

OFFICE OF THE GENERAL COUNSEL  
Division of Operations Management

MEMORANDUM 75-54

December 8, 1975

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

FROM : Joseph E. DeSio, Associate General Counsel

SUBJECT: Guidelines to Regions for Processing Cases Under  
The Trading Port, Inc., 219 NLRB No. 76

All cases presenting issues raised by the Board's decision in The Trading Port, Inc., 219 NLRB No. 76, should henceforth be processed in conformity with the guidelines contained in the attached proposed General Counsel Memorandum entitled Guidelines to Regions For Processing Cases Under The Trading Port, Inc., 219 NLRB No. 76.

You are, however, invited to send in such suggestions for addition or modification as you deem appropriate concerning any aspect of the memorandum on which you may wish to comment. All such comments should be forwarded to your Assistant General Counsel and should be received no later than December 22, 1975.

Although the attached memorandum is to be considered operative and is to be put into effect immediately, additions and modifications may later be made to the extent deemed warranted after full review of all Regional comments.

You will note that, under the guideline memorandum, there are certain situations in which cases are to be submitted for advice. While, as previously indicated, suggestions are solicited with respect to any and all aspects of the proposed memorandum, you are urged to give particular attention to and engage in some creative thinking with respect to those "Advice" situations described at pages 3 and 4 of the proposed memorandum i.e. (1) cases involving unilateral changes which are made before any demand for recognition, and (2) cases involving strikes in protest of the absence of recognition where no demand for recognition is made at the time of the strike, as distinguished from strikes in protest of the employer's independent unfair labor practices. In connection with such cases you may wish to give consideration to the following questions:

1. Can the employer be said to commit a violation of Section 8(a)(5) when the union makes no demand for recognition?
2. Can unilateral changes be considered violative of Section 8(a)(5) when they occur before any demand for recognition has been made?

3. Could it be argued, by analogy with the holding in Laney & Duke Storage Warehouse Co., Inc., 151 NLRB 248, that after a bargaining obligation arises (i.e. after the employer has embarked on a course of unfair labor practice conduct precluding the holding of an election and the union has been designated by a majority of the employees) and the union makes a claim of majority status but makes no demand for recognition, the employer acts at its peril and violates Section 8(a)(5) if it engages in unilateral conduct?
4. Is the same argument possible where neither a claim of majority status nor a demand for recognition is made?
5. Even if unilateral changes before a demand for recognition cannot be held to be violative of Section 8(a)(5), could they be remedied as part of a bargaining order remedy under Section 8(a)(1)?
6. Assuming that the employees are on strike solely to protest the absence of recognition or unilateral changes, rather than the employer's independent unfair labor practices, can it be said that the strike is an unfair labor practice strike where the union has made no demand for recognition?

J. E. D.

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MEMORANDUM 75-54

GUIDELINES TO REGIONS FOR PROCESSING CASES  
UNDER THE TRADING PORT, INC., 219 NLRB No. 76.

The Board in its decision in Trading Port, Inc., *supra*, Special Distribution 75-35, dated July 22, 1975, reconsidered and changed the policy and principles set forth in Steel-Fab, 212 NLRB No. 25. Since the instructions contained in Memorandum 74-45, dated August 9, 1974, were based on Steel-Fab and do not reflect current Board policy, those instructions are no longer applicable. This memorandum contains guidelines for Regional handling of such cases.

I. THE BOARD DECISION

The Board in Trading Port departed from Steel-Fab in two major respects with particularly significant consequences concerning employer unilateral changes in employment conditions and the status of strikers in such cases.

It held that "an employer's obligation under a bargaining order remedy should commence as of the time the employer has embarked on a clear course of unlawful conduct or has engaged in sufficient unfair labor practices to undermine the Union's majority status." <sup>1/</sup> The Board amplified this holding by stating that where an employer fatally impedes the election process, he forfeits his right to a Board election and "must bargain with the Union on the basis of other clear indications of employees' desires. It is at this point . . . the Employer's unlawful refusal to bargain has taken place." <sup>2/</sup>

The Board, secondly, found a Section 8(a)(5) violation in the employer's "refusing to recognize and bargain with the Union as the majority representative of its employees while coterminously engaged in conduct which undermined the Union's majority status and prevented the holding of a fair election." <sup>3/</sup>

The effect and intent of the Board's first holding concerning the time that an unlawful refusal to bargain takes place in such cases is, as explained by the Board, <sup>4/</sup> to remedy employer unilateral changes in employment conditions made after the bargaining obligations attaches. It is also significant with respect to the status of strikers engaged in a strike for recognition in such cases. Thus, in the latter regard, the Board

<sup>1/</sup> Trading Port, Inc., *supra*, p. 10.

<sup>2/</sup> Ibid, p. 11.

<sup>3/</sup> Ibid, p. 12. See also Independent Sprinkler and Fire Publication Co., 220 NLRB No. 140, fn. 2; Baker Machine & Gear, Inc., 220 NLRB No. 40; and Donelson Packing Co., Inc., 220 NLRB No. 159. Compare Ludwig Fish and Produce, Inc., 220 NLRB No. 160; American Map Co., 219 NLRB No. 186.

<sup>4/</sup> Trading Port, Inc., *supra*, p. 10.

found that at the time of the strike in Trading Port, the employer had forfeited its right to an election and was obligated to recognize and bargain with the Union; that the strike for recognition was prompted by the employer's unlawful refusal to bargain; and that the strike was in consequence an unfair labor practice strike. 5/

Although the Employer in Trading Port embarked on a clear course of unlawful conduct on September 1, the Board placed the requirement to recognize and bargain, upon request, with the Union on September 4, "inasmuch as the Union's recognition demand was not made until September 4, and inasmuch as all of the Employer's unfair labor practices are otherwise individually remedied by our adoption of the Administrative Law Judge's recommended Order . . . ." 6/

The Board also found, consistent with its basic holding, that by unilaterally eliminating certain jobs without consultation with the Union and by encouraging an employee to form an independent employee grievance committee to deal directly with the Employer rather than through the Union, the Employer had committed independent violations of Section 8(a)(5) of the Act. 7/

## II. GUIDE FOR HANDLING TRADING PORT TYPE CASES

Where an employer by a course of independent unfair labor practices undermines a union's uncoerced majority status and prevents the holding of a fair election, a bargaining obligation would attach from the time the employer embarked on that unlawful course of conduct. 8/ In such cases, and apart from the question of whether or not unilateral conduct before, or in the absence of, a demand for recognition would constitute a violation of Section 8(a)(5), the question whether to allege a violation of Section 8(a)(5) or merely seek a remedial bargaining order under Section 8(a)(1) would appear to turn on the presence or absence of a demand for recognition.

### A. Section 8(a)(5) based allegations

In cases where the union has made a demand for recognition, the Region, absent settlement, should issue a Section 8(a)(1) and (5) complaint alleging the appropriate bargaining unit, the union's designation of a majority of the unit employees, 9/ the date of the union's demand for recognition and the date of the employer's refusal to recognize, if any,

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5/ Ibid, p. 6.

6/ Ibid, pp. 11-12.

7/ Ibid, p. 12.

8/ See Trading Port, Inc., supra, p. 10; Donelson Packing Co., Inc., supra, p. 3; Baker Machine & Gear, Inc., supra, p. 4.

9/ In cases where it is clear that the union has obtained nearly a majority (e.g. 45% of the unit) and that the employer's unfair labor practices have prevented the acquisition of a numerical majority of uncoerced cards, the Region may argue that the majority requirement for a bargaining order has been met. In doubtful cases in this area, advice should be sought.

and the nature and date of the unfair labor practices alleged to have undermined the union's majority status and prevented a fair election. A Section 8(a)(5) violation would be alleged from the time of the union's request, if made after such time as the union has achieved majority status and the employer has embarked on a course of unlawful independent conduct. Where a continuing request for recognition has been made, either before the union has achieved majority status, or before the employer embarks on its unlawful conduct, or both, the 8(a)(5) violation would be pleaded as of the date when both events have occurred.

Employer unilateral changes in employment conditions after an unlawful refusal to bargain should be alleged as independent 8(a)(5) violations.

Cases involving employer unilateral changes occurring after a bargaining obligation attaches (i.e., after embarcation and union majority dates), but before any request for recognition is made should be submitted for advice.

B. Section 8(a)(1) based bargaining obligation

The fact that no request for recognition has been made by the union does not necessarily mean that a bargaining order should not be sought. As the Board stated in Ludwig Fish and Produce, Inc., 220 NLRB No. 160, at p. 3, slip opinion:

There is nothing in Gissel <sup>6/</sup> which conditions the bargaining order remedy upon a demand for bargaining. Rather, as the Supreme Court stated, the test is whether we may reasonably conclude that Respondent's unfair labor practices have rendered 'a fair and reliable election' impossible. <sup>7/</sup>

<sup>6/</sup> N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575 (1969).

<sup>7/</sup> Id. at 614

Thus, in cases where there has been no request to bargain but where the employer has engaged in unlawful conduct which undermines the union's majority status and precludes the holding of a fair election, a bargaining order should be sought as part of the remedy for the respondent's independent unfair labor practices. The complaint in such cases should contain the same allegations specified in paragraph A above, except for the demand and refusal to recognize, and the remedial bargaining order, under Section 8(a)(1) of the Act, would be alleged from the date on which the bargaining obligation attached (i.e., when the Employer embarked on its unlawful conduct and the Union achieved majority status).

In such cases, if employer unilateral changes in employment conditions occur after the bargaining obligation attaches, the matter should be submitted for advice.

C. Unfair labor practice strike allegation

Where, as in Trading Port, there has been an unlawful refusal to bargain and a strike commences in protest of such refusal, the strike should be alleged as an unfair labor practice strike and an order should be sought requiring the reinstatement of strikers upon unconditional offers to return to work. (Case Handling Manual Section 102.66.1)

In cases where no request for recognition was ever made or where none was made until after commencement of the strike, the question whether a strike solely in protest of the lack of union recognition is to be alleged as an unfair labor practice strike, should be submitted to Advice.

D. Cases where complaint on Steel-Fab theory has already issued

In cases where complaint on Steel-Fab theory has already issued but the hearing has not opened, or if opened, the hearing has not closed, the Region should amend the complaint or ask the Administrative Law Judge for leave to amend the complaint, respectively, consistent with the foregoing discussion.

In cases where the hearing has closed and no briefs have yet been filed, or in cases where the hearing has closed and briefs are under consideration by the Administrative Law Judge or the Board, the Region should submit a brief or a supplemental brief, respectively, making the argument consistent with the foregoing guidelines that, as the case may be, a Section 8(a)(5) violation has been committed as of the appropriate time, 10/ or that a remedial bargaining order under Section 8(a)(1) is appropriate as of the time the employer embarked on a course of unfair labor practice conduct which undermined the union's majority status and precluded the holding of a fair election.

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10/ This assumes that the record contains evidence of a demand for recognition by the union. Absent such evidence, the Region should communicate with the Advice Branch regarding what course of action should be taken.