OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 06-05

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

DATE: April 19, 2006

FROM: Ronald Meisburg, General Counsel

SUBJECT: First Contract Bargaining Cases

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

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

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

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[1] 57 FMCS Ann. Rep. 18 (2004).

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

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

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

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

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

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

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

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

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

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

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

/s/
R.M.

cc: NLRBU
Release to the Public

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

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