

OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 19-05

March 13, 2019

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

FROM: Beth Tursell, Associate to the General Counsel

SUBJECT: Noting Respondents Failure to Cooperate with ULP Investigations in
Subsequently-Issued Complaints

The General Counsel seeks the prompt resolution of labor disputes. In order to achieve this important objective, charging parties are obligated to meet promptly with the Board agent assigned to their charge for purposes of providing a sworn affidavit, and to provide other witnesses and relevant documents within their possession. Similarly, charged parties are encouraged to submit a complete written account of the facts and a statement of their position regarding the allegations in the charge as soon as possible, and are further strongly urged to fully cooperate with the Region's investigation by promptly presenting all evidence relevant to the charge allegations.

A charging party's failure to cooperate may result in dismissal of the charge, while a charged party's failure to cooperate may unnecessarily complicate a ULP investigation or result in needless issuance of a complaint. It is the General Counsel's intention to strongly encourage both charging and charged parties to cooperate with Regional office ULP investigations in all situations.

Accordingly, where a charged party's lack of cooperation during a ULP investigation is significant,¹ and the Regional Director has concluded pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, that a complaint could issue based on the evidence available, the Director is free to issue said complaint and may include a footnote after the second sentence of the first paragraph of thereof, noting the significant lack of cooperation. Inclusion of such language in these situations is not mandatory. Rather, it is suggested that Regional Directors consider taking this measure in lieu of issuing an investigative subpoena, which could unnecessarily prolong the investigation and impede the prompt resolution of the underlying dispute.

Should the Regional Director determine to note the lack of cooperation in the complaint, as

¹ This memo is not applicable to those situations where the charged party failed to cooperate with the Region's investigation into whether it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

discussed above, he/she should do so through the following footnote language:

On (DATE(S)), the Region requested that Respondent cooperate in the administrative investigation of the ULP charge(s) conducted prior to issuance of the instant complaint. Respondent failed to fully cooperate in the investigation by refusing to furnish certain documents relevant to the disposition of the charge(s).

In addition to having the discretion to determine whether to avail themselves of taking this measure, Regional Directors also have discretion to determine whether any given failure to cooperate is significant. A significant lack of cooperation may include a complete failure to respond. It also may include situations where, despite partially cooperating through a furnishing a written response and/or argument, the charged party refuses to provide key information. Typically, these situations would not include failures to produce a witness or witnesses where credibility disputes may dictate issuance of complaint. Also relevant to the significance of a failure to cooperate is the magnitude of the charge/ULP allegations and their impact on commerce. Ultimately, whether any failure to cooperate is significant will be dictated by the particular facts and circumstances of the case. However, finding a significant failure to cooperate resulting in a determination to include the above-language is not a substitute for compelling production of the information through issuance of a trial subpoena. Relevant information should typically be sought in this manner regardless of the presence of a significant lack of cooperation.

If you have any questions regarding this memorandum, please contact your AGC or Deputy in Operations-Management.

/s/

B.T.

cc: NLRBU

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