

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 07-08

May 29, 2007

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

FROM: Ronald Meisburg, General Counsel

SUBJECT: Additional Remedies in First Contract Bargaining Cases

In GC Memorandum 06-05, I set forth a remedial initiative dealing with first contract bargaining cases intended to ensure that employees have freedom of choice on the issue of union representation, free of coercion by any party, and that their decision is protected by this Agency. As noted there, initial contract bargaining constitutes a critical stage of the negotiation process in that it provides the foundation for the parties' future labor-management relationship. Unfair labor practices by employers and unions during this critical stage may have long-lasting, deleterious effects on the parties' collective bargaining and frustrate employees' freely-exercised choice to unionize. For these reasons, GC Memorandum 06-05 instructed Regions to consider Section 10(j) relief and special remedies in first contract bargaining cases, and to submit to the Division of Advice all cases where Regional Directors found merit to post-certification Section 8(a)(1), (3), or (5), or 8(b)(1)(A) or 8(b)(3) allegations.

Our experience with these cases under GC Memorandum 06-05 has led me to conclude that additional remedial measures should be undertaken to adequately protect employee free choice in initial bargaining cases. This memorandum sets forth additional remedies that should regularly be considered in cases where unfair labor practices occur during first contract bargaining. By this memorandum, I am also extending for another six months the directive to submit all cases that involve violations during organizing campaigns or first contract bargaining to the Injunction Litigation Branch of the Division of Advice with a Regional recommendation on whether Section 10(j) relief is appropriate.

I. THE NEED FOR ADDITIONAL REMEDIES IN INITIAL CONTRACT BARGAINING CASES

Where there are bad faith bargaining tactics or other violations in the initial bargaining process that substantially delay or otherwise hinder negotiations, merely ordering the parties to bargain may not return the parties to the status quo ante. I believe that additional measures are often necessary in these situations to truly restore the conditions and the parties' relationships to what would have existed absent the violations. With this object in mind, I instructed Regions in GC Memorandum 06-05 to consider special remedies in initial bargaining cases, such as seeking extension of the certification year, notice reading and publication, union access to bulletin boards, periodic reports on the status of bargaining, and bargaining/litigation expenses. Based on our experience under this remedial initiative, I have concluded that certain remedies specifically tailored to restore the pre-unfair labor practice status quo, make whole the affected parties, and promote good-faith bargaining should regularly be sought in initial bargaining cases where violations have interfered with contract negotiations.

The Board has in the past imposed remedies which, if uniformly applied, could assist in returning the parties to the pre-unfair labor practice status quo. The Board considers these remedies to be extraordinary relief, and has traditionally focused in its analysis on the egregiousness of the respondent's conduct, rather than the impact of the violations on employees' Section 7 rights and the collective-bargaining relationship. I believe that, in first contract bargaining cases, the primary focus should be on the need to restore the status quo and on tailoring make-whole remedies to restore the process of collective bargaining at this critical stage. Therefore, although the Board has so far applied additional remedies only occasionally, and then based on the egregiousness of the violations, we should seek them, and argue their necessity, based on the impact of the violations on the new collective-bargaining relationship.

In identifying which first contract bargaining cases may warrant additional remedies, Regions should focus on the effect of the unfair labor practices, whether committed by employers or by unions, on the bargaining process and the parties' relative bargaining strengths. Regions should consider whether first-contract bargaining violations are likely to irrevocably stymie the bargaining process by unduly delaying negotiations, unlawfully increasing the bargaining expenses of the other party, undermining the union's support, or otherwise causing a decline in a party's bargaining strength. High impact violations during first contract bargaining may include:

- Outright refusals to bargain or overall bad-faith bargaining that may be tantamount to a repudiation of the bargaining relationship.
- Refusals to meet at reasonable times, the use of bargaining agents without adequate bargaining authority, refusals to provide information that is critical for negotiations to proceed, or other tactics that prolong bargaining. By causing undue delay in negotiations, these violations unlawfully increase the other party's bargaining expenses and eventually erode their bargaining strength.
- Unilateral changes that inject extraneous issues into the negotiations. These unlawfully created issues distract from the legitimate issues dividing the parties at bargaining, making it more difficult for the parties to achieve a contract. Unilateral changes may also force unions to bargain from a position of disadvantage, render the unions powerless in the eyes of unit employees, and tend to erode employee support for the union at a time when the union has not had adequate opportunity to establish a strong relationship with the represented employees.
- Unlawful discharges of union supporters. Discharges may also significantly hamper negotiations by removing key supporters from the workplace where they serve as a source of information and communication between the unit and the Union. Discharges that involve employee-negotiators may impact bargaining not only by removing key individuals from the bargaining unit, but also by discouraging other employees from stepping into the discriminatees' bargaining role.

The probable result of these high-impact violations is a seriously damaged collective-bargaining relationship that is less likely to achieve the good-faith bargaining necessary to reach a first contract.

II. APPROPRIATE ADDITIONAL REMEDIES

The serious harm to the collective-bargaining process that may result from violations such as those committed during initial contract bargaining warrant remedies beyond the standard bargaining order. I believe that the remedies discussed below can directly and effectively address the consequences of bad-faith bargaining and other violations during first contract negotiations so as to more adequately restore the pre-violation conditions and relative positions of the parties. Accordingly, they should be considered by Regions in all appropriate cases:

1. Requiring Bargaining on a Prescribed or Compressed Schedule

Specific bargaining schedules have been used against recidivist employers, particularly in contempt proceedings, to bring them into compliance with their bargaining obligations. In this context, the Board, with judicial approval, has alternatively demanded that the parties meet at reasonable consecutive intervals,¹ for a minimum number of days per week,² or for a minimum number of hours per week,³ until an agreement or good-faith impasse is reached. These specific-schedule bargaining orders go further than traditional bargaining orders to minimize the potential for further delay, and help to secure a meaningful opportunity for bargaining.

These scheduled bargaining orders have not been generally sought in unfair labor practice complaints. Where they have been sought, administrative law judges or the Board have rejected them without substantive discussion.⁴ Nevertheless, I believe that these scheduled bargaining orders directly address the problem of improving the diminished chances of a bargaining unit attaining a first contract where there has been unlawful delay and bad-faith tactics. A specific bargaining schedule provides an effective and unburdensome means of improving employees' chances of achieving a first contract. While the exact nature of the bargaining schedule requested may vary depending on the particular circumstances of the case and will be determined in consultation with the Division of Advice, in recommending specific bargaining schedules in first contract bargaining cases Regions should consider the types of bargaining schedules granted in contempt situations.⁵

¹ See, e.g., NLRB v. Johnson Mfg. Co. of Lubbock, 511 F.2d 153, 156 (5th Cir. 1975); NLRB v. Metlox Mfg. Co., 1973 WL 3146 (9th Cir. Apr. 18, 1973).

² See, e.g., Straight Creek Mining, Inc. v. NLRB, 2001 WL 1262218 (6th Cir. May 11, 2001) (ordering bargaining at least one day per week); NLRB v. H&H Pretzel Co., 1991 WL 111249 (6th Cir. June 25, 1991) (three days per week).

³ See, e.g., NLRB v. Schill Steel Prods., 480 F.2d 586, 598 (5th Cir. 1973) (15 hours, unless the union agreed to less).

⁴ See, e.g., People Care, Inc., 327 NLRB 814, 827 (1999); Professional Eye Care, 289 NLRB 1376, 1376 fn.3 (1988).

⁵ See cases cited above, fns. 1-3.

2. Periodic Reports on Bargaining Status

In GC Memorandum 06-05, I discussed remedies requiring the respondent to provide to the Board periodic reports on the status of bargaining. While I believe that requiring bargaining according to a prescribed schedule will help to remedy the consequences of bargaining delays in initial contract bargaining, as discussed above, the additional requirement of periodic reports on bargaining status may be appropriate in cases where there is a reasonable concern that the respondent will repeat its unlawful conduct. It may be an appropriate remedy, for example, where the respondent has previously violated a Board order or settlement agreement.

3. A Minimum Six-Month Extension of the Certification Year

It has long been Board policy to ensure that newly-certified unions have the opportunity to focus solely on bargaining for at least one full year.⁶ To that end, the Board will not allow a union's majority status to be challenged within one year of certification in order to provide the union with "a reasonable period in which it can be given a fair chance to succeed."⁷ Consequently, where an employer's unfair labor practices delay good-faith bargaining during that period, the Board retains the discretion to extend the certification year.⁸ Although the Board sometimes exercises its discretion to extend the certification year for a full 12 months, even where there may have been some period of good faith bargaining,⁹ it frequently rejects such an extension.¹⁰ Rather, the Board considers the context of any particular refusal to bargain in deciding whether to grant a certification year extension, and if so, for how long, particularly taking into account "the nature of the violations; the number, extent, and dates of the collective bargaining sessions; the impact of the unfair labor practices on the bargaining process; and the conduct of the union during negotiations."¹¹

⁶ Brooks v. NLRB, 348 U.S. 96, 101-03 (1954); Kimberly Clark Corp., 61 NLRB 90, 92 (1945).

⁷ Centr-O-Cast, 100 NLRB 1507, 1508 (1952) (quoting Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944)).

⁸ Mar-Jac Poultry Co., 136 NLRB 785, 786-87 (1962).

⁹ Northwest Graphics, Inc., 342 NLRB 1288, 1289-90 (2004), enfd. mem. 156 Fed.Appx. 331 (D.C. Cir. 2005) (citing Glomac Plastics, 234 NLRB 1309 fn.4 (1978), enfd. in rel. part 592 F.2d 94, 101 (2d Cir. 1979)).

¹⁰ See, e.g., St. George's Warehouse, 341 NLRB 904 (2004) (extension of certification year not warranted where employer committed Section 8(a)(5) violations but did not engage in surface bargaining); Mercy, Inc., 346 NLRB No. 88, slip op. at 3-4 (2006) (granting only a 3 month extension where the record contained no explanation as to why the union did not seek bargaining during the first 10 months of the certification year); United Electrical Contractors Assn., 347 NLRB No. 1 (2006) (certification year extended only for a "reasonable period" after employer failed to provide relevant information).

¹¹ Mercy, Inc., 346 NLRB No. 88, slip op. at 3 (citing Northwest Graphics, 342 NLRB at 1289; Wells Fargo Armored Services Corp., 322 NLRB 616, 617 (1996)). Current Board members have emphasized that "the length of such an extension is not necessarily a simple arithmetic calculation." Northwest Graphics, Inc., 342 NLRB 1289. See also id.

The Board has recognized, however, that when unlawful bargaining has disrupted the bargaining relationship, parties need a reasonable period of time to resume their relationship.¹² Accordingly, it has often granted six-month extensions to remedy unlawful bargaining even where there has been lawful bargaining for more than six months during the certification year. In keeping with this approach, Regions should routinely seek minimum certification year extensions of six months in cases where unlawful bargaining in first contract negotiations disrupted the relationship, even where this may require overall bargaining for more than 12 months. I believe six months is the minimum time necessary to reestablish a solid initial bargaining relationship that has been undermined by the effects of the illegal bargaining tactics. At the same time, extending the period by six months, as opposed to a full year, would adequately accommodate employees' right to seek to decertify a union they no longer want to represent them. Certification year extensions of six months generally should be particularly valuable, especially when combined with prescribed bargaining schedules that may require more bargaining in a shorter timeframe.

Of course, in cases where there has been no meaningful bargaining post-certification, or where the unfair labor practices have eliminated any progress made during any period of good-faith bargaining, we will continue to seek 12-month certification year extensions to return the parties to the status quo ante.

4. Reimbursement of Bargaining Costs

The Board has ordered respondents in bad-faith bargaining cases to reimburse the other party for bargaining costs in order to restore the status quo ante. However, the Board has limited this remedy to cases of "unusually aggravated misconduct . . . where it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies."¹³ The Board has applied this standard to both employers¹⁴ and unions¹⁵ that engaged in bad-faith bargaining, where there was

at 1291 (Chairman Battista, in dissent, stating that an extension's length "is not necessarily to be decided by arithmetic reasoning")

¹² See, e.g., Colfor, Inc., 282 NLRB 1173, 1175 (1987), *enfd.* 838 F.2d 164 (6th Cir. 1988) ("It is unreasonable to conclude that these parties could resume negotiations at the point where they left off over 2 years ago, or that fruitful negotiations could take place during a mere 2 months of bargaining after such a hiatus."); see also Beverly Health and Rehabilitation Services, 325 NLRB 897, 902-03 (1998), *enfd.* 187 F.3d 769 (8th Cir. 1999) (granting 6 month extension despite 9 months of good faith bargaining during the certification year); Dominguez Valley Hospital, 287 NLRB 149, 151 (1987), *enfd.* 907 F.2d 905 (9th Cir. 1990) (same).

¹³ Dish Network Service Corp., 347 NLRB No. 69, slip op. at 53 (2006) (quoting Unbelievable, Inc., 318 NLRB 857, 859 (1995), enforcement denied in part 118 F.3d 795 (D.C. Cir. 1997)).

¹⁴ Regency Service Carts, Inc., 345 NLRB No. 44, slip op. at 8-9 (2005).

¹⁵ Teamsters Local Union No. 122, 334 NLRB 1190, 1194-95 (2001), *enfd.* mem. 2003 WL 880990 (D.C. Cir. Feb. 14, 2003).

deliberate misconduct that was “calculated to thwart the entire collective-bargaining process and forestall the possibility of the Respondent ever reaching agreement.”¹⁶ Reimbursed costs have included employee negotiating committee members’ lost wages and union agents’ salaries, as well as mileage, meals, and lodging expenses incurred by the bargaining representatives in getting to the bargaining table.¹⁷

Under this rationale, reimbursement of bargaining costs is particularly appropriate where violations that amount to a complete repudiation of the employee-chosen bargaining relationship occur at a time when that relationship has not had an opportunity to establish itself and employees’ relationship with their chosen union is in a nascent stage.¹⁸ Due to the especially vulnerable status of a new collective-bargaining relationship, such unfair labor practices necessarily “infect the core of the bargaining process” to such an extent that their effects cannot be remedied by a mere bargaining order.

However, as mentioned above, I believe that the appropriate focus should be not on the egregiousness of the violations, but on the effect they have on the bargaining relationship and need for true make-whole relief. Thus, the critical factor in cases involving violations during first contract bargaining is that the violations cause the other party to waste resources in futile bargaining or efforts to enforce the bargaining obligation at a time when the new bargaining relationship is most vulnerable. These unlawfully-imposed costs may have long-lasting effect on the affected party’s economic strength.

Although the Board has stated that it “do[es] not intend to disturb the Board’s long-established practice of relying on bargaining orders to remedy the vast majority of bad-faith bargaining violations[.]”¹⁹ a bargaining order alone may be insufficient to restore the status quo ante where cumulative illegal tactics significantly stall a newly-formed bargaining relationship.²⁰ A bargaining order alone will not make up for the unlawful costs on the affected party, who is forced to expend time and resources arranging, planning for, and participating in fruitless meetings. In such circumstances,

¹⁶ Unbelievable, Inc., 318 NLRB at 858.

¹⁷ See, e.g., NLRB v. Newton-New Haven Co., 1979 WL 4857 (2d Cir. June 18, 1979); NLRB v. Mr. F’s Beef and Bourbon, 1977 WL 4297 (6th Cir. Aug. 29, 1977); NLRB v. Johnson Mfg. Co., 511 F.2d 153, 157 & fn.4 (5th Cir. 1975).

¹⁸ It is well established that newly certified unions are very vulnerable to employer misconduct. See generally Arlook v. S. Lichtenberg & Co., 952 F.2d 367, 373 (11th Cir. 1992), and Ahearn v. Jackson Hospital Corp., 351 F.3d 226, 239 (6th Cir. 2003). A bargaining order alone will not overcome the harm to the union, and its ability to reach a first contract, which result from employer failures to bargain in the critical post-election period.

¹⁹ Regency Service Carts, 345 NLRB No. 44, slip op. at 9 (citing Unbelievable, Inc., 318 NLRB at 859).

²⁰ In contrast, where parties have been able to continue negotiations, despite an employer’s unlawful unilateral changes, the Board has found that reimbursement of negotiating costs was not appropriate. Visiting Nurse Services of Western Mass., 325 NLRB 1125, 1133 (1998), enfd. 177 F.3d 52 (1st Cir. 1999).

reimbursement of bargaining costs is necessary to restore the parties to their lawful pre-violation position and fully counter the effects of the violations on employees' ability to reach an agreement. Where the investigation discloses bad-faith bargaining from the outset, we will seek negotiation costs for the full period of negotiations, rather than confining the requested order to the six month 10(b) period.²¹

III. SUBMISSION OF CASES TO THE DIVISION OF ADVICE

In order to assure consistent analysis and application of these additional remedies in initial contract bargaining cases, Regional Offices should submit to the Division of Advice all cases involving unfair labor practices during bargaining for, or attempts to bargain for, an initial contract. Because our prior experience has shown that Section 10(j) injunctive relief is often the most effective means of preventing potentially irreparable harm to bargaining relationships and restoring the lawful status quo ante, I am also directing the Regions to include in their submission their recommendation regarding Section 10(j) relief. Finally, our review of cases submitted for Section 10(j) consideration under our prior memorandum has led us to conclude that cases involving breaches of first contract settlement agreements are particularly appropriate subjects for Section 10(j) relief.

In short, for a period of six months after the date of this Memorandum, Regions should submit to the Division of Advice, with a copy to Operations-Management:

1. All meritorious cases involving unfair labor practices during bargaining for, or attempts to bargain for, a first contract.²² Regional submissions to the Division of Advice should include a summary of the violations to be alleged, a discussion of the impact of the violations on the bargaining relationship, the Region's recommendation on which, if any, of the additional remedies discussed herein are appropriate and why, and the Region's recommendation on whether Section 10(j) relief is appropriate.

As was the case with GC Memorandum 06-05, if the Region is recommending that Section 10(j) relief be authorized, it should submit the standard "go" 10(j) recommendation memorandum. If the Region is recommending against both 10(j) and any of the remedies discussed here, it should submit a short memorandum explaining the basis for its recommendation and attach the decisional documents (field investigative report, agenda outline, agenda minute) and the complaint. Recommendations to seek the final remedies discussed here should be treated as standard Advice submissions, including the parties' positions, if any, on the recommended remedies.

2. In continuation of GC Memorandum 06-05, all meritorious cases where a union is actively engaged in an organizing campaign and the unfair labor practice activity has undermined employees' right to make a free and informed choice should be submitted for Section 10(j) consideration, with the Region's recommendation on whether injunctive relief is appropriate.

²¹ The Board recently has indicated that this could well be appropriate in cases where "it may not be readily apparent until long after the negotiations have begun that bargaining has been in bad faith from the inception." Regency Service Carts, 345 NLRB No. 44, fn. 14.

²² A Region need not submit test of certification cases or other merit cases in which the parties agree to a bilateral settlement before complaint issues.

3. In crafting their recommendations regarding Section 10(j) relief for cases in either of the above categories, Regions should be cognizant that cases where there has been a breach of a settlement agreement may be particularly appropriate vehicles for injunctive relief.

/s/
R.M.

cc: NLRBU
Release to the Public