

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 11-06

February 18, 2011

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

FROM: Lafe E. Solomon, Acting General Counsel

SUBJECT: First Contract Bargaining Cases: Regional Authorization to Seek
Additional Remedies and Submissions to Division of Advice

General Counsel Ronald Meisburg established a remedial initiative in 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 regarding representation is protected by this Agency.¹ Both memoranda instructed Regions to consider remedies beyond the standard bargaining order to 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. These additional remedies included: notice reading; requiring bargaining on a prescribed or compressed schedule; periodic reports on bargaining status; a minimum six-month extension of the certification year; reimbursement of bargaining expenses; and reimbursement of litigation expenses. In order to assure consistent analysis and application of these additional remedies, Regional Offices were instructed to submit to the Division of Advice all cases involving unfair labor practices during bargaining for, or attempts to bargain for, an initial contract, with the Region's recommendations and rationale on which, if any, additional remedies were appropriate, as well as its recommendation on whether Section 10(j) relief was appropriate.

Our experience with these cases under Memorandum GC 06-05 and Memorandum GC 07-08 indicates that notice-reading, certification-year-extension, and bargaining-schedule remedies have been authorized when certain fact patterns are present. Accordingly, when those fact patterns are present, Regional Offices may seek those additional remedies without submitting the case to the Division of Advice.² On the

¹ See Memoranda GC 06-05 and GC 07-08.

² Regional Offices should continue to consider the propriety of 10(j) relief in all first-contract bargaining cases and should submit their recommendation regarding such relief to the Injunction Litigation Branch in all meritorious cases described in Memorandum GC 08-09 (July 1, 2008): chronic delay in meeting or outright refusal to meet at reasonable times; refusal to provide information needed for bargaining; surface bargaining; unilateral changes; discharge of union leaders/negotiators/key supporters; mass discharges; discriminatory or otherwise unlawful subcontracting of bargaining unit work that decimate or eliminate the unit itself; tainted withdrawal of recognition at the end of the certification year; breaches of settlement agreements during initial contract bargaining.

other hand, we do not have as much experience with the reimbursement of bargaining expenses and reimbursement of litigation expenses remedies. In order to assure consistent analysis and application of those additional remedies in initial contract bargaining cases, Regional Offices should continue to submit to Advice all cases where they may be appropriate.

A. Regions Authorized to Seek Notice Reading, Certification Year Extension, and Bargaining Schedule Remedies

1. Notice reading

Notice-reading remedies generally require that a responsible management official read the notice to assembled employees or, at the respondent's option, have a Board Agent read the notice in the presence of a responsible management official. The public reading of a notice has been recognized as an "effective but moderate way to let in a warming wind of information and, more important, reassurance."³ By imposing such a remedy, the Board can assure that all employees will know that the employer will respect their statutory rights.⁴ A notice reading remedy will ensure that the important information set forth in the notice is "disseminated to all employees, including those who do not consult the [employer's] bulletin boards."⁵ A reading will also allow all employees to more fully internalize all of the notice, as opposed to hurriedly scanning the posting under the scrutiny of others.

Under Memorandum GC 06-05 and Memorandum GC 07-08, the Division of Advice has authorized notice-reading remedies in first-contract bargaining cases where an employer refused to bargain with the union; where an employer rejected all of the union's proposed bargaining dates; where an employer made unilateral changes and refused to provide information; where an employer engaged in surface bargaining; where an employer engaged in bad faith bargaining and discriminated against a steward and union members; and where an employer failed to execute an agreed-upon contract, dealt directly with unit employees, withdrew recognition, and blamed unilateral changes regarding employee bonuses on the union.

Regional Offices are now authorized to seek a notice-reading remedy in first-contract bargaining cases involving the above or similar fact patterns where the employer's unlawful conduct at or away from the table had the effect of undermining union support among employees without submitting the case to Advice.

³ United States Service Industries, 319 NLRB 231, 232 (1999), *enfd.* 107 F.3d 932 (D.C. Cir. 1997), quoting J.P. Stevens & Co. v. NLRB, 417 F.2d 533, 540 (5th Cir. 1969). See also Concrete Form Walls, Inc., 346 NLRB 831, 841 n.3 (2006) (Member Schaumber, dissenting in part) (notice-reading remedy "gives teeth to other notice provisions" that the respondent must also announce).

⁴ Federated Logistics, 340 NLRB 255, 258 & n.11 (2005), *enfd.* 400 F.3d 920 (D.C. Cir. 2005).

⁵ Excel Case Ready, 334 NLRB 4, 5 (2001).

2. Minimum six-month extension of the certification year

The certification year provides a newly-certified union with “a reasonable period in which it can be given a fair chance to succeed.”⁶ It is well established that where an employer’s unfair labor practices delay good-faith bargaining during that time, the Board may extend the certification year.⁷ An employer’s bad faith bargaining after certification takes from the union “the period when unions are generally at their greatest strength – the 1-year period immediately following the certification.”⁸ Therefore, when unlawful conduct has disrupted the bargaining relationship, parties need a reasonable period of time to resume their relationship.⁹ The length of the extension is not merely an arithmetic calculation.¹⁰ In considering whether to extend the certification year, and for how long, the Board considers “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 Where an employer’s unfair labor practices disrupt the bargaining relationship, a minimum six-month extension of the certification year is necessary.¹²

The Division of Advice has authorized Regional Offices to seek extensions of the certification year when part or all of the certification year is lost due to the employer’s bad faith or surface bargaining, dilatory tactics, and/or blanket refusals to bargain. Evidence of employee disaffection resulting from the unfair labor practices was noted in

⁶ Centr-O-Cast & Engineering Co., 100 NLRB 1507, 1508 (1952) (quoting Franks Bros. Co. v. NLRB, 321 U.S. 702, 705 (1944)).

⁷ Mar-Jac Poultry Co., 136 NLRB 785, 786-87 (1962).

⁸ Id. at 787.

⁹ Bryant & Stratton Business Institute, 321 NLRB 1007, 1007 n.5, 1045-46 (1996), *enfd.* 140 F.3d 169 (2d Cir. 1998).

¹⁰ Northwest Graphics, Inc., 342 NLRB 1288, 1289 (2004), *enfd. mem.* 156 Fed. Appx. 331 (D.C. Cir. 2005).

¹¹ American Medical Response, 346 NLRB 1004, 1005 (2006) (extending certification year 3 months when limited record did not show reason for initial 10-month delay in bargaining following certification). See also Northwest Graphics, 342 NLRB at 1289-90 (extending certification year 12 months); Wells Fargo Armored Services Corp., 322 NLRB 616, 617 (1996) (extending year 6 months after employer refused to supply information requested).

¹² See Memorandum GC 07-08, at pp. 4-5. See also Beverly Health & Rehabilitation Services, 325 NLRB 897, 902-903 (1998), *enfd.* 187 F.3d 769 (8th Cir.1999) (granting six-month extension despite nine months of good-faith bargaining during the certification year); Dominquez Valley Hospital, 287 NLRB 149,151 (1987), *enfd.* 907 F.2d 905 (9th Cir. 1990) (same).

several cases but was not present in all cases where this remedy was authorized. In one case, an extension of the certification year was authorized even though the parties continued to bargain but where the employer's unlawful subcontracting and lockout were designed to undermine the union.¹³

Accordingly, as authorized in Memorandum GC 07-08, p.5, in first-contract bargaining cases containing the above or similar fact patterns, Regions may seek Mar-Jac extensions without submitting the case to Advice. Our experience has shown that the above fact patterns normally warrant a full 12-month extension of the certification year. However, in other circumstances, Regional Offices may exercise their discretion to seek extensions of less than 12 months but no less than six months.

3. Bargaining on a specific schedule

Specific bargaining schedules can effectively remedy the delay aspects of an employer's bad faith bargaining.¹⁴ 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.¹⁵ Further, a bargaining schedule can help counter any employee disaffection caused by an employer's illegal tactics. A bargaining schedule can demonstrate to employees that the union's request to collectively bargain on their behalf is being honored, and that their selection of the union as their collective-bargaining representative was not futile.

The bargaining schedule remedy has been authorized when an employer engaged in dilatory tactics, such as delays responding to requests for bargaining dates, cancellation of scheduled bargaining sessions, refusals to provide information that impede bargaining, and refusing to meet for bargaining at regular intervals. In some cases, the time-sensitive nature of bargaining (e.g., an employer's impending loss of a lease or service contract) or evidence of the dilatory conduct's impact on employee support for the union has bolstered the need for a bargaining schedule remedy. Typically, when the bargaining schedule remedy has been authorized, Regional Offices have been instructed to seek a schedule of not less than 24 hours per month for at least six hours per session, or another schedule mutually agreed on by the parties, until a complete collective-bargaining agreement or a good-faith impasse is reached.

¹³ Only in cases where the employer violations did not delay or otherwise adversely affect the course of bargaining during the certification year was authorization denied.

¹⁴ Regions should rely on contempt cases where courts have granted specific bargaining schedules or have required parties to meet at reasonable intervals. See, e.g., Straight Creek Mining, Inc. v. NLRB, 2001 WL 1262218, at *1 (6th Cir. 2001) (ordering bargaining at least one day per week); NLRB v. H & H Pretzel Co., 936 F.2d 573, 1991 WL 111249 at *2 (6th Cir. 1991) (unpublished) (ordering bargaining at least three days per week); NLRB v. Johnson Mfg. Co. of Lubbock, 511 F.2d 153, 156 (5th Cir. 1975), cert. denied 423 U.S. 867 (1975) (ordering bargaining in "reasonably consecutive sessions"); NLRB v. Metlox Mfg. Co., 1973 WL 3146, at *1 (9th Cir. 1973) (ordering bargaining on consecutive days).

¹⁵ See, e.g., Harowe Servo Controls, 250 NLRB 958, 1123-25 (1980).

Based on this experience, if a first-contract bargaining case involves the above or similar fact patterns, Regions are authorized to seek the 24-hour-per-month/6-hour-per-session bargaining schedule without submitting the matter to Advice. If the Region believes that a stricter bargaining schedule is warranted, it should contact Advice.¹⁶ In addition, when seeking a bargaining schedule, the Region should recognize that a schedule is needed to protect bargaining now under a Section 10(j) injunction, rather than at the time of a Board order.

B. Submissions to the Division of Advice: Reimbursement of Bargaining and Litigation Expense Remedies

1. Reimbursement of bargaining expenses

The Board has ordered respondents in bad-faith bargaining cases to restore the status quo ante by reimbursing the other party for bargaining expenses “where it may fairly be said that a respondent’s 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.”¹⁷ The Board has also held that reimbursement of bargaining expenses is appropriate where there is a “direct causal relationship between the [employer’s] actions in bargaining and the charging party’s losses.”¹⁸ Moreover, reimbursement of bargaining costs has been appropriate where an employer’s “conduct was egregious,” “calculated to reduce union representation to inconsequentiality,” and resulted in “frustrat[ing] the bargaining process and deplet[ing] the Union’s resources.”¹⁹ And the Board has ordered employers to reimburse employee negotiators for earnings lost while attending bargaining sessions where they “did not receive the compensatory

¹⁶ Memorandum GC 06-05 and Memorandum GC 07-08 also instructed Regions to consider seeking a remedy requiring employers to provide periodic reports on the progress of bargaining to help restore the status quo. But experience has shown that a bargaining schedule is sufficient because the union can inform the Region if the employer continues its unlawful conduct. If a Regional Office nonetheless believes that a bargaining status report remedy is necessary to restore the status quo, the Region should contact the Division of Advice.

¹⁷ Dish Network Service Corp., 347 NLRB No. 69, slip op. at 2, 30 (2006) (quoting Frontier Hotel & Casino, 318 NLRB 857, 859 (1995), enfd. in relevant part 118 F.3d 795 (D.C. Cir. 1997) (awarding bargaining expenses)).

¹⁸ Regency Service Carts, 345 NLRB 671, 676 (2005) (financial losses union incurred in negotiations were “directly caused by [employer’s] strategy of bad-faith bargaining”); Teamsters Local 122 (August A. Busch & Co.), 334 NLRB 1190, 1195 (2001), enfd. 2003 WL 880990 (D.C. Cir. 2003) (citing Frontier Hotel & Casino, 318 NLRB at 859) (consent judgment).

¹⁹ Alwin Mfg. Co., 326 NLRB 646, 646 (1998), enfd. 192 F.3d 133 (D.C. Cir. 1999) (awarding bargaining expenses where employer insisted on illegal contract issues, continued making unilateral changes, engaged in direct dealing, and threatened to fire ULP strikers).

benefit of good-faith bargaining for which they sacrificed their wages” due to the employer’s bad faith bargaining.²⁰

The Division of Advice has authorized Regional Offices to seek the bargaining-expense remedy when parties engaged in bargaining for a first contract but the sessions were fruitless or futile due to employer conduct such as surface bargaining or bad-faith bargaining. In one case, the bargaining expense remedy was authorized where the union should not even have had to engage in first-contract bargaining because the successor employer had failed to disclose that it had assumed the predecessor’s collective-bargaining agreement. In another case, the bargaining-expense remedy was authorized where employee negotiators had taken time off work to bargain but no bargaining occurred due to the employer’s dilatory tactics.

In cases where this additional remedy has been authorized, the particular bargaining expenses sought have included: reimbursement to employee negotiators of earnings lost while attending fruitless sessions; the costs incurred by the union, including travel costs and attorney fees; and costs of union agent salaries. In some cases, we specifically pointed out that reimbursement of bargaining expenses should be limited to those incurred during the Section 10(b) period. Whether it would ever be appropriate to award costs incurred outside the 10(b) period is an open question. Regions should submit to Advice cases in which they wish to seek such relief.

We have not had as much experience with cases involving a bargaining-expenses remedy as with cases involving notice-reading, certification-year-extension, and bargaining-schedule remedies. Therefore, in order to assure consistent analysis and application of the bargaining-expense remedy in initial contract bargaining cases, Regional Offices should continue to submit such matters to the Division of Advice.

2. Reimbursement of litigation expenses

The Board awards reimbursement for litigation expenses incurred by a union and/or the General Counsel under both Section 10(c) and its “inherent authority” to control Board proceedings through the bad-faith exception to the American Rule.²¹ The

²⁰ Modern Mfg. Co., 292 NLRB 10, 10 n.4, 23 (1988) (reimburse employee negotiators where totality of circumstances demonstrated employer had no intent of reaching agreement, including insisting on maintaining absolute discretion and control over every important economic term); M.F.A. Milling Co., 170 NLRB 1079, 1080 (1968), enfd. 463 F.2d 953 (D.C. Cir. 1972) (course of conduct designed to frustrate bargaining and make negotiations a “fruitless waste of time,” including negotiators lacking sufficient authority to meaningfully bargain, breaking off negotiations for four months, and withdrawing tentative agreements). See also Preterm, Inc., 240 NLRB 654, 656, 676 (1979), supplemented 273 NLRB 683 (1984), enfd. 784 F.2d 426 (1st Cir. 1986) (reimburse employee negotiators where employer violations included refusal to meet with union on several occasions, unreasonably delaying provision of certain information, persistent refusals to negotiate over economic issues).

²¹ Alwin Mfg. Co., 326 NLRB at 647.

Board reserves this remedy for instances when a respondent's bad faith in bargaining is carried over into litigation.²²

The Division of Advice has authorized a Regional Office to seek reimbursement of the union's and the General Counsel's litigation expenses in a case where an employer bargained in bad faith, failed to rectify prior violations, and raised frivolous defenses. In another case, we authorized a Regional Office to seek reimbursement of litigation expenses when an employer forced the union and the General Counsel to litigate a second time bad-faith bargaining conduct that was the subject of an ALJ-approved settlement.

Like the bargaining-expenses remedy, we have not had as much experience with cases involving a litigation-expenses remedy as with cases involving notice-reading, certification-year-extension, and bargaining-schedule remedies. Therefore, in order to assure consistent analysis and application of the litigation-expenses remedy in initial contract bargaining cases, Regional Offices should continue to submit such matters to the Division of Advice.

Summary

In summary, Regional Offices may use their discretion to seek notice-reading, certification-year-extension, and bargaining-schedule remedies in first-contract bargaining cases that have fact patterns similar to cases described above. Of course, Regions may still contact Advice with respect to those additional remedies in first-contract cases that present unusual variations from the fact patterns described above. In addition, Regions should continue to submit to Advice all cases where it may be appropriate to seek reimbursement of bargaining expenses or litigation expenses. Finally, Regions should continue to submit all first-contract bargaining cases in which they issue complaint to the Injunction Litigation Branch with a recommendation on whether Section 10(j) relief, including additional remedies in the 10(j) order, is appropriate.

/s/
L.S.

²² Teamsters Local 122 (August A. Busch & Co.), 334 NLRB at 1193-94.