

UNITED STATES GOVERNMENT
National Labor Relations Board
Office of Inspector General



Financial Remedies and Other Settlement Terms

Report No. OIG-AMR-63-10-02

September 2010

INSPECTOR GENERAL



NATIONAL LABOR RELATIONS BOARD

WASHINGTON, DC 20570

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We conducted a review of Financial Remedies and Other Settlement Terms, Report No. OIG-AMR-63-10-02, to evaluate the controls over the computation of backpay and the nature of other settlement terms. We also reviewed the accuracy of backpay-related data entered in the Agency's case management system.

We generally found that the controls over the computation of backpay were not working in the sense that the Regional Offices reviewed were not following them. Some of our findings involve very basic procedural requirements including collecting information to calculate backpay and providing forms to employees. Others, however, involve the exercise of the Agency's discretion to approve a settlement of a case for less than 80 percent or more than 100 percent without proper authorization.

These findings related to the controls are similar to those identified by the Division of Operations-Management's annual quality reviews of Regional Offices. Because that review process does not appear to be working, we are recommending that the Division of Operations-Management develop and implement new control techniques.

We also found that the backpay data in the Case Activity Tracking System is not reliable. In making that determination, we used a threshold error rate of 10 percent and tested 23 data elements. We found significant errors in 8 of the 23 data elements. The types of errors identified would not be detected in a standard Case Activity Tracking System error query.

Because of that level of error in the data, we were not able to rely on the data to determine Agencywide statistics for the number of employees eligible for reinstatement, the total amount of backpay due, or the number of cases involving organizing campaigns or first contract bargaining. Our recommendations also addressed this issue.

Overall, we believe that the control environment that we observed and the unreliability of the case processing data create a difficult management challenge. Our recommendations are tailored to focus attention on that challenge and should be addressed with a view towards the Agency's new case processing system.

When we were planning this review, stakeholders expressed a concern to us regarding backpay being used as a tradeoff for reinstatement, particularly in cases involving organizing activity. The concern was that if employees do not return to work in exchange for a settlement with a guarantee of receiving backpay, the organizing efforts would effectively die.

Approximately 25 percent of the 96 cases that we reviewed involved either organizing campaigns or first contract bargaining in which a labor organization was attempting to gain entry into a workplace. Of those cases, 25 percent resulted in employees returning to work. For the remaining cases, 89 percent involved a non-Board or informal settlement and 39 percent resulted in backpay of more than 100 percent.

In the comments to the draft audit report, the Division of Operations-Management stated that Agency policy prohibits Board agents from being involved in agreements that use backpay as a tradeoff for reinstatement. The comments noted that, unfortunately, often a waiver of reinstatement cannot be avoided in light of the fact that discharged employees are required to mitigate their damages by promptly beginning a search for alternate employment. The Division of Operations-Management also noted that there is no effective means that the Agency has to require that an employee return to his or her former position if the employee and employer reach an agreement for backpay and a waiver of reinstatement. The comments state that for these reasons, the Agency pays so much attention to timely investigation and early settlement of merit discharge cases, and when a settlement cannot be reached a preliminary injunction requiring reinstatement can be sought from the District Court.

The comments of the Division of Operations-Management are included as an appendix to the audit report. We appreciate the cooperation and assistance of the Division of Operations-Management and the Regional Offices in completing this report.

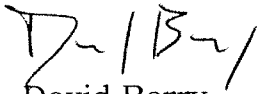

David Berry
Inspector General

TABLE OF CONTENTS

BACKGROUND..... 1

OBJECTIVE, SCOPE, AND METHODOLOGY..... 2

FINDINGS..... 3

NATURE OF CASES 3

BACKPAY AND REINSTATEMENT IN ORGANIZING CASES..... 4

BACKPAY CONTROLS..... 5

Obtaining Information to Calculate Backpay Early 6

Interim Earnings in Affidavits..... 6

Backpay Forms to Employees..... 7

Documentation of Backpay Calculation..... 7

Documentation of Waiver of Reinstatement 8

Backpay Settlements..... 8

Less than 80 Percent Backpay 9

Settling at 80 Percent..... 9

Oversight of Settlements by Operations-Management..... 10

Employer’s Share of FICA Tax 11

DATA ACCURACY OF CATS 11

Using Backpay Data to Determine Agencywide Statistics..... 12

Total Backpay Due..... 13

INCONSISTENT CRITERIA 13

RECOMMENDATIONS 14

ATTACHMENT - CATS DATA ELEMENTS TESTED 15

APPENDIX

Memorandum from the Associate General Counsel, Division of Operations-Management, Discussion Draft of Report “Financial Remedies and Other Settlement Terms” – Agency Response, dated August 27, 2010

BACKGROUND

The remedies for a violation of the National Labor Relations Act (NLRA) are remedial in nature and are intended to restore the situation to that which would have taken place had the violation not occurred. When an NLRA violation has resulted in the loss of employment or earnings, backpay is the standard Board remedy. In keeping with the remedial nature of the NLRA remedies, the goal of the National Labor Relations Board (NLRB or Agency) in determining backpay is to make whole the person who has suffered from a violation for earnings and other compensation lost as a result of that violation.

The backpay remedy also effectuates the purposes of the NLRA by discouraging employers from further unfair labor practices and by assuring employees that the Government is protecting their rights under the NLRA. Backpay is based first on the earnings an employee would have had but for the unlawful action. Against this gross amount is offset the employee's actual earnings from other employment that took place after the unlawful action, less the necessary expenses incurred by the employee in seeking and holding interim employment.

Although backpay awards can result from a Board order, more commonly, backpay awards are the result of negotiated agreements between the parties. The policy issued by the Board and the General Counsel states that the Agency is to actively encourage the parties to reach a mutually satisfactory resolution of unfair labor practice cases at the earliest stages. Regional Offices can seek to obtain either a formal settlement agreement, which is approved by the Board, or an informal settlement agreement, which is approved by the Regional Director or Administrative Law Judge if a hearing has begun. Both types of settlement agreements allow for the Agency to police compliance with the agreement.

The parties may also enter into an agreement among themselves that satisfies the charging party, resulting in the withdrawal of a charge. These are called non-Board settlements. Non-Board settlements do not have the Board's approval and are not policed by the Agency. The Regional Director, however, has the discretion to reject a non-Board settlement that is repugnant to law and policy. Non-Board settlements account for the majority of cases in which a financial remedy is paid.

The Agency reported that the Regional Offices recovered \$77,611,322 on behalf of employees as backpay or reimbursement of fees, dues, and fines during Fiscal Year (FY) 2009. Additionally, a total of 1,549 employees were offered reinstatement.

OBJECTIVE, SCOPE, AND METHODOLOGY

The objective of this audit was to evaluate the controls over the computation of backpay and the nature of other settlement terms. We also reviewed the accuracy of backpay-related data entered in the Agency's Case Activity Tracking System (CATS). Our scope includes unfair labor practice cases involving financial remedies and other settlement terms that closed during FY 2009. We conducted this audit at NLRB Headquarters in Washington, DC and at the following four Regions: Region 4 – Philadelphia; Region 9 – Cincinnati; Region 16 – Fort Worth and the Houston Resident Office; and Region 19 – Seattle. These Regions were chosen as being representative of the Agency as a whole based on many factors related to their administration of backpay.

We reviewed the NLRA, the Agency's Rules and Regulations, Division of Operations-Management (Operations-Management) and General Counsel memoranda, and the NLRB Casehandling Manual to learn about the policies and procedures for administering backpay and for handling settlement agreements. We reviewed the Regional Office Support Staff Manual to learn how backpay and non-Board settlements are recorded. We reviewed the Quality Review Memoranda for the 32 Regional Offices to learn about issues with administering backpay and non-Board settlements.

We interviewed staff in Operations-Management and conducted field work in four Regional Offices. Through that process we learned about how backpay and non-Board settlements are processed and received suggestions about how to improve the efficiency of administering backpay and non-Board settlements. We obtained data from CATS and computed statistics related to backpay and non-Board settlements.

We selected a judgmental sample of 24 cases that closed during FY 2009 involving a financial remedy in each of the Regions we visited. This sample was selected based on a review of the CATS data and includes cases that closed through a non-Board settlement, informal settlement agreement, Board order, or Court judgment. The composition of those cases is shown in the table below.

	Region 4	Region 9	Region 16	Region 19
Pre-Complaint Non-Board Settlement				
Pre-Merit Determination	6	5	2	2
After Merit Determination	1	1	3	1
Deferred	1	9	6	5
Pre-Complaint Informal Settlement	3	0	3	4
After Complaint				
Non-Board Settlement	9	3	7	6
Informal Settlement	2	2	2	5
Board Decision	0	2	0	1
Court Order	2	2	1	0

For each sample of cases, we tested the accuracy of 23 data elements in CATS and compliance with Agency policy regarding backpay and non-Board settlements.

During our review of the case files in Region 19, we identified that items were added to the case files from the Portland Subregional Office and data in CATS was changed after that office was notified of the field visit. As a result, the cases in our sample from the Portland Subregional Office were removed from our testing.

This audit was performed in accordance with generally accepted government auditing standards during the period January 2010 through July 2010. Those standards require that we plan and perform the audit to obtain sufficient, appropriate evidence to provide a reasonable basis for our findings and conclusions based on our audit objectives. We believe that the evidence obtained provided a reasonable basis for our findings based on our audit objectives.

FINDINGS

NATURE OF CASES

The backpay remedy can arise in many different circumstances. The most obvious types of cases involve employees who are discharged for their activities involving organizing campaigns and first contract bargaining, in which a labor organization is trying to gain entry into a workplace, and employees who are discharged for engaging in protected concerted activities. Less obvious cases involve backpay in an instance in which there is no discharge. Those cases include instances in which the employer makes a unilateral change to a benefit that affects all of the employees in the bargaining unit.

During FY 2009, the Agency closed 1,770 cases that involved backpay and/or reinstatement. As shown in the table below, the majority of those cases closed as a result of pre-complaint non-Board settlements.

	Number of Cases	Percent
Pre-Complaint Non-Board Settlement	1,090	61.58
Post-Complaint Non-Board Settlement	148	8.37
Pre-Complaint Informal Settlement	152	8.59
Post-Complaint Informal Settlement	244	13.79
Contested Board Order	55	3.11
Uncontested Board Order	30	1.71
Court Order	46	2.60
Formal Settlement	2	0.11
Not Specified	3	0.17

Most of these cases involved only a few recipients of backpay. Over 50 percent of the cases involved a single individual receiving backpay, and 70 percent had less than 10 employees receiving backpay. The largest number of backpay recipients was 2,000 employees.

In over half the cases involving backpay, there were no employees eligible for reinstatement. For the remaining cases, over 75 percent of them involved only one employee. At the other extreme, the largest number of employees eligible for reinstatement was 300 employees. This was a case in which an entire bargaining unit was discharged and then put back to work pursuant to a non-Board settlement approximately 6 weeks after the charge was filed.

BACKPAY AND REINSTATEMENT IN ORGANIZING CASES

One area of concern that was expressed to us by stakeholders involved settlements of backpay cases involving organizing campaigns and first contract bargaining, in which a labor organization is trying to gain entry into a workplace. Discharging an employee who is trying to organize an employer could have a detrimental effect on the organizing campaign. Of the 96 cases tested, we observed that 28 involved either an organizing campaign or first contract bargaining and 24 of those cases also involved an unlawful discharge.

Overall, reinstatement after discharge during organization activity occurred in 6 of the 24 cases with 21 of 47 employees returning to work. Fourteen of the employees who returned to work were employees in one case. The chart below provides statistical data from the cases in which reinstatement was not achieved.

Cases with 1 Employee	77.8%
Settlements with more than 100% Backpay	38.9%
Non-Board Settlements	61.1%
Informal Settlements	27.8%
Reinstatement Declined – before settlement	27.8%
Reinstatement Waived – after settlement	72.2%

As noted below, data related to organizing campaign and first contract bargaining cases in CATS was determined not to be reliable, so statistics related to the Agency as a whole were not computed.

Operations-Management commented that Agency policy prohibits Board agents from being involved in agreements that use backpay as a tradeoff for reinstatement. The comments noted that often a waiver of reinstatement cannot be avoided because discharged employees are required to mitigate their damages by promptly beginning a search for alternate employment. If an employee secures alternative comparable employment, it is likely that the employee will decline an offer of reinstatement. Operations-Management also noted that there is no effective means that the Agency has to require that an employee return to his or her former position if the employee and employer reach an agreement for backpay and a waiver of reinstatement. Even if an agreement for reinstatement and backpay is disapproved by a Regional Director, an employee can refuse to cooperate with the prosecution of the case or an Administrative Law Judge can approve the settlement over the objections of the General Counsel. The comments stated that for these reasons, the Agency pays so much attention to timely investigation and early settlement of merit discharge cases, and when a settlement cannot be reached a preliminary injunction requiring reinstatement can be sought from the District Court.

BACKPAY CONTROLS

The Government Accountability Office’s (GAO) Standards for Internal Control in the Federal Government states that internal control activities help ensure that management's directives are carried out. Control activities are the policies, procedures, techniques, and mechanisms that enforce management’s directives. They include a wide range of diverse activities such as approvals, authorizations, verifications, performance reviews, and the creation and maintenance of related records which provide evidence of execution of these activities. The Standards also note that internal control is not one event, but a series of actions and activities that occur throughout an entity’s operations and on an ongoing basis.

We identified several policies that were not being complied with. These policies related to obtaining proper authorization for actions, calculating backpay, and maintaining appropriate documentation. These items are discussed in detail below. Our findings were similar to those identified in annual quality reviews of Regional Offices conducted by Operations-Management. Although those reviews determine whether policies are being followed, the reviews do not happen on an ongoing basis and did not prevent non-compliances with Agency policy from occurring.

Operations-Management commented that the issues we identified below with respect to data integrity and weaknesses in management of the compliance program will be addressed in the design of NxGen, the Agency's new case management/document management system.

Obtaining Information to Calculate Backpay Early

The Casehandling Manual states that because estimates of backpay liability are often necessary for the parties to consider settlement options prior to the issuance of complaint, all information in the charging party's and/or employees' possession that is relevant to calculating backpay should be obtained as part of the investigation. Information that should routinely be obtained during the initial investigations and should generally be included in affidavits in 8(a)(3) discharge cases includes contact information, job classifications, wage rates, hours of work, overtime, benefits, and bonuses.

In all four Regional Offices visited, we identified cases in which the hours and wages, the most basic information needed to calculate backpay, should have been included in the initial affidavit, but were not. These are summarized by Region in the table below.

	Region 4		Region 9		Region 16		Region 19	
	Num	Pct	Num	Pct	Num	Pct	Num	Pct
In Affidavit	11	68.8	16	88.9	12	70.6	9	60.0
Not in Affidavit	5	31.2	2	11.1	5	29.4	6	40.0

Interim Earnings in Affidavits

The Casehandling Manual also states that it is not necessary or appropriate to include the identity of interim employers and the wages received by employees during the backpay period in an affidavit. We identified seven cases in three of the four Regional Offices visited with interim earnings included in an affidavit, as shown in the table below.

	Number of Cases
Region 4 – Philadelphia	0
Region 9 – Cincinnati	2
Region 16 – Fort Worth	1
Region 19 – Seattle	4

Backpay Forms to Employees

The Casehandling Manual states that the Compliance Officer should establish contact with employees as soon as possible after the Region has determined that a violation has occurred that might result in a backpay remedy, both to begin collecting information needed to determine backpay and to advise the employee of his or her responsibilities. To maintain contact and to provide appropriate information, the NLRB forms related to backpay should be sent to all identified employees at the time the Region determines that a charge has merit and, if possible, no later than at the time it issues complaint. The paper case file should reflect all action taken in the investigation and be kept up-to-date.

As shown in the following table, for the case files in our sample that this requirement was applicable, we generally found a lack of documentation that the backpay forms were being sent to employees.

	Region 4		Region 9		Region 16		Region 19	
	Num	Pct	Num	Pct	Num	Pct	Num	Pct
Documented	4	40.0	4	40.0	4	50.0	4	44.4
Not documented	6	60.0	6	60.0	4	50.0	5	55.6

Documentation of Backpay Calculation

The Casehandling Manual states that the Region’s files in meritorious cases should contain documentation clearly describing the Region’s assessment of the backpay due. In rare situations, detailed computations may not be required if preparing the computations is not feasible or worth the investment of time. In the event the Region determines it is not feasible or necessary to calculate backpay, the file should clearly document this determination and set forth the reasons that such determination was made.

As shown in the following table, for the case files in our sample that this requirement was applicable, we generally found documentation of the assessment of backpay due.

	Region 4		Region 9		Region 16		Region 19	
	Num	Pct	Num	Pct	Num	Pct	Num	Pct
Documented	16	88.9	8	80.0	12	92.3	15	83.3
Not Documented	2	11.1	2	20.0	1	7.7	3	16.7

Documentation of Waiver of Reinstatement

The NLRB Casehandling Manual states that if, pursuant to a settlement, an employee voluntarily agrees to waive reinstatement, a signed waiver must be obtained clearly in writing. In all four Regional Offices visited, we identified cases in which a written waiver of reinstatement should have been documented in the case file, but was not documented. These are summarized by Region in the table below.

	Region 4		Region 9		Region 16		Region 19	
	Num	Pct	Num	Pct	Num	Pct	Num	Pct
Documented	2	15.4	3	42.9	5	62.5	4	40.0
Not Documented	11	84.6	4	57.1	3	37.5	6	60.0

Backpay Settlements

The Casehandling Manual provides authority to the Regional Director to accept backpay settlements without authorization from Operations-Management if the backpay settlement will constitute at least 80 percent, but not more than 100 percent of the full backpay and interest due. The Casehandling Manual also states that Regional Offices should strive to obtain 100 percent of the backpay determined by the Region. It adds that this requirement is not meant to imply that settlements meeting the threshold should be routinely accepted, and that it constitutes nothing more than a trigger for the need to obtain clearance. The chart below shows the distribution of the percentage of backpay received to backpay due in settled cases.

Percentage of Backpay Received	Number of Cases
0-80 Percent	16
80-100 Percent	24
80 Percent	11
81-85 Percent	5
86-90 Percent	3
91-95 Percent	3
96-100 Percent	2
100 Percent *	38
Greater than 100 Percent	11

* We note that the 100 percent figure may be misleading in that for non-Board settlements prior to a merit determination, which account for 21 of these cases, Regional staff are allowed to use the same amount for backpay due and backpay paid if sufficient information is not available to determine the amount of backpay that was actually due. This occurs because the Regional Offices are not required to calculate the backpay prior to a merit determination.

Less than 80 Percent Backpay

For the 16 cases that had backpay paid of less than 80 percent, 5 cases were pre-complaint non-Board settlements. Justifications for accepting backpay less than 80 percent included:

- Uncertainty / Risk of Litigation;
- Uncertainty about the calculation of the backpay;
- Bankruptcy of the employer;
- Resolution of a grievance resolved through the Union's processes;
- Recognition of Union / Signing of a collective-bargaining agreement; and
- Charging Party's satisfaction with the offer.

Settling at 80 Percent

We identified cases in which the Regional Offices appeared to negotiate or hold discussions showing that they were attempting to settle or justify a settlement at the 80 percent threshold. Examples include:

- In one case, multiple communications with the employer's attorney conveyed a backpay calculation to the employer's attorney that computed 80 percent of backpay. Additionally, a counteroffer from the Union was

transmitted and noted “This is the 80% figure.” The case was settled at the 80 percent figure.

- In a conversation with the employer's attorney, the backpay calculation was discussed, which included an amount for 80 percent of backpay. The parties eventually settled at 80 percent of backpay.
- In a conference call with an Administrative Law Judge and the employer’s attorney, the Board agent provided both the 100 percent and 80 percent amounts in a settlement discussion. The parties settled at 80 percent of backpay due with reinstatement.
- In an internal discussion regarding a case, the e-mail thread among the Regional Office staff noted that there is an “80 percent problem” and that they need to get the backpay amount over 80 percent.

Staff in the Regional Offices visited noted that the 80 percent threshold is public knowledge, and that the Casehandling Manual is posted on the Internet. As a result, the parties in cases know the extent that the Regional Office can maneuver and still approve a settlement.

Oversight of Settlements by Operations-Management

In three of the four Regional Offices visited, cases were identified in which there was no evidence that the required authorization from Operations-Management was obtained. These are summarized by Regional Office in the table below.

	Region 4		Region 9		Region 16		Region 19	
	Num	Pct	Num	Pct	Num	Pct	Num	Pct
Documented	5	100.0	0	0.0	5	71.4	0	0.0
Not Documented	0	0.0	4	100.0	2	28.6	6	100.0

The 12 cases that were settled without proper authorization accounted for approximately \$736,000 in backpay paid. They were mainly the result of non-Board settlements, mostly occurring after the issuance of a complaint, but prior to the beginning of the hearing. In 9 of the 12 cases, the amount of backpay paid equaled the amount of backpay due in CATS, even though the file contained a calculation with a differing amount. For 6 cases, the backpay paid was greater than 100 percent of backpay due.

The Casehandling Manual also states that any compromise from obtaining 100 percent backpay must be warranted by the facts, law, and circumstances of the case. Additionally, in the event that the settlement falls between 80 and 100 percent of calculated backpay, but represents more than minor concessions,

the Region should submit to Operations-Management a copy of the Closed Case Report showing the amount computed and the amount collected, along with a copy of any memorandum that Operations-Management issued authorizing settlement or closure of the case. There was no evidence that the Closed Case Reports were sent to Operations-Management in any of the applicable cases tested. Staff in Operations-Management stated that they had not received the Closed Case Reports from the Regional Offices because the Closed Case Reports are available in CATS and the Regional Offices consider that the concessions involved in these cases are not more than minor.

Employer's Share of FICA Tax

According to the Casehandling Manual, backpay is an amount representing earnings and other forms of compensation. The Casehandling Manual states that when an employer remits backpay to the Agency in the form of a check that is made payable to the Agency, the amount should reflect all backpay, interest, and other amounts, such as reimbursement for medical expenses, that are due, as well as the employer's Federal Insurance Contribution Act (FICA) tax share of the wage component of backpay.

In one case, an employer remitted a check for backpay made payable to the Agency for an amount that matched the figure specified in the Compliance Stipulation, but did not include an additional amount for the employer's FICA tax share. The stipulation stated only that the payment represented the full amount owed to the employee for backpay and did not address the employer's share of the FICA tax. The instructions provided to the employer by the Regional Office did not mention the employer's share of the FICA tax. When the Agency paid the backpay to the employee, it withheld \$2,100 for the employer's share of the FICA tax. By definition in the Casehandling Manual, the employer's share of the FICA tax is not backpay and is not due to the employee. Additionally, the FICA taxes are payable by the employer to the Government.

DATA ACCURACY OF CATS

The GAO's Standards for Internal Control in the Federal Government states that information should be recorded and communicated to management and others within the entity who need it and in a form and within a time frame that enables them to carry out their internal control and other responsibilities. The standards also note that for an entity to run and control its operations, that the data must be relevant, reliable, and timely.

A CATS data integrity program was implemented in 2002 to ensure that information entered into CATS was accurate and reliable. In 2006, the Agency

implemented a new CATS Data Integrity Program. The related guidance stated that Regions should incorporate the use of standard queries as the foundation for their Data Integrity Plan. Such queries would be used to identify missing or illogical data. The guidance also states that Regions must be “vigilant” with respect to information that cannot be verified through the use of queries.

We tested 23 data elements from CATS against the case files. These data elements were selected based on their relevance to backpay and reinstatement and key processing events in a case. A list of these data elements is included as an attachment. We identified errors in 14 data elements and found that the errors in 8 data elements were significant in that the rate exceeded 10 percent in any one of the Regional Offices. For those eight elements, the error rate for each Regional Office is provided in the table below.

	Region 4		Region 9		Region 16		Region 19	
	Errors	Pct	Errors	Pct	Errors	Pct	Errors	Pct
Number of Employees Eligible for Reinstatement	1	4.2	2	8.3	3	12.5	3	12.5
Total Backpay Due	12	50.0	9	37.5	7	29.2	11	45.8
Total Backpay Paid by Employer	2	8.3	3	12.5	2	8.3	0	0.0
* Organizing Campaign/First Contract Bargaining	9	37.5	0	0.0	4	16.7	4	16.7
Date Closed	0	0.0	0	0.0	3	12.5	1	4.2
Date Filed	0	0.0	0	0.0	3	12.5	0	0.0
Date Assigned to Compliance	0	0.0	0	0.0	0	0.0	3	12.5

(* This line item includes two CATS data elements)

The types of errors identified would not be detected in a standard CATS query because they were generally not the result of missing or illogical data. Additionally, the standard queries are not broad enough to encompass all data fields. Based on the errors we identified, the controls were not sufficient to prevent the data errors.

Using Backpay Data to Determine Agencywide Statistics

We found that the CATS data related to backpay cases does not meet the reliability standard set forth in the GAO’s Standards for Internal Control in the

Federal Government. In reaching this determination, we used an error rate of 10 percent in any one of the Regions tested as a showing of unreliability. We therefore cannot rely on the CATS data to determine Agencywide statistics for the total number of employees eligible for reinstatement, the total amount of backpay due, or the number of cases involving organizing campaigns.

Total Backpay Due

The Casehandling Manual states that while the entries for the amount of backpay paid entered onto the Closed Case Report should reflect amounts actually paid, the entries for the amount of backpay due should reflect the full remedial backpay and interest or refunds due, based on the violations at issue and following established methods of determining backpay liabilities. The amounts from the Closed Case Report are also entered into CATS.

In the majority of cases with a data error, the total amount due listed in CATS equaled the total amount paid, despite the fact that a calculation of the actual backpay due was located in the case file and differed from the amount actually paid.

The Total Backpay Due is an important number because it is the basis for determining whether the backpay paid meets the threshold for requiring settlement authorization from Operations-Management. This has been a recurring item found during Operations-Management's quality reviews, including the most recent summary of the FY 2009 quality reviews performed.

INCONSISTENT CRITERIA

The criteria from the NLRB's Casehandling Manual regarding the requirement for Operations-Management's clearance to approve a non-Board settlement in which reinstatement is waived in exchange for backpay greater than 100 percent are inconsistent.

Section 10140.2 of Volume I of the NLRB's Casehandling Manual, Backpay, states "For guidance, including clearance from the Division of Operations-Management, concerning non-Board settlements with backpay amounting to less than 80 percent or more than 100 percent of net backpay, see Sec. 11752 and Secs. 10592.1, .4, and .8 of the Compliance Manual." However, the cited sections are not consistent with each other. Section 10592.8 states that all settlements, including non-Board settlements, in which an employee is to receive more than 100 percent must be approved by Operations-Management. Section 11752, referring to pre-complaint submissions to Operations-Management, states that certain settlements of more than 100 percent of net backpay require Operations-Management's clearance, including non-Board settlements where the Regional Office has decided to issue complaint.

Section 10592.8 implies that all non-Board settlements with backpay greater than 100 percent must be approved, while Section 11752 implies that only the non-Board settlements in which a merit determination has been made need to be cleared. As a result, Regional Offices may handle non-Board settlements with greater than 100 percent backpay inconsistently. We identified one case with greater than 100 percent backpay in which different understandings of the standard were documented, with the Regional Office eventually determining not to seek Operations-Management's clearance.

In December 2009, the Quality Committee's Comprehensive Report on Quality Casehandling stated that "adjusted withdrawals and non-Board settlements, in which a merit determination has not been made, do not require a minimum of 80 percent backpay or the approval of the Division of Operations-Management, except in situations where backpay is more than 100 percent." This confirms the understanding that when backpay is greater than 100 percent, regardless of the timing of the settlement, authorization must be obtained from Operations-Management.

Operations-Management noted in its comments that the confusion in the casehandling instructions with respect to the clearance requirement for backpay settlements of less than 80 percent or greater than 100 percent will be addressed.

RECOMMENDATIONS

We recommend that the Associate General Counsel, Division of Operations-Management:

1. Develop and implement control techniques to provide reasonable assurance of compliance with Agency policies regarding backpay. Because the Agency is migrating to the NxGen system, a new casehandling system, that process should be with a view towards that system and its use of electronic case files.
2. Develop and implement control techniques to provide reasonable assurance that data related to backpay is accurate. Because the Agency is migrating to the NxGen system, a new casehandling system, that process should be with a view towards that system.
3. Clarify policies regarding approval of settlements with backpay in excess of 100 percent.

ATTACHMENT**CATS DATA ELEMENTS TESTED**

	CATS Field Name	Description
1.	Allegations, Keyname containing "Initial Contract"	First Contract Bargaining
2.	CCR, Closing Stage	Closing Stage
3.	CCR, Closing Type	Closing Type
4.	CCR, Date Closed	Date Closed
5.	CCR, Compliance Type	Compliance Type
6.	CCR, Remedies, Backpay, Amount Paid to Company	Total Backpay Paid by Company
7.	CCR, Remedies, Backpay, Amount Paid to Union	Total Backpay Paid by Union
8.	CCR, Remedies, Backpay, Total Amount Due	Total Backpay Due
9.	CCR, Remedies, Backpay, Total Number Receiving	Number of Employees Receiving Backpay
10.	CCR, Remedies, Fees, Amount Paid By Company	Total Fees Paid by Company
11.	CCR, Remedies, Fees, Amount Paid to Union	Total Fees Paid by Union
12.	CCR, Remedies, Fees, Number Receiving	Number of Employees Receiving Fees
13.	CCR, Remedies, Fees, Total Due	Total Fees Due
14.	CCR, Remedies, Reinstatement, No. Discriminatees	Number of Employees Eligible for Reinstatement
15.	CCR, Remedies, Reinstatement, No. on Pref. List	Number of Employees on Preferred List
16.	CCR, Remedies, Reinstatement, Number Accepting	Number of Employees Accepting Reinstatement
17.	CCR, Remedies, Reinstatement, Number Declining	Number of Employees Declining Reinstatement
18.	CCR, Remedies, Reinstatement, Number Waiving	Number of Employees Waiving Reinstatement
19.	Closing, Method	Closing Method
20.	Closing, Timing	Closing Timing
21.	Compliance, Date Assigned to Compliance	Date Assigned to Compliance
22.	Date Charge Filed	Date Charge Filed
23.	Determination, Org. Campaign	Organizing Campaign

APPENDIX

UNITED STATES GOVERNMENT
National Labor Relations Board
Division of Operations-Management



Memorandum

TO: David Berry, Inspector General

DATE: August 27, 2010

FROM: Richard A. Siegel, Associate General Counsel (RS/cr)

SUBJECT: Discussion Draft of Report "Financial Remedies
and Other Settlement Terms" - Agency Response

Management appreciates the opportunity to provide comments in response to the Draft Report of the audit conducted by the Office of the Inspector General of financial remedies and other settlement terms provided in meritorious unfair labor practice cases. Generally, the issues addressed in the audit are issues of concern to the Office of General Counsel and issues that the Division of Operations-Management acting for the General Counsel has sought to address with its oversight of Regional Office operations. We welcome the report and intend to use the information provided to improve Regional Office operations.

Several observations made in the draft report concerning the enforcement of the National Labor Relations Act require comment, in my view. The Draft Report recounts concerns voiced by stakeholders that backpay is often used as a tradeoff for reinstatement and that if employees who are discharged illegally after engaging in protected union activities do not return to the work place the union organizing efforts of which they were a part will often be fatally undercut.

I am concerned by report of the perception of "stakeholders" that backpay is used "as a tradeoff for reinstatement." Agency policy prohibits Board agents from being involved in such an agreement and I note that your report does not indicate that you found evidence of such activity. That is not to say that it can and does occur, particularly in "nonBoard settlements where the Board agents may not be familiar with settlement discussions between the employee and employer. Unfortunately there is often no way waiver of reinstatement can be avoided. Employees who are discharged often promptly begin their search for an alternative job and an alternative paycheck. If they file unfair labor practice charges complaining of their discharge, the Board agent will inform them of their responsibility under the law to mitigate their losses with a diligent search for work. The longer an employee must wait for an offer of reinstatement, the longer he or she will have attempted to find alternative employment and the greater the chances of their success. If an employee secures alternative comparable employment the greater the likelihood that an offer to return to work for the discriminating employer will be declined. Anecdotally, the fact that an employee has been unlawfully discriminated against by the employer does not make returning to the

workplace an attractive option for him or her, particularly when another job has been secured.

If the employee wants the money and is willing to forego reinstatement, there is no effective means by which the Agency can require the employee to return to his or her former position. While Regional Directors can disapprove a charge withdrawal request submitted as part of a greater than 100% non-Board settlement where the employee waives reinstatement, the disapproval will likely not result in the return of the employee to his or her former job. If the employee and the employer have made a mutually acceptable deal, the employee will refuse to cooperate with the Region in the prosecution of the case. Even if the Region issues a subpoena to the employee to coerce the employee's appearance at a hearing, the presiding administrative law judge will likely approve a settlement over Counsel for General Counsel's objection.

The best way to achieve the best remedial result under the Act when an employee is discharged unlawfully is to secure the reinstatement of the employee by settlement promptly after an unfair labor practice charge complaining of the violation is filed. In the absence of prompt reinstatement through settlement, a remedy should be obtained by a reinstatement order promptly secured. It is for this reason that we pay so much attention to the timely investigation and early settlement of merit discharge cases. Where there is no settlement, early reinstatement is achievable through Section 10(j) of the Act, under which the Board can petition a United States district court for a preliminary injunction requiring reinstatement of the discharged employee and a cease and desist order, enforceable in a contempt of court proceeding, to prohibit a repetition of the employer's unlawful conduct.

As the report observes, the Agency is in the process of developing a new case management/document management system, "NxGen," to replace the current Case Activity Tracking System. The issues identified in the report with respect to data integrity and weaknesses in management of the compliance program will be addressed in the design of NxGen. Any confusion in case handling instructions with respect to clearance requirements for backpay settlements of less than 80% or greater than 100% will be addressed. The importance of investigating lost wages early in the processing of discharge cases will be emphasized in Agency training, as it was recently in our Senior Agent Training Conference.

R. A. S.