

**NYSBA Labor and Employment Law Section—Fall Meeting
Workshop C: The NLRB Today: What Has Changed,
What is Current and What May Lie Ahead**

**Recent Acting General Counsel Initiatives and
Current Issues before the NLRB**

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National Labor Relations Board**

A. **Acting GC Lafe Solomon's Initiatives.** There have been a number of important initiatives by Acting General Counsel Lafe Solomon:

1. **Seeking 10(j) Relief for Discharges During an Organizing Campaign.** In GC Memorandum 10-07, issued September 30, 2010, Acting GC announced an initiative to seek 10(j) relief in all discriminatory discharges during an organizing campaign (nip-in-the-bud cases) because they have a severe impact on Section 7 rights. As the memo states:

My goal is to give all unlawful discharges in organizing cases priority action and a speedy remedy. For years the Agency has been committed to a vigorous Section 10(j) injunction program as a highly effective tool for achieving meaningful real time remedies. As Acting General Counsel, I am committed to continue and enhance this important program for nip-in-the-bud cases. In addition, I am committed to the most expeditious administrative litigation possible for such cases. The program outlined below has been developed to streamline the processing of nip-in-the-bud cases involving discharges to assure that the passage of time does not undercut our ability to provide effective remedies in these cases.

- a) To date, there have been more than 400 offers of reinstatement.
- b) NLRB has collected more than 2 million in backpay.

- c) Since the start of this initiative, the time for processing a Region's request for Section 10(j) authorization by Headquarters has been significantly reduced for cases involving discharges during an organizing campaign.
- d) Statistics from FY 2011:
- i. During FY 2011, Regions identified **463** cases involving discharges during an organizing campaign. This represents approximately **2.1%** of total intake (**22,188** unfair labor practice charges) during FY 2011.
 - ii. For investigations completed during the first year of the initiative, Regions found there was reasonable cause to believe that **362** employees in **128** cases were discharged during an organizing campaign in violation of Section 8(a)(3) of the Act. The total number of employees alleged in charges to have been discharged during an organizing campaign in violation of Section 8(a)(3) was **1224**.
 - iii. During the first year of the initiative, **384** cases were decided by Regional Directors. Of these **384** cases, **267** cases were found to have no merit and **128** cases were found to have merit to the discharge allegation.
 - iv. During the first year of the initiative, Regions sent **39** memoranda to ILB seeking 10(j) authorization with respect to discharges occurring during an organizing campaign.
 - v. During the first year of the initiative, Regions have obtained settlements in **76** cases in an average of **102** days from the filing of the charge. During the first year of the initiative, for 5 cases litigated to completion

in district court, remedial relief was obtained in an average of **298** days from the filing of the charge.

- vi. As to these **5** Section 10(j) cases, **14** discriminatees were ordered reinstated to their former or substantially equivalent positions by the district courts.
- vii. For all cases settled since the beginning of this initiative in FY 2011, **272** discharged employees were offered reinstatement, of whom **129** accepted the offers of reinstatement and **143** waived reinstatement. In these settlements, Regions collected a total of **\$1,319,637.82** in backpay and interest. The monies collected generally represent 95% of the total amount owed to the discriminatees in backpay and interest.
- viii. During FY 2011, with respect to district court litigation, for the 16 completed Board-authorized cases involving Section 10(j) discharge during an organizing campaign, Regions won in full or in part **5** cases, lost no cases, and obtained settlements and adjustments in **11** cases, resulting in a **100%** success rate.
- ix. Since the start of this initiative, the time for processing a Region's request for Section 10(j) authorization by Headquarters has been significantly reduced for cases involving discharges during an organizing campaign. Specifically, the Acting General Counsel's Office passed on such requests for 10(j) authorization in an average of **7 days** from receipt of the Region's memorandum and the Board

decided whether to authorize 10(j) relief in an average of **6 days** from receipt of the memorandum seeking such authorization.

2. Seeking Effective Remedies --In GC Memorandum 11-01, issued December 20, 2010, the Acting General Counsel Lafe Solomon authorized Regions to seek remedies in organizing campaign cases that enhance the effectiveness of Section 10(j) relief and Board relief.

- a) **Notice reading.** The public reading of a notice has been recognized as an “effective but moderate way to let in the warning wind of information and, more important, reassurance.” *United States Industries*, 319 NLRB at 232 quoting *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 540 (5th Cir. 1969).
- b) **Access Remedies.** GC memorandum 11-01 notes: “Allowing union access to the employer’s bulletin boards and providing the union with the names and addresses of employees will restore employee/union communication and assist the employees in hearing the union’s message without fear of retaliation.” *Teamsters Local 115 v. NLRB*, 640 F.2d 392, 399 (DC Cir. 1981), enforcing, 242 NLRB 1057 (1979).
- c) Where there is an adverse impact on employee/union communication, Regional Offices seek:
 - i. **Access to Bulletin Boards.** “Union access to bulletin boards permits employees to see, at the workplace, that open displays of union information are acceptable, and will better thaw the chilling impact

of the violations than the bare recitation of rights in a standard notice posting. **Excel Case Ready**, 334 NLRB 4, 5 (2001).

- ii. Employee names and addresses. A remedial provision of names and addresses for a longer and earlier time period is designed to restore “the conditions that are a necessary prelude to a free and fair election.” See, e.g., **Blockbuster Pavilion**, 331 NLRB 1274, 1275 (2000).

3. First Contract Cases. On GC Memorandum 11-06 dated February 18, 2011, the Acting General Counsel Lafe Solomon continued former GC Meisburg’s emphasis on remedial relief in first contract bargaining cases by focusing on seeking certain effective remedies:

- a) Notice reading by a company official.
- b) Bargaining Schedules.
- c) Payment of Bargaining or Litigation Expenses--Requires the submission to the Division of Advice.
- d) Reading remedies have recently been granted by several district courts in Section 10(j) cases. See **Garcia v. Sacramento Coca-Cola Bottling Co., Inc.**, 733 F. Supp.2d 1201, 1218 (E.D. Cal. 2010) (affirmative provision (c)); **Norelli v. HTH Corp.**, 699 F. Supp.2d 1176, 1206-07 (D. Haw. 2010) (ordering notice reading as part of 10(j) relief in case where employer withdrew recognition from incumbent union), affirmed sub.nom. *Frankl v.*

HTH Corp., 650 F.3d 1334 (9th Cir. 2011); ***Calatrello v. General Die Casters, Inc.***, 190 LRRM 2157, 2163-64, 2011 WL 446685, at *8 (N.D. Ohio 2011). The notice-reading remedy was also ordered by the Board in ***Vincent/Metro Trucking, LLC***, 355 NLRB #170 (May 31, 2011). The requirement of scheduled bargaining and periodic reporting as a remedy for the failure to bargain in good faith for a first contract has been ordered by the Board in ***Gimrock Construction Inc.***, 356 NLRB No. 83 (January 28, 2011).

- e) Regions are instructed to carefully consider whether 10(j) relief would be appropriate in first contract bargaining cases. GC Memorandum 11-06 states: “Regions should continue to submit all first contract bargaining cases in which they issue complaint to the Injunction Litigation Branch with a recommendation on whether Section 10(j) relief, including additional remedies in the 10(j) order, is appropriate.”
- f) Injunctive relief has been sought and obtained. See, e.g., ***Calatrello v. General Die Casters, Inc.***, 190 LRRM 2157, 2163-64 (ND Ohio 2011).

4. Deferral Policy: In GC Memorandum 12-01 dated January 20, 2012, Acting General Counsel Lafe Solomon announced that he will be seeking to have the Board change existing policy and no longer routinely defer Section 8(a)(1) and (3) cases where arbitration will not be completed within a year.

- a) Determining whether deferral to an arbitration process is appropriate requires balancing Federal labor policies promoting collective bargaining

and private dispute resolution with the Board's statutory duty to enforce the Act.

- i. If there is excessive delay, a charging party can be left without effective relief.
 - ii. Witnesses may have disappeared, evidence is lost or memories have faded.
- b) Any eventual Board order may be rendered "pointless and obsolete." See e.g., ***NLRB v. Mountain Country Food Stores, Inc.***, 931 F.2d 21, 23-24 (8th Cir. 1991).
- c) New Procedures:
- i. Prior to ***Collyer*** deferral, Regions must take affidavits from the charging party and from all witnesses in the charging party's control. GC Memorandum 11-05.
 - ii. In Section 8(a)(1) and (3) cases, Regions must discover whether the grievance arbitration will be completed in less than a year. GC Memorandum 12-01.
- d) If arbitration is to be completed in less than a year:
- i. Defer and conduct quarterly reviews.
 - ii. After a charge is deferred for one year and no resolution, the Region should send a "show cause" letter to all parties, seeking an explanation why deferral should not be revoked and a full investigation made.

- iii. If Deferral is revoked:
 - a. If case has merit, submit to Advice.
 - b. If case is non-meritorious, dismiss, absent withdrawal.

- e) If arbitration is **not likely** to be completed in less than a year:
 - i. Regional Director should determine if deferral is appropriate, especially given the problems encountered by delay.
 - ii. If RD determines deferral would unduly disadvantage the CP or frustrate the Board's ability to enforce the Act, then the Region should complete investigation and reach a merit determination.
 - a. If the RD determines the case is meritorious, submit the case to Advice.
 - b. If deferral considered appropriate despite the delay, contact Advice.

- f) GC Memorandum 11-05 provides: The Board should not defer to a pre-arbitral grievance settlement unless the parties themselves intended the settlement to also resolve the unfair labor practice. If so, the review would be under the Board's **Independent Stave** standards. **Independent Stave Co.**, 287 NLRB 740, 743 (1987) (the Board will examine all the surrounding circumstances including, but not limited to: (1) whether the parties have agreed to be bound and the General Counsel's position; (2) whether the settlement is reasonable in light of the alleged violations, risks of

litigation, and stage of litigation; (3) whether there has been any fraud, coercion, or duress; and (4) whether the respondent has a history of violations or of breaching previous settlement agreements).

g) 8(a)(5) Cases.

- i. Make deferral decisions and conduct quarterly review.
- ii. If arbitration is not likely to be completed in a year and the case implicates individuals' statutory rights or involves serious economic harm, conduct full investigation and submit the case to Advice.

B. Issues Before the Board.

1. **Faculty.** Are University faculty members seeking to be represented by a union employees covered by the Act or excluded managers? See *NLRB v. Yeshiva University*, 444 U.S. 672 (1980),

- a) Board invited briefs from parties on this issue on May 22, 2012.
- b) The case at issue is *Point Park University* (06-RC-012276).
- c) Case remanded to the Board by DC Circuit.
- d) Board granted review when RD found again that faculty members were statutory employees.

2. **Graduate Students.** Are graduate students seeking to be represented by a union employees covered under the Act?

a) The Board asked the following questions:

1. Should the Board modify or overrule *Brown University*, 342 NLRB 483 (2004), which held that graduate student assistants

who perform services at a university in connection with their studies are not statutory employees within the meaning of Section 2(3) of the National Labor Relations Act, because they “have a primarily educational, not economic, relationship with their university”? 342 NLRB at 487.

2. If the Board modifies or overrules *Brown University*, supra, should the Board continue to find that graduate student assistants engaged in research funded by external grants are not statutory employees, in part because they do not perform a service for the university? See *New York University*, 332 NLRB 1205, 1209 fn. 10 (2000) (relying on *Leland Stanford Junior University*, 214 NLRB 621 (1974).

3. If the Board were to conclude that graduate student assistants may be statutory employees, in what circumstances, if any, would a separate bargaining unit of graduate student assistants be appropriate under the Act?

4. If the Board were to conclude that graduate student assistants may be statutory employees, what standard should the Board apply to determine (a) whether such assistants constitute temporary employees and (b) what the appropriate bargaining unit placement of assistants determined to be temporary employees should be?

b) Board invited briefing on June 22, 2012.

3. **Misclassification of Workers.** Are the individuals in questions independent contractors or employees within the meaning of the Act?

a) Issue has arisen in many contexts: delivery drivers, taxi drivers, limousine drivers, insurance agents, etc.

b) Issue also implicates tax law.

4. **Access.** Issues involving access for union organizers are being considered by the Board.

a) See *Roundy's Inc.*, 356 NLRB No. 27 (2010), enf'd, 192 LRRM 3079 (7th Cir. 2012)(employer violated the Act by unlawfully ejecting union protestors from

the common areas outside of 23 grocery stores without having a state law property interest in doing so.

b) Speech by Member Sharon Block on July 25, 2012.

5. **Remedy Issues.** When awarding backpay, should the Board routinely require that the respondent 1) submit documentation to Social Security Administration so that backpay is allocated to the appropriate calendar quarter; and 2) pay for any excess federal and state income taxes owed as a result of the discriminatee receiving a lump-sum payment?

a) Board invited briefs on the is issue on July 31, 2012.

6. **Standards for Social Media Cases.** Employer discipline for postings on Facebook, etc. and employer rules limited use of social media have been raised in a number of cases.

a) Board is reviewing **Three D, LLC d/b/a Triple Play Sports Bar and Grille**, JD(NY)-01-12 (January 3, 2012).

b) ALJ in that case found that an employee selecting the “Like” option as part of a Facebook conversation was concerted activity.

c) ALJ found that Facebook comments that referred to the boss as an “asshole” did not lose protection of the Act.

d) However, ALJ found Employer’s Internet policy that cautioned against inappropriate discussion was not overly broad.