

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 99-10

December 22, 1999

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

FROM: Leonard R. Page, General Counsel

SUBJECT: Submission of Advice Cases

Last fiscal year there were almost 30,000 unfair labor practice charges filed in the Regional offices. These charges involve a variety of issues including a number of cases which involved novel, complex, unsettled, or policy issues. These cases have historically been sent to the Division of Advice to insure consistency of approach of the General Counsel's view on these issues. This is especially true now where increased use of technology and changes in business organizations have generated many new issues under the Act. With this in mind, I have conducted a review of the requirements for mandatory submission of cases to the Division of Advice and the following list of cases, in my view, meet the above requirements. Of course, while this list covers a variety of issues, it is by no means exhaustive. Regional Directors have the discretion to submit to the Division of Advice cases, which, in the Director's view, involve novel or complex issues.

1. Section 10(j) Cases, where Regions seek authorization to file a 10(j) petition.
2. Cases in which the complaint seeks a Gissel bargaining order must be submitted for 10(j) consideration.
3. 48-hour rule, i.e. after Board authorizes 10(j), Region wishes to delay filing of petition for 48 hours or more.
4. Contempt of 10(j) of 10(l) court order.
5. Cases involving novel legal theories or remedies where there is no extant Board law or where there are conflicting lines of Board precedent.
6. Cases where Region wishes to overturn precedent, including the request for extraordinary remedies.
7. Cases that are the subject of national attention.

8. Cases where charges presenting the same issues are filed in different Regions.
9. Cases involving anti-dual shop clauses ("double-breasting" situations).
10. Where the filing of a grievance or lawsuit is alleged to be unlawful based either upon footnote 5 in Bill Johnson's or because the lawsuit is not reasonably based.
11. EAJA cases where Region wishes to pay a claim.
12. Cases involving whether company owned by employees, in whole or in part (ESOP), has a bargaining obligation.
13. Cases involving whether employee activities to form an ESOP are protected.
14. Cases involving interpretation of other statutes, e.g., ERISA, ADA, RICO, LMRDA, ADEA.
15. Cases of potential or actual overlapping jurisdiction with other Federal agencies except where there is an inter-agency memorandum of understanding.
16. Cases presenting issues involving undocumented aliens left unanswered by GC Memorandum 98-15.
17. Cases involving bargaining to impasse for unilateral control over terms of employment in excess of that allowed by case law, e.g., Colorado Ute, 295 NLRB 607 (1989). Toledo Blade, 295 NLRB 626 (1989), McClatchy Newspapers, 299 NLRB 1045, enf denied and remanded 964 F.2d 1153 (D.C. Cir. 1992).
18. Case involving scope of Section 8(d) bargaining obligation under Dubuque Packing Company, 303 NLRB 386 (1991), Fibreboard Corp. v. NLRB, 379 U.S. 203 (1964), and Torrington Industries, 307 NLRB 809 (1992).
19. Cases involving validity of union mergers, affiliations, disaffiliations where there is continuity of representation but lack of due process is alleged.
20. Cases involving denial of access to private property where it is alleged that there is no reasonable alternative means of communication, where the employer arguably lacks a property interest sufficient to exclude non-employees, or where off duty or striking employees are seeking access to make appeals to the public.
21. Cases involving the legality of union or union-sponsored actions which, although arising in the context of a labor dispute, address matters of social or public concern. See GC Memorandum 95-14.

22. Cases involving a Board notice to parties for a response following a remand from the Court of Appeals. See GC Memorandum 95-14.
23. Cases where the issue is whether the successor employer had plans to retain all the predecessor's employees. See Spruce Up Corp., 209 NLRB 194 (1974); Canteen Company, 317 NLRB 1052 (1995).
24. Cases where an Employer's withdrawal of recognition or refusal to bargain is based upon a good faith doubt of continued majority support under Allentown Mack, 522 U.S. 359 (1998), but where the Employer has not shown actual loss of majority support; cases where an Employer withdraws recognition based on good faith doubt even though there is later evidence showing majority support for the Union under AMBAC, 299 NLRB 505 (1990); and cases where the Region has evidence, unknown to the Employer, that the Union no longer represents a majority of employees.
25. Cases raising issues of joint employer status based solely on the General Counsel's position set forth in Jeffboat, 9-UC-406, on the "economic reality" theory, or issues of determining the appropriate unit in joint employer situations distinguishing Greenhoot, 205 NLRB 250 (1973).
26. Cases involving an employer's unilateral cessation of dues checkoff after expiration of a collective bargaining agreement, currently lawful under Bethlehem Steel, 136 NLRB 1500 (1962).
27. Cases involving the provision of witness statements in grievance proceedings under Anheuser-Busch, 237 NLRB 982 (1978).
28. Cases involving whether to issue an investigative subpoena in an attempt to identify an employer placing a "blind" newspaper advertisement seeking job applications, under NLRB v. Midland Daily News, 151 F.3d 472 (6th Cir. 1998).
29. Cases raising the issue of whether an employer's rules regarding standards of conduct reasonably chill employees' exercise of Section 7 rights under Lafayette Park, 326 NLRB No. 69 (1998).
30. Cases involving the lawfulness of employer videotaping employees for use in employer anti-union communications.
31. Cases involving rules, or discipline under rules, regarding employee use of employer e-mail, access to the Internet, or other aspects of using employer-owned means of electronic communication for Section 7 activities.
32. Cases involving an employer's requirement in a non-union setting that employees arbitrate employment disputes.

33. Cases involving allegations of "premature recognition" of a union in successorship situations, and where an employer is opening a new facility but has yet to begin its normal operations or hire a substantial representative complement of employees.
34. Cases raising 8(a)(5), 8(b)(3), and/or 8(e) issues involving "neutrality" and similar clauses designed to enhance union success in organizing, e.g. by requiring employers to waive Lechmere rights and give union organizers access to their facilities, to provide unions with employee names and addresses upon initiation of an organizing campaign, and to waive their Section 8(c) rights to express opinions about unions' organizing campaigns.
35. Cases involving the application of Section 8(e) to agreements with public employers.
36. Cases in organizing situations raising the issue of union access to lists of employee names and addresses where those employees are widely dispersed or have no fixed duty location, under Technology Service Solutions, 324 NLRB 298 (1997).
37. Cases involving Section 8(g) issues of the need to give additional, more precise advance notice of strike or picketing activity at health care institutions when the time of the commencement of such activity varies from that set forth in the original 8(g) notice.
38. Cases involving whether "nontraditional" strike or picketing activity (e.g., coordinated "shopping", excessive use of loudspeakers) constitutes Section 8(b)(ii) conduct.
39. Cases where remedial Gissel bargaining orders are sought or recommended based solely on Section 8(a)(1) allegations.
40. Beck issues regarding the chargeability of expenses for organizing employees "beyond the competitive market" of unit employees, or implicating the type and level of audit unions must give Beck objectors.
41. Cases involving assertion of jurisdiction over Native American enterprises located on tribal land.
42. Consistent with OM 99-79 cases involving the issues of compensatory damages, remedies for organizing interference and front pay.

L.R.P.

cc: NLRBU