board investigations and prosecution of unfair labor practices were invalid. In *Clark*, the Board found that the clause in question prohibited the signatory employees from voluntarily providing evidence to the Board in its investigation of charges that concern other employees, distinguishing cases in which waiver and release agreements were limited to the claims of the employees who entered into them. The Board also found that, by conditioning acceptance of the settlement agreement on a requirement that employees not participate in the Board's investigatory process, respondent violated Section 8(a)(1) of the Act.

SECTION 9-800—SETTING ASIDE SETTLEMENT AGREEMENTS—In *Nations Rent, Inc*., 339 NLRB 830, 831 (2003), the Board reaffirmed that a settlement agreement may be set aside and unfair labor practices found, based on pre-settlement conduct, if there has been a failure to comply with

the provisions of the settlement agreement or if post-settlement unfair labor practices are committed, citing authorities. In *Nations Rent*, there was no allegation of post-settlement unfair labor practices, but the Board, in a 2-1 decision, found that the respondent violated the settlement agreement by failing to rescind an allegedly broad no-solicitation/no distribution rule and by failing to notify an employee in writing that any references to his unlawful discipline and discharge had been removed from respondent's files and that they would not be used against him.

In *American Postal Workers Local 735*, 340 NLRB 1363 (2003), the General Counsel revoked a settlement and issued a new complaint, alleging that the respondent union had breached the earlier settlement agreement and committed a new violation. The union had complied with the terms of the original settlement, including the posting of a notice, to remedy an allegation that the union violated the Act by discriminating against the charging party, a nonmember. But, at the same time, the union's president wrote an article addressed to all members calling the charging party a "scab" and a "freeloader," and asserting that he was "proud" of the actions of the steward whose conduct had led to the original unfair labor practice charge. The Board, in a 2-1 decision, found that the comments of the union president suggested that it was "permissible, indeed laudable, for a union to discriminate against nonmembers," and thus undermined the settlement. It found the situation analogous to cases where a respondent posts its own disparaging notice alongside the Board's version. Accordingly, the Board found that the General Counsel acted within his discretion in setting aside the original settlement and issuing a consolidated complaint alleging violations both before and after the execution of the settlement. *Id.* at 1365.

In *The Courier Journal*, 342 NLRB No. 118 (2004), the Board dismissed a complaint alleging that respondent had violated the Act by failing to provide relevant information to the union because that information was the subject of a prior settlement agreement that had been closed on compliance. The Board majority found, contrary to the dissent, that the information sought in the second complaint was not a new request for information, but rather an attempt to revive the original dispute that had been settled. According to the Board majority, the union alleged that the information sought in the second complaint was information omitted from the information provided pursuant to the settlement, but it failed to protest the closure of the case on compliance. Thus, the Board declined to set aside the settlement.

SECTION 9-850 (new section)—EFFECT OF PRIOR DECISION THAT HAS BEEN VACATED BY VIRTUE OF SETTLEMENT—In *Caterpillar, Inc*., 332 NLRB 1116 (2000), the Board held that an order vacating a prior published decision pursuant to a settlement agreement vacates that decision "only insofar as there is no longer a court-enforceable order in the case and the decision has no preclusive effect on the parties." The decision remains published and "may be cited as controlling precedent with respect to the legal analysis therein." This is distinguishable from a *vacatur* on the merits, which does eliminate the prior decision for all purposes, including precedential effect. See also **SECTION 3-750**, supra, and **SECTION 11-303** (new section), infra.

SECTION 10-500—VIOLATION OF SEPARATION OF WITNESSES ORDER—SEQUESTRATION RULE VIOLATION—PREJUDICE REQUIRED—In *AEi2, LLC*, 343 NLRB No. 56 (2004), the Board reaffirmed that a violation of a sequestration rule does not amount to reversible error unless the complaining party establishes prejudice. The Board affirmed the judge's denial of respondent's motion to sequester because it was untimely. But the Board also found that, even if the judge's ruling was erroneous, it would not have made any difference because respondent failed to show that it was prejudiced by the judge's ruling. The non-excluded witness, Carter, was not present in the discussion that was the critical event in the case, and thus did not testify about it. Moreover, as the Board observed, Carter would have been designated as the Charging Party's designee to remain in the hearing room to assist counsel, had the motion to sequester been granted. Since, as the Board also noted, at footnote 3, another witness would have been designated by the General Counsel as his representative, the Board has in effect endorsed the notion that exceptions to a sequestration rule permit the General Counsel and the Charging Party to each designate a separate witness to remain in the hearing room to assist them.

In *North Hills Office Services*, 342 NLRB No. 25 (2004), slip op. 1, fn. 2, the Board rejected respondent's contention that the attorney for charging party testified in violation of the judge's sequestration order because he had been present throughout the trial. Noting that the judge had warned the parties that "the credibility of witnesses who were present during the testimony of other witnesses would be subject to attack," the Board held that "the judge fairly applied the sequestration order to all parties."

SECTION 11-200—BANKRUPTCY, JURISDICTION OF THE BOARD—The Board retains jurisdiction over, and its orders may be enforced against, bankrupt employers. In both Title 7 and Title 11 bankruptcies, Board orders, as "government unit's police or regulatory power," are exempt under subsections (b)(4) and (b)(5) from the automatic stay provision in 11 U.S.C. Section 362(a) of the bankruptcy code. See *Bristol Nursing Home*, 338 NLRB 737 at fn. 1 (2002). Collection of back pay, however, requires a separate application to the bankruptcy court. *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 832-835 (9th Cir. 1991); *NLRB v. 15th Avenue Iron Works*, 964 F.2d 1336, 1337 (2d Cir. 1992).

SECTION 11-301—JUDGES DECISIONS, WHEN NOT BINDING PRECEDENT—JUDGE'S DECISION ADOPTED WITHOUT EXCEPTIONS IS NOT BINDING PRECEDENT—It is well settled that the Board's adoption of all, or even a portion, of a judge's decision to which no exceptions are filed does not serve as precedent for any other case. *Whirlpool Corp.*, 337 NLRB 726, 727 at fn. 4 (2002), enf'd mem. 92 Fed. Appx. 224 (6th Cir. 2004). See also *Pathmark Stores, Inc.*, 342 NLRB No. 31 at fn. 1 (2004) and *Stanford Hosp. and Clinics v. NLRB*, 325 F.3d 334, 344 (D.C. Cir. 2003).

SECTION 11-302—MOTIONS TO DISMISS—ORALLY AT HEARING—BENCH DECISIONS—EVIDENCE IN SETTLED CASES PROPERLY USED AS BACKGROUND—In *St. Mary's Acquisition Co.*, supra, 342 NLRB No. 100 (2004), the Board reversed a judge who had orally dismissed a complaint on respondent's motion, on the record, at the conclusion of the General Counsel's case, and it remanded the case to another judge. In his initial decision, a ruling from the bench, the judge granted the respondent's motion to dismiss, stating that the General Counsel had failed to establish union animus in support of the complaint allegations. On an initial appeal, the Board remanded the matter and ordered the judge to issue either a written decision or a bench decision, and the judge responded by simply issuing a "certification of transcript." The Board did not pass on whether this complied with its initial remand order, but found that the motion to dismiss was not properly granted. It found that the judge erroneously rejected background evidence of animus proffered by the General Counsel, because it was submitted in a settled case. The Board found that this evidence should have been considered, citing *Black*

Entertainment Television, 324 NLRB 1161, 1163 (1997) and *Overnite Transportation Co.*, 335 NLRB 372, 376 fn. 18 (2001).

As to the distinction between granting a motion to dismiss an entire case and issuing a decision, see also *Technology Service Solutions*, 332 NLRB 1096 and fn. 3 (2000). In that case, the judge granted the respondent's motion to dismiss after the conclusion of the General Counsel's case, but, unlike in *St. Mary's*, supra, gave the parties an opportunity to submit briefs. The Board subsequently vacated the judge's decision and remanded the case for completion of the hearing and the issuance of a supplemental decision. After issuance of the supplemental decision, the Board ultimately affirmed the judge in part and reversed him in part, but it nevertheless questioned the nomenclature used by the judge in defining his actions. The judge had described his initial ruling as not being a decision under Section 102.45(a) of the Board's Rules, but rather a dismissal under Section 102.35(a)(8). The Board disagreed, and found that it should have been labeled a decision so that the appropriate procedures in appealing the matter were those under Section 102.46 of the Board's rules.

See also, infra, **SECTION 12-640** and **SECTION 13-106.**

MOTIONS TO DISMISS—VIOLATION OF SKIP COUNSEL RULE—In *Operating Engineers Local 17*, 335 NLRB 578 (2001), the Board denied respondent's motion to dismiss a complaint because one of its agents was interviewed by General Counsel and gave a statement without the respondent's counsel being present. According to respondent, this conduct was improper and allegedly in violation of Section 10056.6 of the Board's Case Handling Manual. That section of the Manual, which is known as the skip counsel rule, provides that normally when a respondent's agent is interviewed by a Board agent the respondent's counsel should be consulted and given an opportunity to be present. The Board, noting that the Manual was not binding authority, nevertheless found that the General Counsel's conduct was not improper because the Board agent initiated contact with the witness at a time when no notice of appearance had been filed by respondent's counsel, and, when it was, the witness was notified but agreed to continue the interview. In addition, the Board agent attempted to notify counsel for respondent but the latter delayed in obtaining his telephone messages until after the statement was secured. Significantly, the witness was not called to testify in the hearing and his statement was not used.

SECTION 11-303 (new section)—RELIANCE ON ALJ FINDINGS IN PRIOR CASE PENDING REVIEW BEFORE THE BOARD—Although the Board itself does not take judicial notice of an ALJ decision in a case that is pending review before the Board because it is not binding authority (*St. Vincent Medical Center*, supra, 338 NLRB 888 (2003)), that does not mean that a judge may not rely on factual findings or credibility determinations made by a judge in a prior case. In such situations, the judge is not relying on the prior decision as binding authority, but making a judgment that, for reasons of judicial efficiency, he or she can justifiably rely on the prior factual or credibility determinations rather than take the same evidence and relitigate the same issues. The Board has approved this approach. See *Grand Rapids Press of Booth Newspapers*, 327 NLRB 393, 394-395 (1998), enf'd mem. 215 F.3d. 1327 (6th Cir. 2000), citing authorities (judge's findings in earlier case relied upon as showing evidence of animus in the present case). Not only does this approach advance judicial efficiency, but it also avoids a possible inconsistent result, where one judge makes certain findings or credibility determinations and a second judge, hearing the same evidence, makes contrary findings or credibility determinations. It also avoids the delay attendant in awaiting the Board's decision reviewing the earlier judge's findings. In giving effect to the earlier judge's findings and determinations, the second judge should understand that, if the Board (or a court) reverses the earlier judge's findings on review, his or her findings may likewise be vulnerable. In this respect the second judge's decision is somewhat contingent on the Board's ultimate disposition of the issue litigated in the prior case. See *Detroit Newspaper Agency d/b/a Detroit Newspapers*, 326 NLRB 782 fn. 3 (1998), enforcement denied 216 F.3d 109 (D.C. Cir. 2000) (judge properly relied on earlier decision of another judge in a case pending before the Board for finding that a strike was an unfair labor practice strike).

The above authorities simply permit the judge to rely on the earlier findings; the judge certainly has the discretion, in appropriate circumstances, not to rely on them. See **Section 13-102**, infra, and *Fluor Daniel, Inc. v. NLRB*, 332 F.3d 961, 972 (6th Cir. 2003), discussed therein. In *Fluor Daniel*, the Court found that a judge properly declined to rely on testimony about a witness's lack of credibility in an earlier proceeding because consideration of that testimony would be "confusing" to the issues in the second case. When presented with this issue, the judge should consider the

matter on a case by case basis and determine whether the circumstances warrant reliance on the earlier findings.

Compare with **SECTION 3-750**, supra, discussing *Great Lakes Chemical Corp*., 300 NLRB 1024 (1990), where the Board itself has made earlier findings involving the same respondent. In those circumstances, it is appropriate to take official notice of the Board's prior findings and determinations. See also **SECTION 9-850** (new section) and *Caterpillar, Inc*., 332 NLRB 1116, discussed therein.

SECTION 11-350 (new section)—MOTIONS FOR SUMMARY AND DEFAULT JUDGMENT—An administrative law judge has authority to rule on motions for summary judgment, default or otherwise, under Section 102.35(a)(8) of the Board's Rules and Regulations. This authority, which, under Section 102.35(a), applies with respect to cases assigned to the judge between the time the judge is designated and the time the case is transferred to the Board, exists notwithstanding failure of the moving party to file such a motion with the Board no later than 28 days prior to the scheduled hearing under Section 102.24 of the Rules. *Calyer Architectural Woodworking Corp.*, 338 NLRB 315 (2002).

In January 2004, the Board revised its rules to provide specifically for the granting of motions for default judgment where a respondent has failed to file an answer. Such motions may be made either to the Board or, under Section 102.35 of the Board's Rules and Regulations, to the administrative law judge. According to the explanatory material set forth in connection with issuance of the final rule, motions for default judgment are not subject to the requirements of Section 102.24(b) that motions for summary judgment be filed no later than 28 days before the hearing. Such limitation is unnecessary where the respondent has failed to file an answer.

SECTION 11-400—CORRECTION OF TRANSCRIPT—In *Teamsters Local 705 (Pennsylvania Truck Lines)*, 314 NLRB 95 fn. 2 (1994) the Board rejected the General Counsel's attempt through an exception to supply the surname of a discriminate, identified in the transcript as "Rich [inaudible]," where no post-hearing motion or stipulation to correct the record had been submitted. It stated that the burden was on the parties, not the court reporter, to make certain the transcript showed the correct name. During a trial, if a witness does not speak distinctly, the judge should see that the reporter

checks the tapes to assure that all testimony is audible, particularly, in the case of critical witnesses.

SECTION 11-405—PORTIONS OF OTHER RECORDS—In *Beverly Health & Rehabilitation Services*, 335 NLRB 635, 639 fn. 26 (2001), enf'd in part 317 F.3d 316 (D.C. Cir. 2003), the Board stated that it expects parties to introduce all non-testimonial evidence on which they rely in the form of individual exhibits. They cannot "incorporate by reference" portions of other records, even those of Board cases involving the same parties.

SECTION 11-602 (new section)—TESTIMONY OR DEPOSITIONS BY VIDEO—Video conferencing is widely used by lawyers, courts and agencies for depositions. Perhaps, at least on a limited scale, they may be used at trial. No Board case has directly addressed the issue, but testimony by video may well ameliorate any problems the Board had with telephone testimony in the *Westside Painting* case, discussed in Section 11-601 of the bench book. In *Palace Arena Football LLC, a/k/a Detroit Fury*, Case 7-CA-45132, the judge approved the taking of video testimony by the respondent of a witness who would have had to travel a great distance at an inconvenient time to appear at trial. The General Counsel objected to the procedure and requested permission to take a special appeal. In an unpublished order dated January 10, 2003, the Board denied the request, without prejudice to the right to raise the issue later on exceptions. Subsequently, the judge issued a decision dismissing the case and the General Counsel did not file exceptions so the Board had no occasion to address the issue. The Social Security Administration addressed the issue in a final rule issued on December 11, 2003 (68 Fed Reg. 69003), which permits hearings or parts of hearings (the testimony of individual witnesses) before SSA administrative law judge by virtue of video conferencing. Under that rule, however, if a "party" objects, SSA will reschedule the matter for a regular hearing. Video conferencing equipment is available in all regional offices and most large law firms. So long as counsel are given the opportunity to be present, perhaps by a surrogate, at the location used by the witness, and all other reasonable due process requirements are followed, there appears to be no significant reason why the procedure should not be used, if circumstances warrant, in Board proceedings. Obviously, a reporter must be present to transcribe the proceeding and care should be taken to insure that the reporter is able to hear all the speakers wherever they are located. To the extent that video conferencing may be thought to be an improvement over the present wide-spread use of telephone conference call

settlement sessions, it seems to be even less objectionable, although probably more costly, than telephone settlement conferences. A cautionary note however: The process of videoconferencing may present technical or logistical problems that may outweigh the advantages of its use.

SECTION 11-800—STIPULATIONS, USE OF—STIPULATED RECORDS—Section 102.35(a)(9) of the Board's Rules and Regulations was amended in 2002 to delete a former provision that authorized a long-time unused kind of stipulation and to substitute a new one authorizing more generally stipulations of fact that "waive a hearing and provide for a decision by the administrative law judge." Alternatively, the parties may agree to stipulate the matter to the Board, a procedure previously utilized, but never before formally embodied in the Board's Rules. Before accepting a stipulated record for decision, the judge should make sure that the stipulation covers all evidence needed to render an effective decision.

SECTION 12-401(new section)—USE OF BRIEFS IN DECISIONS—Judges should not use excerpts from the briefs of the parties as a substitute for their findings and legal analysis in the written decision. Extensive and verbatim copying from the brief of the winning party in the judge's decision not only creates the appearance of partiality, but also gives the impression that the judge failed to conduct "an independent analysis of the case's underlying facts and legal issues." *Dish Network Service Corp.*, 345 NLRB No. 83 (2005). In that case, the Board set aside the judge's decision because he had copied so extensively from the briefs of the General Counsel and the Charging Party. To dispel any impression of partiality, the Board remanded the case for a different judge to independently review the record and prepare a new decision. See also **SECTION 2-510**, supra.

SECTION 12-500—EXPEDITED DECISION WITHOUT BRIEFS—In *K.O. Steel Foundry & Machine,* 340 NLRB No. 153 (2003), slip op. 1, the Board rejected a claim that the judge had erred in refusing to allow the respondent to file a post-hearing brief. Noting that the judge had precluded all parties from filing briefs, the Board held that "[w]hether to permit the parties to file post-hearing briefs is a matter committed to the sound discretion of the administrative law judge."

SECTION 12-620—DECIDING TO ISSUE BENCH DECISION—NOT IN COMPLEX CASES—In *Des Moines Register and Tribune Co.*, 339 NLRB 1035 fn. 1 (2003), petition for review den., 381 F.3d 767 (8th Cir.

2004), the Board cautioned that judges should not issue bench decisions in complex cases, but should invite briefs and conduct a more thorough analysis of the matter in a written decision.

SECTION 12-640—BENCH DECISIONS—CONTENTS OF BENCH DECISION—See **SECTION 11-302**, supra, and *St. Mary's Acquisition*, 342 NLRB No. 100 (2004) discussed therein.

SECTION 13-102—EVIDENCE—TAUT RECORD—RULE 403 FRE—In *Fluor Daniel, Inc. v. NLRB,* 332 F.3d 961, 972 (6th Cir. 2003), the Court stated that the administrative law judge was "under no obligation to consider determinations made by another ALJ in a wholly different case regarding the credibility of a particular witness." The witness was found to have filed frivolous charges, falsified evidence and committed perjury in an earlier case, but the Board had reversed those findings. According to the Court, the judge properly ruled that any testimony regarding involvement of the witness in the earlier case would "add confusion to the current case." Thus, the Court refused to disturb the judge's credibility determination in the case before it.

SECTION 13-102(a) (new section)—EVIDENCE—TAUT RECORD—RULE 403 FRE—CREDIBILITY—In *J.S. Troup Electric, Inc.*, 344 NLRB No. 125 (2005), the Board upheld a judge's exclusion of evidence purportedly showing that a witness, otherwise broadly credited, was working while receiving unemployment or worker's compensation benefits, allegedly in violation of State law and that he was untruthful with State agencies on those matters. Citing FRE 608(b) and relevant case authority, the Board observed that extrinsic evidence bearing on a witness's credibility is inadmissible unless it pertains to a criminal conviction, and, although a judge may, in his or her discretion, permit some cross-examination on a witness's character for truthfulness, the judge may exclude such evidence if its probative value is outweighed by considerations of undue delay or waste of time. Thus, FRE 608(b) is subject to FRE Rule 403. Moreover, even if such cross-examination is permitted, the cross-examiner may not attempt to disprove the witness's answers by extrinsic evidence because this would risk a mini-trial on peripheral matters. The Board also noted that the judge did not act summarily, but deferred ruling on the proffered evidence until he had heard all of the evidence bearing on the witness's credibility. See also *Boardwalk Regency Corp.*, 344 NLRB No. 122 fn. 1 (2005), where the Board clarified its earlier decision in *Double D Construction Group*, 339

NLRB 303, 306 (2003), in which the Board criticized a judge for generally discrediting a witness for lying about his social security number. In *Boardwalk Regency*, the Board stated that *Double D Construction* stands for the proposition that "a judge should not rely *solely* on a single prior act of falsification;" but if there are other factors supporting the witness's credibility, "they too must be considered." See also **SECTION 13-703**—IMPEACHMENT—CREDIBILITY.

SECTION 13-106—PRESETTLEMENT CONDUCT—EVIDENCE IN SETTLED CASES PROPERLY USED AS BACKGROUND—See also **SECTION 11-302**, supra, and *St. Mary's Acquisition*, 342 NLRB No. 100 (2004) discussed therein.

SECTION 13-203—HEARSAY—ADMISSIBLE IF CORROBORATED—In *RC Aluminum Industries, Inc.*, 343 NLRB No. 103 (2004), slip op. 2-3, respondent challenged a judge's decision to admit into evidence a notation from a personnel file indicating that the alleged discriminatee had been terminated. While agreeing that the notation was hearsay, the Board affirmed the decision to admit it since it had been corroborated by the credible testimony of the alleged discriminatee.

SECTION 13-215—POSITION STATEMENTS—ADMISSIBILITY—In *United Scrap Metal, Inc*., 344 NLRB No. 55 (2005), the Board held that a respondent's position statement is admissible in evidence as an admission against interest, even though submitted by the respondent's former counsel. The Board noted that the attorney who voluntarily provided the position statement to the General Counsel never withdrew as respondent's counsel. *Id*. at fn. 5. See also, infra, **SECTION 13-243.**

Compare **SECTION 8-450** (new section), supra, and *Kaiser Aluminum*, 339 NLRB 829 (2003), discussed therein. In *Kaiser Aluminum*, the Board found that the statement of a charging party's attorney was protected by the work product privilege.

SECTION 13-217—TAPE RECORDING (AUDIO/VIDEO) MADE SECRETLY – In *Times Herald Record*, 334 NLRB 350, 354 (2001), enf'd mem. 27 Fed. Appx. 64 (2nd Cir. 2001), the Board reaffirmed that a surreptitious tape recording is admissible even when the recording violates state law. And in *Fleming Companies*, 336 NLRB 192 at fn.2 (2001), enf'd in part 349 F.3d 968 (7th Cir. 2000), the Board stated that it did not consider

a witness's surreptitious taping of a conversation with management representatives to be a basis for discrediting the witness's testimony.

SECTION 13-235—ADVERSE INFERENCES—BANNON MILLS SANCTIONS—See **SECTION 8-620**, supra, and *McAllister Towing*, 341 NLRB No. 48 (2004) discussed therein. See also **SECTION 8-500** and *National Specialties Installations*, 344 NLRB No. 2 (2005) discussed therein (Adverse inference rule is not mandatory).

SECTION 13-236 (new section)—PRESUMPTION AS TO SERVICE OF DOCUMENTS BY FAX BY VIRTUE OF SENDER'S FAX CONFIRMATION REPORT—See **SECTION 4-500**, supra, and *Hardesty Company,* 336 NLRB 258, 259 (2001) discussed therein.

SECTION 13-237 (new section)—PROTECTIVE ORDERS—Where appropriate, documents may be admitted in evidence, subject to protective orders limiting the use of the documents or requiring that they be placed under seal. See **SECTION 8-330**, supra, particularly Rule 26 of the Federal Rules of Civil Procedure and *United Parcel Service,* 304 NLRB 693, 694 (1991), discussed therein.

SECTION 13-243—ADMISSIONS BY ATTORNEY—See **SECTION 13-215**, supra, and *United Scrap Metal*, 344 NLRB No. 55 (2005) discussed therein.

SECTION 13-270—PRIVILEGES—ATTORNEY CLIENT—CRIME-FRAUD EXCEPTION—See *Smithfield Packing Co*., 344 NLRB No. 1 (2004), discussed above, in **SECTION 8-410,** supra**;** and **SECTION 8-450** (new section), supra, and *Kaiser Aluminum,* 339 NLRB 829 (2003), discussed therein.

SECTION 13-275—WORK PRODUCT PRIVILEGE—In *Sprint Communications d/b/a Central Telephone Co.*, 343 NLRB No. 99 (2004), the Board sets forth a thorough discussion of the work product privilege as it applies to Board proceedings. In that case, the Board affirmed a judge's dismissal of a Section 8(a)(5) allegation that the respondent failed to provide relevant information to a union in support of a grievance. The union had requested a copy of notes taken by respondent's human resources specialist with respect to an investigation into alleged misconduct by employees represented by it. The Board, in a 2-1 decision, found that the notes were

prepared in anticipation of litigation, because even though no litigation had been initiated and indeed the employees had not yet been disciplined when the notes were prepared, respondent's fear of litigation was "objectively reasonable." According to the Board majority, the particular investigation was not a routine one done in the ordinary course of business, but rather in anticipation of litigation. Slip op. 3. Thus, the Board majority held that the notes fell within the ambit of the work product privilege and the union had not met its burden of showing a "substantial need" to overcome the privilege. See also fn. 6 in the dissent for the differences between the work product privilege and the attorney-client privilege. See also **SECTION 8-450** (new section), supra, and *Kaiser Aluminum*, 339 NLRB 829 (2003) discussed therein.

Compare *Borgess Medical Center*, 342 NLRB No. 109 at fn. 5, in which the Board upheld a Section 8(a)(5) and (1) violation for the failure to provide information, rejecting a claim that the information was subject to the attorney-client and work product privileges. The incident reports that were the subject of the information request were prepared by employees, sent to the department director for review, then forwarded to the risk management staff, most of whom are not attorneys, for entry into the employer's data base. Only incident reports that concern serious occurrences are forwarded to individual attorneys. See also **SECTION 13-270** and **SECTION 8-410** and **SECTION 8-450** (new section), supra.

SECTION 13-406—BACKPAY AND REINSTATEMENT OF ILLEGAL ALIENS—In *Hoffman Plastic Compounds, Inc. v. NLRB*, 535 U.S. 137, 140 (2002) the Supreme Court ruled that federal immigration policy, as expressed in the Immigration Reform and Control Act of 1986 (IRCA) prevented the Board from awarding back pay "to an undocumented alien who has never been legally authorized to work in the United States."

SECTION 13-606—INTERPRETERS—Rule 604 of the Federal Rules of Evidence provides as follows: "An interpreter is subject to the provisions of these rules relating to qualification as an expert and the administration of an oath or affirmation to make a true translation." An Authors' comment to the rule states that interpreters should strive to translate exactly what was said, without comment on the testimony or embellishment, citing cases.

SECTION 13-608 (new section)—PROVIDING INTERPRETERS FOR JENCKS STATEMENTS USED IN CROSS-EXAMINATION—See

SECTION 8-500, supra, and the discussion therein of *NLRB v. Doral Building Services*, 666 F.2d 432, 435 (9th Cir. 1982), where the court required that the General Counsel provide an official English translation of non-English affidavits turned over to respondent for cross-examination of General Counsel's witnesses.

SECTION 13-703—IMPEACHMENT—CREDIBILITY—See **SECTION 13-102(a)** (new section), supra, and discussion therein of *J.S. Troup Electric*, 344 NLRB No. 125 (2005) and *Boardwalk Regency*, 344 NLRB No. 122 (2005). See also **SECTION 13-217**, supra, and *Fleming Companies*, 336 NLRB 192 fn. 2 (2001), discussed therein.

SECTION 13-801—JENCKS STATEMENTS—JUDGE MUST MAKE IN CAMERA INSPECTION TO DETERMINE RELEVANCE—In *Tejas Electrical Services, Inc.*, 338 NLRB 416 at fn. 2 (2002), the Board, citing *Caterpillar, Inc.*, 313 NLRB 626 (1994), found that the judge erred by summarily denying respondent's request for the production of affidavits given by witnesses in cases other than the instant one, without making a determination through an in-camera inspection that the affidavits were not relevant to the issues in the case before him. The Board found, however, that the error was not prejudicial in this particular case because the complaint was dismissed.

SECTIONS 13-803 and 804 (clarification)—EVIDENCE—WITNESS STATEMENTS (JENCKS RULE)—OF PERSONS NOT GOVERNMENT WITNESSES—SECTION 611(c) WITNESSES—The Charging Party is entitled, on request and for the purpose of cross-examination, to the statement, in the possession of the General Counsel, of an agent who testifies on behalf of a respondent. Section 10394.7 of the Board's Case Handling Manual (Part One). This codification of the ruling in *Seftner Volkswagen Corp.*, 257 NLRB 178 fn. 1, 186-187 (1989) also apparently applies when a charging party calls an adverse witness under FRE Section 611(c). See *Louisiana Dock Co*., 293 NLRB 233, 250-251 (1989), enforcement denied 909 F.2d 281 (7th Cir. 1990).

SECTION 13-815—JENCKS STATEMENTS—RIGHT TO COPY OR KEEP—In *Wal Mart Stores, Inc.*, 339 NLRB 64 (2003), the Board emphasized the narrow scope of the limited exception in Section 102.118(b)(1) of the Board's Rules and Regulation to the general prohibition in Section 102.118 against release of Board files, including witness

affidavits, without permission. The specific exception provides for the release of a witness statement, after that witness has testified, for use in cross-examination of that witness. But, as the Board stated, "[a]fter that limited purpose is served, the exception no longer applies and the prohibition of the Rule is restored." Although, in *Wal-Mart*, the Board clearly held that the judge erred in permitting the respondent to retain witness statements after the close of the hearing, in dictum, the Board seemed also to question whether retention of the statements beyond the purpose stated in the rule was required. Nevertheless, it appears that a judge may, in his or her discretion, appropriately permit counsel to copy the statement and to retain it throughout the hearing "for any legitimate trial purpose." *Ibid* at fn. 3.

In *Pacific Bell Telephone Co. d/b/a SBC California*, 344 NLRB No. 11 fn. 3 (2005), the Board affirmed the judge's ruling that the respondent was not entitled to a witness's affidavit when the request was made untimely, namely, after the close of respondent's case. The Board cited other cases in which the request was deemed untimely, for example, when the request was not made until after cross-examination was completed and the witness excused.