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".
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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

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., C.C. Nos. 6-CA-7135, -7236, and -7364 and 6-RC-6682, June 12, 1979, 242 NLRB No. 179

Before NLRB: Fanning, Chairman; Jenkins, Pentello, Murphy, and Trueblood, Members.

ORDER Sec. 10(e)

—Bargaining order | 56.501 | 56.513

NLRB’s remedial authority under Section 10(e) of LMRA may well encompass the duty to issue bargaining order in absence of prior showing of majority support, thereby granting NLRB’s remedial authority to devise remedies— including extraordinary remedies which, although 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.

—Bargaining order — Extraordinary remedies | 56.501 | 56.513

NLRB declines to issue bargaining order in favor of union which has not obtained showing of majority support, but maintains instead its remedial authority to devise remedies— including extraordinary remedies which, although 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 | 56.501

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 request, reasonable access to employer’s bulletin boards and all places where notices to employees 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 speech on question of union representation; (3) to afford union representatives access to employees on working time prior to any NLRB election that may be scheduled in which union is a participant. These remedies are in order for two-year period from date of posting of NLRB’s notice to employees, or until reasonable directed to post appropriately certifyingavitation 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 unreasonable, unduly dilatory written statement to employees concerning union activities, by giving them the impression that it had its 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 discharging seven employees for engaging in union activities. Although there was no evidence that the employer had committed the 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 June 15, 1979, and recommended that the challenges to seven ballots be overruled.

On April 17, 1975, the Board issued an unfair labor practice complaint in which it affirmed the ALJ’s rulings, findings, and conclusions with regard to the unfair practices in violation of Sections 8(a)(1) and 8(a)(3) of the Act. The Board also found that the employer had committed the majority status, and ordered the employer to grant union request, reasonable access to employees in plant during nonworking time; to give union notice of, and equal time and facilities to respond to any speech on question of union representation; to afford union representatives access to employees on working time prior to any NLRB election that may be scheduled in which union is a participant; and to supply unreasonable, unduly dilatory written statement to employees concerning union activities, by giving them the impression that it had its union activities under surveillance, and by

The administrative law judge found that the employer violated Section 8(a)(3) of the Act by dismissing seven employees for engaging in union activities. The employer’s president, who is responsible for all mailings and posted — signed by employer’s president, is to read notice to current employees assemble for that purpose; (3) to afford union representatives access to employees on working time prior to any NLRB election that may be scheduled in which union is a participant; and to supply unreasonable, unduly dilatory written statement to employees concerning union activities, by giving them the impression that it had its union activities under surveillance, and by

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