OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-01 December 15, 2006

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

FROM: Ronald Meisburg, General Counsel

SUBJECT: Submission of §10(j) Cases to the Division of Advice

In my April 19, 2006 memorandum GC 06-05, "First Contract Bargaining Cases," I stated that one of my priorities would be to ensure that employees be able to vote promptly in elections in an atmosphere free from all unlawful interference and coercion by any party and that, if employees select union representation, their freely made choice is protected during bargaining for an initial contract. I reiterated this priority at the Regional Directors conference, to practitioners at the annual meeting of the American Bar Association, and in a number of recent speeches.

Section 10(j) relief is particularly well suited to accomplish the goal of protecting the representational choice of employees, collective bargaining, and labor peace, while also encouraging the use of Board election processes. For example, if employees must wait for a Board order to remedy unfair labor practices committed during an organizing drive or during initial contract bargaining, their right to make and effectuate a fully informed choice on representation will likely be undermined. Where unfair labor practices have damaged the laboratory conditions needed to proceed to a timely election, a §10(j) injunction can restore the status quo, counter the negative message created by the violations, and create an appropriate atmosphere where employees are able to vote promptly and freely in a Board-conducted election. In this way, Section 10(j) relief can perhaps obviate the need for Gissel bargaining orders in some cases.

The Board election process is only one of many areas in which §10(j) relief can be an effective enforcement tool. The critical Section 10(j) question in every case is whether there is a real danger of remedial failure if the case goes the full litigation route. Such failure can be real if employees have to wait for years of litigation in order to see the fruition of their choices about collective bargaining. Employee free choice is protected by §10(j) relief where successor employers refuse to recognize and bargain and discriminatorily refuse to hire a majority of predecessor employees in order to avoid a bargaining obligation, or where employers extend and unions receive recognition when the union does not have the demonstrated support of a majority of employees. The Board recently authorized §10(j) relief in a case involving an employer's refusal to provide health plan information critical to effective collective bargaining,[1] and I have

[1] Day Automotive Resources, d/b/a Centennial Chevrolet, Case 6-CA-34843, April 5, 2006 (authorized May 4, 2006).

requested Board authorization in a case where an employer refused to meet with the union at reasonable times.[2]

In order to facilitate the effective use of §10(j), Regional Offices should consider the following guidelines to determine the appropriateness of seeking §10(j) relief:

1. The Strength of the Merits Case -- Regional Offices should consider the strength of the complaint allegations in light of the burden of proof in §10(j) cases. District courts recognize that they are not deciding the ultimate merits of the case, and therefore will not resolve contested factual issues or issues of witness credibility. Rather, courts generally consider the evidence in the light most favorable to the Board. If the Regional Director presents rational facts, together with an arguable legal theory, even if novel, courts generally will find that the Regional Director has met the "minimal burden"[3] of either the applicable test of "reasonable cause to believe" the allegations are true or "likelihood of success" on the merits. In cases where §10(j) proceedings might otherwise be appropriate but the strength of a defense is unclear, the Regional Offices should reconsider §10(j) relief after the close of the administrative hearing or, if not much time has passed, after a favorable decision by an administrative law judge.

2. The Threat of Remedial Failure -- Regional Offices should conduct thorough "just and proper" investigations in each potential §10(j) case. If evidence shows no threat of remedial harm, e.g., employee support for the Union has stayed the same or even increased despite the employer's unfair labor practices, then §10(j) may not be appropriate. However, if the Regional 0ffice is unable to obtain evidence to either support or refute harm to employee Section 7 rights or to the collective bargaining process, the Regional Office may rely on an inference of adverse impact on Section 7 rights that will occur "based on the nature and extent of the violations."[4] For example, courts routinely conclude that the discharge of union activists and supporters has "a serious adverse impact on employee interest in unionization."[5] Such discharges can have a dramatic and long-term effect on the employees remaining at the facility who will likely fear that

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[2] Gregory Chrysler Jeep, Case 13-CA-42961, May 12, 2005 (withdrawn from Board as settled).

[3] Boire v. Pilot Freight Carriers, 515 F.2d 1185, 1189 (5th Cir. 1975), reh. and reh. en banc denied 521 F.2d 795, cert. denied 426 U.S. 934 (1976).

[4] Pascarell v. Vibra-Screw, Inc., 904 F.2d 874, 880 (3d Cir. 1990). Accord: Scott v. Stephen Dunn & Associates, 241 F.3d 652, 668 (9th Cir. 2001).

[5] Kaynard v. Palby Lingerie, 625 F.2d 1047, 1053 (2d Cir. 1980). Accord: Pye v. Excel Case Ready, 238 F.3d 69, 74-75 (1st Cir. 2001); Aguayo v. Tomco Carburetor, 853 F.2d 744, 749 (9th Cir. 1998); Eisenberg v. Wellington Hall Nursing Home, Inc., 651 F.2d 902, 907 (3d Cir. 1981).

they, too, could be discharged for engaging in union activity.[6] Similarly, unilateral changes can undermine employee free choice and the status of the union as the exclusive bargaining agent of the employees.[7] They inhibit the union's ability to bargain because it is forced by these unilateral changes to bargain back terms and conditions unlawfully modified.[8] Finally, there is a strong inference of irreparable harm to statutory rights in successor cases, where employees and their union have a new and uncertain bargaining relationship with a different employer and are particularly vulnerable in the transition from predecessor to successor.[9] Employees may feel that their choice of a union is "subject to the vagaries of an enterprise's transformation."[10] Thus, in appropriate circumstances, the same evidence that establishes the unfair labor practices can often provide evidentiary support for the danger of remedial failure.[11]

3. Number of Alleged Unfair Labor Practices – The number of alleged unfair labor practices is not necessarily determinative of the need for injunctive relief. A single unfair labor practice, such as a discharge, unilateral change, or refusal to meet or provide information, may warrant interim relief if that unfair labor practice adversely impacts employee Section 7 rights or the collective bargaining process. Regional Offices should conduct the same level of just and proper analysis in these cases as cases involving multiple allegations.

4. Blocking Charge Cases -- A meritorious blocking charge may be particularly appropriate for a §10(j) petition, where the petitioner is considering whether or not to proceed to an election notwithstanding the alleged unfair labor practices. In those cases, the Regional Office should discuss the pros and cons of seeking interim relief with the petitioner. Specifically, it should inform the petitioner that it is considering seeking §10(j) authorization to remove the taint of unfair labor practices and enhance the possibility of a fair election. The union, of course, is free to proceed immediately to an election without waiting for §10(j) process, but in the event the Union loses the election, it should be aware that Section 10(j)

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6 Schaub v. West Michigan Plumbing & Heating, Inc., 250 F.3d 962, 971 (6th Cir. 2001); NLRB v. Electro-Voice, Inc., 83 F.3d 1559, 1572-1573 (7th Cir. 1996), cert. denied 519 U.S. 1005 (1997). See also Angle v. Sacks, 382 F.2d 655, 660 (10th Cir. 1967).

7 See e.g. Morio v. North American Soccer League, 632 F.2d 217, 218 (2d Cir. 1980)(per curiam).

8 See e.g. Florida-Texas Freight, 203 NLRB 509, 510 (1973), enfd. 489 F.2d 1275 (6th Cir. 1974).

9 Hoffman v. Inn Credible Caterers, 247 F.2d 360, 369 (2d Cir. 2001); Bloedorn v. Francisco Foods d/b/a/ Piggly Wiggly, 276 F.3d 270, 297-298 (7th Cir. 2001).

10 Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27, 39-40 (1987).

11 Bloedorn v. Francisco Foods, 276 F.3d at 297; Pye v. Excel Case Ready, 238 F.3d 69, 74 (1st Cir. 2001).

relief, based on pre-election unfair labor practices, is very difficult to obtain from the courts. Based on this discussion with the Regional Office, the petitioner can make an informed decision about whether or not it is willing to proceed to an election if it believes the alleged violations can be remedied on an interim basis by a §10(j) injunction.

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

/s/
R.M.

cc: NLRBU
Release to the Public

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