7-20-1979

Memorandum on Remedies for Violation of National Labor Relations Act, 1979

Warren C. Ogden

Memorandum on Remedies for Violation of National Labor Relations Act, 1979

Abstract

"Memo about types of remedies that employers should anticipate will be sought by the General Counsel in future cases alleging violations of the National Labor Relations Act. Includes a distribution list of consultants, July 20, 1979".

ALL CONSULTANTS

DISTRIBUTION

Sam Beard
Jerry Freidin
Tom Geist
Chet Keil
Fred Long
Dean Michelson
Sandy Michelson
Jim Beard
Pete Becker
Jim Dale
John Garza
John Hermann
Ken Leever
Bill Leopardi
Dennis Rohan
Steven Ross
Bill Whipple
Al Lucia
Nels Umble
Mike O'Donnell
Carl Kaiser
Chris Thomas
Larry Broderick
Frank Dennis
Len Scott
Jim Laurin

MEMORANDUM

TO: ALL CONSULTANTS

FROM: WARREN OGDEN

DATE: JULY 20, 1979

RE: REMEDIES FOR VIOLATION OF NATIONAL LABOR RELATIONS ACT

On June 13, 1979, the General Counsel of the National Labor Relations Board, John S. Irving, delivered an address to the 32nd National Conference on Labor at New York University. During his address, he discussed the types of remedies that employers should anticipate will be sought by the General Counsel in future cases alleging violations of the National Labor Relations Act. I synopsize his comments below:

1) There will be a substantial increase in the number of 10(j) cases. In these cases, the General Counsel seeks an injunction to prevent an employer from committing further violations of the National Labor Relations Act. You should anticipate that these injunction cases will arise most often where the employer commits substantial violations of the Act in order to frustrate a union's organizational attempts.

2) Currently, the NLRB is seeking an approval of a "Stevens" remedy which saddles the parent company with the violations of any of its constituent companies. This, of course, is applicable only when dealing with one company in a larger enterprise. But, it could have significant effect in those situations.

3) There will be a substantial increase in the number of cases where the General Counsel seeks bargaining orders even without proof of majority status where an employer uses unfair labor practices as a technique to prevent a union from organizing. Traditionally, the NLRB has sought a Gissel order only where the union could show majority status and further show that the employer's unfair labor practices undermine its majority status. These are referred to as Gissel II cases. Gissel I cases are now before the NLRB at the request of the General Counsel. Please find attached a copy of the Board's decision on a Gissel I case. You will note that while the Board did not grant the bargaining order, it did order the employer to: (1) Grant the union complete access to the premises, (2) give the union notice of any

employer addresses for the employees, (3) let the union run captive audience meetings on the premises, (4) have the company president read the notice to all employees, and (5) publish the notice in a local newspaper twice a week for four weeks.

4) Where an employer has been found to have been engaged in "surface bargaining," the General Counsel is now beginning to seek a so called "concentrated bargaining order." In these cases, the Board will require that the employer and the union meet for a minimum period of time in a given week or month until agreement, lawful impasse, or the parties mutually agree to a rest period in bargaining.

5) In cases involving bad faith or "surface bargaining," the General Counsel will commence seeking an order requiring the employer to pay the union for its bargaining expenses and/or the union's expenses and attorney's fees in prosecuting unfair labor practice charges against the employer.

6) In certain other cases, the General Counsel will seek reimbursement to the union for arbitration expenses where an employer failed to furnish specific information requested by the union which was critical to a pending grievance while later sandbagging the union with evidence at the arbitration.

7) In "surface bargaining" or other bad faith bargaining cases, the bargaining order will no longer require bargaining for a "reasonable period of time" which was normally expected to be four months. Instead, the General Counsel will seek a one year certification period during which the employer may not test majority status.

8) In those cases where an employer hires illegal aliens and calls in the Immigration and Naturalization Service for the purpose of frustrating an organizational campaign, the NLRB will continue to issue illegal discharge complaints. Additionally, the NLRB will seek a remedy requiring that the employer keep the jobs of the alleged discriminatees open, offering reinstatement as soon as the individuals return in a lawful status. However, the NLRB will seek an order requiring that the offer remain open indefinitely.

9) The General Counsel is seeking to have the National Labor Relations Board increase the interest on back pay awards. Currently, the NLRB follows the fluctuating interest rate charged by the Internal Revenue Service for under payments and over payments of federal taxes. See Florida Steel Corporation 231 NLRB No. 117, 96LRRM 1070. The General Counsel is now seeking to have interest accrue on monetary awards at no less than 9%. See Hansen Cakes, Inc. 242 NLRB No. 74, 101LRRM1189.

While the NLRB General Counsel is not bearing down on every type of case, it is apparent that the General Counsel will require stiffer remedies for pre-election violations and stiffer penalties for "surface bargaining" after elections. When advising clients, these developments should be considered.

Warren W.

Warren

signed by direction in
WCO's absence

WCO:vj

Enclosures

UNITED DAIRY FARMERS COOP. ASSN. —

UNITED DAIRY FARMERS COOPERATIVE ASSOCIATION, Pittsburgh, Pa. and TEAMSTERS, LOCAL 205, et al., Case Nos. 6-CA-7135, -7238, and -7364 and 6-RC-6682, June 12, 1979, 242 NLRB No. 179

F. J. Surprenant and Mathew Franckiewicz, for General Counsel; John Regis Valow, Pittsburgh, Pa., and Oliver N. Hormell, California, Pa., for employer; Louis B. Kushner, Pittsburgh Pa., for union; Administrative Law Judge Thomas A. Ricci.

Before NLRB: Fanning, Chairman; Jenkins, Penello, Murphy, and Truesdale, Members.

ORDER Sec. 10(c)

—Bargaining order ▶ 56.501 ▶ 56.513

NLRB's remedial authority under Section 10(c) of LMRA may well encompass authority to issue bargaining order in absence of prior showing of majority support for union. Members Murphy and Truesdale find that Board may well have such authority; Chairman Fanning and Member Jenkins find that Board has authority to issue bargaining order in appropriate cases even though union has never demonstrated majority support.

—Bargaining order — Extraordinary remedies ▶ 56.501 ▶ 56.513

NLRB declines to issue bargaining order in favor of union which has never obtained showing of majority support, but focuses instead on use of its remedial authority to devise remedies — including extraordinary remedies which, although perhaps not sufficient to eradicate totally the effects of employer's unfair labor practices, will tend to restore atmosphere in which employees are given meaningful opportunity to exercise their LMRA rights in representation election.

—Extraordinary remedies ▶ 56.104

Employer that committed "outrageous" and "pervasive" unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) of LMRA is ordered, among other things, (1) to post copies of NLRB's notice to employees, include it in appropriate company publications, and mail it to each employee of its plant — including all employees on payroll at time unfair labor practices were committed; (2) to have all notices — both mailed and posted — signed by employer's president, who is to read notice to current employees assembled for that purpose; (3) to afford NLRB reasonable opportunity to provide for attendance of Board agent at any assembly of employees called for purpose of reading such notices; (4) to publish notice in local newspapers of general circulation two times a week for period of four weeks.

—Extraordinary remedies ▶ 56.104 ▶ 56.101

Employer that committed "outrageous" and "pervasive" unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) of LMRA is ordered, among other things, (1) to grant union, on request, reasonable access to employer's bulletin boards and all places where notices to employees customary are posted, and reasonable access to employees in plant in nonwork areas during employees' nonworking time; (2) to give union notice of, and equal time and facilities to respond to, any address that employer makes to its employees on question of union representation; (3) to afford union right to deliver 30-minute speech to employees on working time prior to any NLRB election that may be scheduled in which union is a participant. These provisions shall apply for two-year period from date of posting of NLRB's notice to employees, or until regional director issues appropriate certification following fair and free election, whichever comes first.

—Extraordinary remedies ▶ 56.505

Employer that committed "outrageous" and "pervasive" unfair labor practices in violation of Sections 8(a)(1) and 8(a)(3) of LMRA is ordered, among other things, to supply union, on request made within one year of date of Board's order in this case, with names and addresses of current employees.

The administrative law judge found that the employer violated Section 8(a)(1) of the Act by interrogating employees concerning union activities, by threatening to discharge them for engaging in union activities, by threatening to shut down its business because of their union activities, by giving them the impression that it had their union activities under surveillance, and by granting an unprecedented cash Christmas bonus of from $25 to $100 per employee while the union's election petition was pending.

The ALJ found that the employer violated Section 8(a)(3) of the Act by changing the employment conditions of the bulk of its drivers and helpers in a manner adverse to their interest, and by ostensibly converting them from employees to independent contractors. He found that various companies — each having the name of one or more of the drivers — were organized as corporations and that the employer then entered into milk-hauling contracts with these companies. All of the contracts were the same.

The ALJ found that the employer violated Section 8(a)(3) of the Act by discharging seven employees for engaging in union activities.

Although there was no evidence that the union had enjoyed majority status, the ALJ recommended that the employer be ordered to bargain. He found merit in the union's objections to an NLRB election held on January 8, 1974, and recommended that the challenges to seven ballots be overruled.

On April 17, 1975, the Board issued an unpublished decision in which it affirmed the ALJ's rulings, findings, and conclusions with regard to the unfair labor practices and adopted his recommendations regarding the challenged ballots. However, the Board specifically deferred consideration of the appropriate remedy and the objections to the election until the regional director had opened the challenged ballots.

The revised tally of ballots showed a vote of 14 to 12 against the union.

[*Text*] * * * in view of the fact that the revised tally indicates that the Union has lost the election, the Board must now decide whether a bargaining order should issue here as proposed by the Administrative Law Judge. Resolution of that issue presents two questions for consideration: (1) whether the Board's remedial powers encompass the authority to issue a bargaining order in the absence of a prior showing of majority support by the Union, and (2) if so, whether it will effectuate the policies of the Act to issue such an order.

The use of bargaining orders to remedy an employer's unfair labor practices committed in the context of a union's organizational campaign was considered by the Supreme Court in N.L.R.B. v. Gissel Packing Co., Inc., 395 U.S. 575, 71 LRRM 2481 (1969). Prior to its determination of the appropriateness of the bargaining orders issued by the Board in the cases before it, the Court therein defined three categories of fact situations for purpose of analysis. As the Administrative Law Judge correctly found, the violations herein fall within the first category delineated by the Supreme Court in Gissel. In setting forth the nature of category one, the Court, citing the Fourth Circuit's decision in N.L.R.B. v. S.S. Logan Packing Company,[3] stated at 395 U.S. 575, 613 — 614, 71 LRRM 2481.

"While refusing to validate the general use of a bargaining order in reliance on cards, the Fourth Circuit nevertheless left open the possibility of imposing a bargaining order, without need of inquiry into majority status on the basis of cards or otherwise, in 'exceptional' cases marked by 'outrageous' and 'pervasive' unfair labor practices. Such an order would be an appropriate remedy for those practices, the court noted, if they are of 'such a nature that their coercive effects cannot be eliminated by the application of traditional remedies, with the result that a fair and reliable election cannot be had.' N.L.R.B. v. Logan Packing Co., 386 F.2d 562, 570, 66 LRRM 2596 (C.A.4 1967); see also N.L.R.B. v. Heck's, Inc., 398 F.2d 337, 338, 68 LRRM 2638. The Board itself, we should add, has long had a similar policy of issuing a bargaining order, in the absence of a §8(a)(5) violation or even a bargaining demand, when that was the only available, effective remedy for substantial unfair labor practices. See, e.g., United Steelworkers of America v. N.L.R.B., 376 F.2d 770, 64 LRRM 2650 (C.A.D.C., 1967); J.C. Penney Co., Inc. v. N.L.R.B., 384 F.2d 479, 485 — 486, 66 LRRM 2069 (C.A. 10 1967)."

Although the precise holding of the Supreme Court in Gissel was to approve the Board's use of bargaining orders where an employer's unfair labor practices have dissipated the union's majority and impeded the election processes (395 U.S. at 614 — 615), the essence of the Court's consideration was the scope of the Board's remedial authority.[4] By setting forth the authority of the Board to give bargaining orders in cases where the unfair labor practices were "less pervasive" than in the first or extreme situation but "nonetheless still" had the "tendency to undermine majority strength and impede the election processes," the Court indicated that the scope of the Board's remedial authority is broad (395 U.S. at 614). And, as noted above, the Court referred to the Fourth Circuit's conclusion that a bargaining order may well constitute an appropriate remedy for employer unfair labor practices without need of inquiry into majority status where the damage caused to the election process thereby is otherwise irreparable.

That the Board may also have the remedial authority to impose a bargaining order in the absence of a prior showing of majority support by the Union is further indicated by the Board's special responsibility to devise suitable remedies to effectuate the Act's policies and the broad discretion, vital to the administration of that responsibility, which the Act accords. Thus, in discussing the Board's remedial authority under Section

---

[3] 386 F.2d 562, 66 LRRM 2596 (C.A. 4), enfg. 152 NLRB 421, 59 LRRM 1115 (1965). The second category covers "less extraordinary cases . . . which nonetheless still have the tendency to undermine majority strength and impede the election processes," and, in those cases, the Supreme Court indicated there must be "a showing that at one point the union had a majority." 395 U.S. at 614. The third category delineated by the Court covered "minor or less extensive unfair labor practices, which, because of their minimal impact on the election machinery, will not sustain a bargaining order." 395 U.S. at 615.

[4] Beasley Energy, Inc., d/b/a Peaker Run Coal Company, Ohio Division #1, 228 NLRB 93, 94 LRRM 1563 (1977).