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OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-13 **September 4, 2020**

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

FROM: Peter B. Robb, General Counsel

SUBJECT: Guidance Memorandum on Employer Assistance in Union Organizing

In the past year, Regions have sought advice on a series of issues relating to the amount of lawful support an employer can provide a union that is attempting to organize its employees. Some of these situations have involved self-described "neutrality agreements" between employers and unions that have not yet been selected as the exclusive collective-bargaining representative of the employer's employees. As described below, the Board's current decisions in the area are confusing and contradictory. In order to place these issues before the Board for clarification, Regions should proceed according to the following guidance.

Section 7 of the Act protects the right of employees to choose to "form, join, or assist a labor organization . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection," as well as the right "to refrain from any or all such activities."

An employer violates Section 8(a)(2) and (1) by providing impermissible support to a union in organizing the employer's unrepresented workforce, and a union's acceptance of such support violates Section 8(b)(1)(A).[1] Likewise, an employer violates Section 8(a)(1) when it provides impermissible support to employees who wish to decertify or withdraw from a union.[2] The Board has held that such employer support for a union organizing drive or a decertification campaign impacts the Section 7 rights of employees. The rationale for both violations is the same—that employees have been deprived of "that freedom of choice which is the essence of collective bargaining."[3]

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[1] *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. 731, 739 (1961); *Dana Corp.*, 356 NLRB 256, 265 (2010) (Hayes, dissenting).

[2] *Consolidated Rebuilders*, 171 NLRB 1415 (1968).

[3] *IAM Lodge No. 35 v. NLRB*, 311 U.S. 72, 79 (1940) (finding employer unlawfully assisted union organizers). *See also Movie Star, Inc.*, 145 NLRB 319, 320 (1963) (finding that more than ministerial aid restrained employees in their Section 7 rights), *enforced in relevant part*, 361 F.2d 346 (5th Cir. 1966).

Nevertheless, the Board has applied two different legal standards to these two similarly coercive activities, creating different and incongruous outcomes.

In the former situation—employer support for a union's organizing efforts—the Board uses "a totality of the circumstances" standard. In the latter situation—employer support of a decertification petition—the Board uses "the more than ministerial aid" standard. As explained below, the "totality of the circumstances" standard is difficult to apply because it is more amorphous, and, lacking clear guidelines as to what is lawful and unlawful conduct, yields inconsistent results. The "more than ministerial aid" standard is stricter and less ambiguous and provides a brighter line with respect to lawful and unlawful conduct.

Board law has thus evolved to apply different standards—one for employer involvement in an organizing drive and one for its involvement in a decertification campaign. These different standards have yielded inconsistent conclusions for what is essentially the same or similar conduct affecting the same aspect of employees' Section 7 rights. To create greater certainty in its guidance to the public concerning what activity is considered impermissible support and to treat consistently similar types of conduct that impact Section 7 rights in similar ways, the Board should apply the same standard to both types of violations of the Act, and that standard should be the "more than ministerial aid standard." Use of the "more than ministerial aid" standard in both contexts would harmonize these two areas of Board law, and will clarify ambiguity and better protect employee free choice and majoritarian principles.

We have seen allegations of impermissible employer support of union organizing activities emerge in the context of pre-recognition neutrality agreements. Although truly neutral pre-recognition "neutrality agreements" are lawful, we have increasingly seen in neutrality agreements provisions that go beyond neutrality into the area of impermissible support. These types of neutrality agreements often contain provisions that sacrifice the statutory rights of employees for the commercial interests of unions and employers. Because the standards for review of these agreements have been unclear, extant Board law has effectively permitted interference with employee free choice by not carefully examining the provisions of neutrality agreements to determine whether they are, in fact, neutral or provide support to the union. These provisions should be examined under the lens of whether they provide "more than ministerial support" to the union's efforts to organize.

To achieve these goals, the Board should apply the same standard in assessing the lawfulness of employer support for union organizing drives as it does to such support for employee decertification efforts. Further, with respect to pre-recognition agreements, the Board should adopt a simple bright-line test that would find a violation of the Act whenever an employer and union enter into a pre-recognition agreement where: (1) the parties negotiate terms and conditions of employment prior to the union attaining majority status; (2) the parties agree to restrain employee access to Board processes and procedures; or (3) the parties agree to any provision that is inconsistent with the purposes and policies of the Act, such as by impacting Section 7 rights by providing support of the union's organizing activities, rather than neutrality.

1. Current Pre-Recognition Union Organizing and Neutrality Agreement Law

An employer violates Section 8(a)(2) and (1) by providing impermissible support to a union in organizing the employer's unrepresented workforce, and a union's acceptance of such support violates Section 8(b)(1)(A).[4]

Currently, when determining whether an employer has rendered unlawful 8(a)(2) assistance to a union, the Board considers the totality of the circumstances, including pre-recognition and post-recognition conduct.[5] Because of this doctrine, "[t]he quantum of employer cooperation which surpasses the line and becomes unlawful support is not susceptible to precise measurement."[6] This has led to confusion as to where the line exists and to inconsistent results. For instance, in *99¢ Stores*, 320 NLRB 878, 879-80 (1996), the Board found no unlawful assistance where the employer allowed the union to solicit on company property during working time, and supervisors were generally present during solicitation, while in *Monfort of Colorado, Inc.*, 256 NLRB 612, 613-14 (1981), *enforced*, 683 F.2d 305 (9th Cir. 1982), the Board found unlawful assistance where the employer allowed the union to solicit on company property during working hours, supervisors were generally present during the solicitation, the union made some false representations, and the employer recognized and signed a contract with the union on the same day. Indeed, the D.C. Circuit in *NLRB v. Southwest Regional Council of Carpenters*, 826 F.3d 460 (D.C. Cir. 2016), decided to remand an "employer assistance" case because the Board had come to a different conclusion than a previous Board despite indistinguishable facts.[7]

As for neutrality agreements, very few decisions exist in which the Board has analyzed the lawfulness of their provisions under Section 8(a)(2), and none have addressed issues of possible unlawful assistance under Section 8(a)(2). For instance, in *Dairyland USA Corp.*, 347 NLRB 310, 310-11 (2006), *enforced mem. sub nom. NLRB v. Local 348-S, UFCW*, 273 F. App'x 40 (2d Cir. 2008), the Board found that the employer

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[4] *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. 731, 739 (1961); *Dana Corp.*, 356 NLRB 256, 265 (2010) (Hayes, dissenting).

[5] *Ryder Systems, Inc.*, 280 NLRB 1024, 1046 (1986) (citing *Farmer's Energy Corp.*, 266 NLRB 722 (1983), *enforced*, 730 F.2d 1098 (7th Cir. 1984)), *enforced mem.*, 842 F.2d 332 (6th Cir. 1988).

[6] *New England Motor Freight*, 297 NLRB 848, 852 (1990) (quoting *Longchamps, Inc.*, 205 NLRB 1025, 1031 (1973)).

[7] *Compare Garner/Morrison, LLC*, 366 NLRB No. 184 (Aug. 27, 2018), *on remand from NLRB v. Southwest Regional Council of Carpenters*, 826 F.3d 460 (D.C. Cir. 2016), *with Coamo Knitting Mills*, 150 NLRB 579 (1964).

violated the Act by directing employees to sign authorization cards, but did not address the neutrality agreement that allowed the union onto the employer's premises in the first place. Only in *Dana Corp.*, 356 NLRB 256 (2010), *enforced sub nom. Montague v. NLRB*, 698 F.3d 307 (D.C. Cir. 2012), did the Board finally address whether a neutrality agreement might violate Section 8(a)(2) of the Act, and then only under the limited analysis of whether, by dealing with terms and conditions of employment, it violated *Majestic Weaving Co.*, 147 NLRB 859 (1964), *enforcement denied*, 355 F.2d 854 (2d Cir. 1966). In *Dana Corp.*, the Board held that such neutrality agreements do not interfere with employee free choice and thus do not violate the Act unless the parties negotiate a complete collective-bargaining agreement prior to attaining majority support.[8]

2. The More than Ministerial Aid Standard in De-Certification Campaigns.

The Board applies the stricter and less ambiguous "more than ministerial aid" standard to determine whether an employer's assistance to employees seeking to decertify or withdraw from a union constitutes an unfair labor practice.[9] It has repeatedly held that a decertification petition is tainted if an employer provides "more than ministerial aid" in the initiation or collection of signatures in support thereof. The inquiry in deciding whether an employer has provided "more than ministerial aid" is whether "the preparation, circulation, and signing of the petition constituted the free and uncoerced act of the employees concerned."[10]

For example, in both *Lee Lumber* and *Dentech Corp.*,[11] the Board found that the employers violated the Act by allowing anti-union employees to solicit signatures for decertification petitions on company time. In *Scherer & Sons Co.*,[12] the employer violated the Act by giving an antiunion employee unrestricted access to the plant and offices and directed employees to sign a legal complaint against the union. Similarly, in *Mickey's Linen & Towel Supply*, the Board found that the employer violated Section 8(a)(1) by assisting employees in their attempts to decertify the union when it performed translations for an employee who was soliciting signatures for a decertification petition.[13] Lastly, in *Leggett & Platt*, the Board found that the employer violated Section 8(a)(1) when it directed a new employee on his first day of work to meet with a fellow employee

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[8] *Dana Corp.*, 356 NLRB at 261 n.15, 263-64.

[9] *Consolidated Rebuilders*, 171 NLRB 1415 (1968).

[10] *Eastern States Optical Co.*, 275 NLRB 371, 372 (1985) (citing *KONO-TV-Mission Telecasting Corp.*, 163 NLRB 1005, 1006 (1967)).

[11] *See Lee Lumber & Bldg. Material*, 306 NLRB 408, 410, 418 (1992), *enforced in rel. part*, 117 F.3d 1454 (D.C. Cir. 1997); *Dentech Corp.,* 294 NLRB 924, 926-28 (1989).

[12] *Scherer & Sons Co.*, 147 NLRB 1442, 1449 (1964).

[13] *Mickey's Linen & Towel Supply*, 349 NLRB 790, 791 (2007).

(who was also the known leader of the decertification effort) to persuade the new employee to sign the petition.[14]

3. Application of the More than Ministerial Aid Standard to Pre-Recognition Union Organizing.

The prohibited employer conduct at issue in the pre-recognition and de-certification contexts—unlawful assistance rather than neutrality—has, in both cases, the same impact on Section 7 rights of employee free choice. There is no reason to treat the same or similar conduct, having the same or similar effect, differently in the pre-recognition and the de-certification contexts. *Compare 99¢ Stores*, 320 NLRB 878, 879-80 (1996) (no unlawful assistance where the employer allowed the union to solicit on company property during working time, and supervisors were generally present during solicitation of an organizing campaign), *with Lee Lumber*, 306 NLRB at 408, 410, *and Dentech Corp.*, 294 NLRB at 926-28 (unlawful assistance where the employers allowed anti-union employees to solicit signatures for decertification petitions on company time). If permitting solicitation on company property during a de-certification campaign unlawfully taints a de-certification petition because the employer has provided more than ministerial support to the de-certification campaign, permitting solicitation on company property during a recognition campaign is no less a provision of support and thus no less unlawfully taints the recognition campaign.

Given that the rationale for both violations is the same—protection of employee free choice in representation—there is no statutory or policy basis for using a different or less strict standard for the same conduct. Since the employer activity that is scrutinized in the recognition and the de-certification contexts concerns whether unlawful support occurred, it makes eminent sense to examine whether that conduct constituted "more than ministerial aid." It further makes no sense that the same conduct is deemed "more than ministerial aid" and will taint a union decertification petition, but does not taint a union organizing or representation campaign. Equitable application of these principles dictates they be applied identically, regardless of whether employees are seeking to unionize or to reject their bargaining representative. The "ministerial aid" standard is both more protective of statutory rights than the "totality of the circumstances" standard and, as is demonstrated above, provides greater clarity. If allowing anti-union employees to solicit signatures on work time in support of a decertification effort constitutes more than ministerial aid,[15] so, too, does allowing the union the use of company property to organize; and, if allowing an anti-union employee unrestricted access to the employer's facility to oppose the union is more than ministerial aid,[16] so, too, is providing employee information to the union in support of its organizing drive. Accordingly, the Board should apply the "more than ministerial aid"

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[14] *Leggett & Platt, Inc*., 367 NLRB No. 51, slip op. at 2-3, 16 (Dec. 17, 2018), *aff'd on remand*, 368 NLRB No. 132 (Dec. 9, 2019).

[15] *See, e.g.*, *Lee Lumber,* 306 NLRB at 410, 418; *Dentech Corp.*, 294 NLRB at 924.

[16] *See, e.g., Scherer & Sons Co.*, 147 NLRB at 1449.

standard to employer assistance furnished to unions engaged in efforts to organize their employees.

This standard should also be applied when analyzing certain provisions of neutrality agreements. As noted above, the Board's jurisprudence regarding neutrality agreements has not focused on whether they provide unlawful support to unions. Yet, the very wording of some neutrality agreements may be coercive. Neutrality agreements that are truly "neutral" and do not interfere with employee rights—for instance, where an employer agrees to remain neutral during an organizing campaign in exchange for the union refraining from a corporate campaign—will remain lawful under the "more than ministerial aid" standard. However, some neutrality agreements may contain provisions that permit or require conduct that under the "more than ministerial aid" analysis is prohibited under the Act, such as those described below.[17]

a. Allowing non-employee union organizers access to employer facilities or informing employees of presence of union organizers

An employer committing in a neutrality agreement to provide a union with use of its private facilities before and after work, as well as during the employees' meals and break times, to solicit employees to sign union authorization cards would typically rise to the level of more than ministerial aid.[18]

b. Allowing union solicitation during working time

Permitting union solicitation during working time pursuant to a neutrality agreement is analogous to an employer providing employees with time off from work to collect signatures in the workplace—conduct found to exceed ministerial aid in the decertification context.[19]

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[17] Although the following examples are of provisions in neutrality agreements, an employer that permits these types of conduct would be rendering more than ministerial aid, and therefore violating Section 8(a)(2), regardless of whether the employer signed a formal neutrality agreement or not.

[18] *See id.* (employer violated the Act by giving antiunion employee unrestricted access to plant and offices to oversee employees directed to sign legal complaint against union). *See also Lee Lumber*, 306 NLRB at 410, 418 (finding it unlawful to allow employees to solicit other employees to sign decertification petition on company time and property); *Dentech Corp.*, 294 NLRB at 926-28 (same).

[19] *See e.g.*, *Lee Lumber,* 306 NLRB at 410, 418; *Dentech Corp.*, 294 NLRB at 924. However, nothing in this memorandum should be read as affecting the rights of *employees* to solicit for or against unions at their workplace subject to lawful, non-discriminatory employer restrictions. *See T-Mobile USA, Inc.*, 369 NLRB No. 50, slip op. at 2-3 (Apr. 2, 2020) (citing *Register Guard*, 351 NLRB 1110, 1118 (2007), *enforced sub nom. Guard Publ'g v. NLRB*, 571 F.3d 53 (D.C. Cir. 2009)). Nor does this memorandum

c. Providing a union with employee contact information

An employer's provision of a list of employees' names to a union during an organizing campaign, including personal identifying information, rises to the level of more than ministerial aid because the purpose of providing this information is to encourage the employee to engage, or refrain from engaging, in Section 7 activity, making it unlawful under Section 8(a)(1) of the Act.[20]

d. Certain statements of preference for a specific union

Often, neutrality agreements require the employer to post a notice or letter announcing the neutrality agreement itself. The content of this notice or letter must be closely scrutinized to determine whether it is lawful. For example, such a notice or letter in which the employer advises employees that union organizers will be on premises to speak to employees and/or distribute authorization cards, or which contains certain language suggesting the employer's preference for the union, would cross the line into unlawful support, as the conduct is akin to cases where the Board found it unlawful for an employer to direct employees to speak with other employees distributing a decertification petition.[21]

4. Negotiation of Terms and Conditions of Employment Before the Union Attains Majority Status.

Neutrality agreements in which substantive terms and conditions of employment have been negotiated are unlawful. See *Majestic Weaving*[22] and *Bernhard-Altmann*.[23] In *Majestic Weaving*, the Board held that an employer unlawfully assisted a union by negotiating a bargaining agreement with it at a time the union did not have majority support even though the parties did not execute the agreement until after the union had secured such support.[24] In so doing, an employer provides a union with "a deceptive cloak of authority with which to persuasively elicit additional employee support," thereby

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address an employer's discriminatory refusal of access to non-employees. *See Kroger Ltd. Partnership I Mid-Atlantic*, 368 NLRB No. 64, slip op. at 1-2 (Sept. 6, 2019).

[20] *See Leggett & Platt, Inc.*, 367 NLRB No. 51, slip op. at 2-3, 16 (finding employer violated Section 8(a)(1) by directing new employee to meet with coworker—the known leader of the decertification effort—to get new employee to sign petition).

[21] *See id.*

[22] *Majestic Weaving Co.,* 147 NLRB 859 (1964), *enforcement denied*, 355 F.2d 854 (2d Cir. 1966).

[23] *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. 731 (1961).

[24] *Majestic Weaving Co.,* 147 NLRB at 859-60.

interfering with employee free choice.[25] As stated by the U.S. Supreme Court in *Bernhard-Altmann*, Section 9(a) of the Act "guarantees employees freedom of choice and majority rule."[26] The Court also observed that there "could be no clearer abridgment" of Section 7 rights, assuring employees the right "to bargain collectively through representatives of their own choosing," or "to refrain from such activity" than to grant exclusive bargaining status to a union "selected by a minority of employees."[27] Agreements that are vehicles for prematurely granting a union exclusive bargaining status affect employee rights under the Act and constitute unlawful support.[28]

It undermines the majoritarian principles underlying the Act for a union and employer to agree to substantive terms and conditions of employment prior to executing a voluntary recognition agreement—even if the parties may see some benefit in doing so. Rather, "the legality of negotiating such terms must turn on the statutory rights of employees, not on the commercial interests of unions and employers. To hold otherwise is to encourage the escalation of top-down organizing, by which unions organize employers first and employees last."[29] Upholding an "unneutral" neutrality agreement that includes substantive terms and conditions of employment "threatens to reinstate the very practice that those statutory provisions [Section 8(a)(2) and 8(b)(1)(A)] were meant to prohibit, i.e., the establishment of collective-bargaining relationships based on self-interested union-employer agreements that preempt employee choice and input as to their representation and desired terms and conditions of employment."[30] Moreover, agreement prior to lawful recognition on subjects that are not themselves terms or conditions of employment may nevertheless furnish the union with a deceptive cloak of authority with which to persuasively elicit additional employee support.[31]

The Supreme Court, in *NLRB v. Cabot Carbon Co*., also interpreted Sections 2(5) and 8(a)(2) to find that Congress did not limit Section 8(a)(2) interference of a labor organization to situations where employee committees engage in "bargaining with" the employer. Rather, Congress adopted the broader term of "dealing with employers concerning grievances . . . or conditions of work" when defining a labor organization under Section 2(5).[32] Therefore, Congress envisioned that an employer violates Section

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[25] *Dana Corp*., 356 NLRB at 266 (Hayes, dissenting) (quoting *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. at 737).

[26] *Ladies Garment Workers (Bernhard-Altmann) v. NLRB*, 366 U.S. at 737.

[27] *Id.*

[28] *Majestic Weaving Co.*, 147 NLRB at 859-60.

[29] *Dana Corp*., 356 NLRB at 267 (Hayes, dissenting).

[30] *Id*. at 265 (Hayes, dissenting).

[31] *Id.* at 266 (Hayes, dissenting).

[32] *NLRB v. Cabot Carbon Co.,* 360 U.S. 203, 203 (1959).

8(a)(2) even when it engages in something *less* than formal bargaining with a labor organization that did not have majority support, noting that "none of the Employee Committees attempted to negotiate any formal bargaining contract."[33]

Thus, it follows that an employer violates Section 8(a)(2) by dealing with or bargaining with a minority union regarding working conditions. And a minority union's agreement to such terms constitutes unlawful restraint of Section 7 rights in violation of Section 8(b)(1)(A).[34]

The Board's decision in *Dana* thus incorrectly held that pre-recognition agreements that deal with terms and conditions of employment are only unlawful if they contain a full agreement.[35] The decision is inconsistent with prior Board law such as *Majestic Weaving* and Supreme Court principles. The Board's decision did not explain why negotiating but not signing a collective-bargaining agreement at the beginning of an organizing campaign is unlawful (in *Majestic Weaving*), but actually contracting to certain terms and conditions of employment (even if not reaching an entire collective-bargaining agreement) is not. Nor did the Board distinguish Section 8(a)(2) cases where the Board found that prematurely negotiating contract terms is evidence of a pattern of unlawful support.[36] Instead, the Board focused on the question of whether, based on the complete agreement, employees would view union representation as a "foregone conclusion" or not, implying that they would not unless a complete contract had been negotiated.[37] This focus errs, both by assuming employees would only see a *fait accompli* in a finished contract, and by assuming premature negotiations could not otherwise coerce employee choice. Thus, as shown in *Majestic Weaving and Bernhard-Altmann*, the issue is not whether the agreement was finished or not, but whether the act of prematurely negotiating or dealing with substantive terms and conditions of employment interferes with employees' free choice.

Accordingly, where a minority union and an employer enter a neutrality agreement that sets or otherwise deals with terms and conditions of employment, it

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[33] *Id*. at 213.

[34] *Bernhard-Altmann*, 366 U.S. at 738 (the Act prohibits "unions from invading the rights of employees under [Section] 7 in a fashion comparable to the activities of employers prohibited under [Section] 8(a)(1)").

[35] *Dana Corp.*, 356 NLRB at 261-64.

[36] *See Midwestern Personnel Services*, 331 NLRB 348, 353 (2000) (holding that negotiating the terms of an eventual contract prior to even commencing organizing was a relevant factor in finding unlawful assistance), *enforced*, 322 F.3d 969 (7th Cir. 2003); *Monfort of Colorado*, 256 NLRB 612, 613 (1981) (finding that statements by union organizers giving the impression that a contract "was being typed up at that moment" were coercive), *enforced sub nom. NMU v. NLRB*, 683 F.2d 305 (9th Cir. 1982).

[37] *Dana Corp.*, 356 NLRB at 262.

establishes that the union clearly dealt with the employer at a time when it did not represent an uncoerced majority, thereby establishing violations of Sections 8(b)(1)(A) and 8(a)(2) respectively. This bright-line test should be applied to all neutrality agreements that set or deal with terms and conditions of employment. However, Regions are instructed to submit cases involving neutrality agreements that do not set or deal with employee terms and conditions of employment to the Division of Advice.

Pre-Recognition Agreement Provisions

a. Wage provisions

While a pre-recognition agreement that sets post-recognition wages is the most obvious example of prematurely setting terms and conditions of employment, pre-recognition agreements that otherwise deal with wages are also unlawful. For example, a pre-recognition agreement containing a comparable-wages provision that requires the parties to "consider" or "bear in mind" the wage rates of unionized competitors or the employer's other facilities is also unlawfully coercive, since it fixes a range of acceptable proposals even when it does not establish precise wage rates.[38] Because the parties thus give their imprimatur to a range of acceptable contract proposals before the union has obtained majority support, it provides the union with a "deceptive cloak of authority with which to persuasively elicit additional employee support,"[39] and is therefore unlawful.

b. Interest arbitration provisions

While interest arbitration is not a term and condition of employment itself,[40] when parties make a pre-recognition agreement to submit collective-bargaining disputes to interest arbitration, they have placed the decision as to what terms and conditions will ultimately be in the parties' collective-bargaining agreement into the hands of a third-party arbitrator, which would constitute "dealing with" under *NLRB v. Cabot Carbon Co.* Accordingly, where an interest arbitration provision is negotiated before the union has attained majority status, it provides a "deceptive cloak of authority" to the union and is unlawful.

c. No-Strike/No-Lockout provisions

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[38] *NLRB v. Cabot Carbon Co.*, 360 U.S. at 203, 213, 218 (finding that minority labor organization cannot lawfully deal with an employer over wages, hours and working conditions).

[39] *Dana Corp*., 356 NLRB at 266 (Hayes, dissenting).

[40] *See Tampa Sheet Metal*, 288 NLRB 322, 325-26 (1988).

The Board has long held that an agreement that waives employees' right to strike is a term and condition of employment.[41] Thus, any agreement that waives employees' right to strike prior to the union gaining majority support is unlawful, even if the agreement expires upon recognition. However, where a union has not achieved lawful recognition, it may agree that the union will not itself call or cause a strike as part of a neutrality agreement.

d. Access to Company Facilities provisions

Provisions in an agreement providing union organizers with access to employer facilities is "more than ministerial aid" as outlined above. The Board has also held that union access to an employer's property is a mandatory subject of bargaining.[42] Accordingly, any pre-recognition agreement that provides union organizers such access is also premature and unlawful.

e. Determination of Appropriate Unit provisions

Although it is well settled that the scope of a bargaining unit is a permissive subject of bargaining,[43] premature agreement on unit scope between the parties ousts the Board of its authority to determine the unit while at the same time giving the union "a deceptive cloak of authority with which to persuasively elicit additional employee support," thereby interfering with employee free choice. Accordingly, such a provision agreed upon before a union has achieved majority status is premature and unlawful.

5. Agreements in Restraint of Employee Access to the Board or Otherwise Inconsistent with the Policies and Purposes of the Act.

Pre-recognition or neutrality agreements between a union and employer that mandate opposition to employees seeking to vindicate their rights before the Board are also unlawful. For instance, a provision that requires both parties to request the Board dismiss any effort by a third party to petition for an election restrains employees' access to the Board. The Board and courts have recognized that NLRB-supervised elections provide the more reliable basis for determining whether employees desire representation.[44] Requiring the parties to seek dismissal of a representation petition constitutes unlawful restraint by creating a mandatory opposition to employees' exercise

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[41] *See Carpenters District Council of Detroit, Etc. (Excello Dry Wall),* 145 NLRB 663, 666 (1963) ("A no-strike clause is a 'condition of employment' and as such a mandatory subject of collective bargaining.").

[42] *See, e.g., Scott Bros. Dairy*, 332 NLRB 1542, 1553 (2000); *Ernst Home Centers, Inc.*, 308 NLRB 848, 848-49 (1992).

[43] *See, e.g., Grosvenor Resort*, 336 NLRB 613, 616-17 (2001), *enforced mem.*, 52 F. App'x 485 (11th Cir. 2002).

[44] *Dana Corp.*, 351 NLRB 434, 436 (2007).

of their rights to seek a Board election, irrespective of the merits of such petition, and is inconsistent with the Board's compelling interest in protecting employee freedom of choice. Such a provision restrains employees' ability to access Board procedures that are put in place to provide the most reliable basis for determining employee sentiment. Such an agreement is a premeditated commitment to extinguish efforts by employees to challenge a union's recognition, specifically with the Board, and is indicative of the inherent preference and bias in such an agreement to secure and safeguard the parties' relationship over employee rights.

Accordingly, such provisions are clearly inconsistent with the purposes and policies of the Act, which seeks to protect employees' free choice concerning self-organization and forming or joining labor organizations.

The imperative of Section 7 is to protect the right of employees to choose to "form, join, or assist a labor organization . . . and to engage in other concerted activities," and to "refrain from any or all such activities." Neutrality agreements that impinge on such rights by requiring or permitting an employer to provide impermissible support to the union adversely impact these Section 7 rights. Regions are directed to follow the guidance provided in this memo when investigating charges involving pre-recognitional agreements.

If you have any questions about any given case, or any of the concepts discussed in this memo, please contact the Division of Advice.

/s/
P.B.R.