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## NLRB GENERAL COUNSEL ARTHUR ROSENFELD ISSUES REPORT ON RECENT CASE DEVELOPMENTS

National Labor Relations Board General Counsel Arthur F. Rosenfeld today issued a report on casehandling developments in the Office of the General Counsel. The report covers selected cases of interest that were decided during the period from July 2003 through December 2003. It discusses cases that were decided upon a request for advice from a Regional Director or on appeal from a Regional Director's dismissal of unfair labor practice charges. In addition, it summarizes cases in which the General Counsel sought and obtained Board authorization to institute injunction proceedings under Section 10(j) of the National Labor Relations Act.

General Counsel Rosenfeld is beginning with this report a practice of discussing some of the ethical issues in the administration of the Act. The issues discussed in the report relate to state bar applications of ABA Model Rule 4.2 (communications with represented persons) to Agency investigations.

*(The General Counsel's report can be accessed in the press releases area of the NLRB web site: www.nlrb.gov or copies can be obtained by contacting the Division of Information at 202-273-1991.)*

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# REPORT OF THE GENERAL COUNSEL

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With this Report, I am beginning a practice of reporting on some of the ethical issues that confront us in the administration of the Act. We have discussed these at various conferences with the Bar and have received a number of requests for more information about what we are doing. The issues discussed in the Report relate to state bar applications of ABA Model Rule 4.2 (communications with represented persons) to Agency investigations.

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Arthur F. Rosenfeld
General Counsel

## EMPLOYER REFUSAL TO BARGAIN IN GOOD FAITH

### Employer Obligation to Provide Union with Relevant Medical Information after Enactment of Health Insurance Portability and Accountability Act

In several cases, we examined the impact of the Health Insurance Portability and Accountability Act (HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996)) and its regulations against disclosure of health-related information (the Privacy Rule, 45 CFR §§ 160 & 164 (2002)) on employers' duty to provide unions with requested relevant medical information. We decided that the promulgation of the HIPAA regulations did not terminate an employer's obligation to bargain over an accommodation of its confidentiality interest in health information concerning unit employees. We reached that conclusion because HIPAA does not absolutely prohibit the disclosure of such information, and because the HIPAA regulations' exceptions for providing redacted medical information and for allowing patients to consent to disclosure are consistent with Board accommodations for providing confidential information.

Case One

The employer operated an on-site medical facility at its plant, which maintained employee medical records and was staffed by a nurse. The union representing 1700 employees requested documents relating to the administration of workers' compensation claims, the provision of health care at the on-site medical facility, workplace injuries and illnesses, including injury reports required by OSHA (Form 301 equivalents), internal employer injury reports, and medical records. Relying on HIPPA regulations, the employer stated that it would supply the information only upon employee consent. The HIPAA Privacy Rule prohibits "covered entities" (such as the Employer here) from misusing and sharing individually identifiable "protected health information" (PHI), relating "to the past, present, or future physical or mental health or condition of an individual [or] the provision of health care" (45 CFR § 160.103).

In certain situations, however, a covered entity may disclose PHI without violating HIPAA. For example, the Privacy Rule permits a covered entity to disclose PHI upon receiving an individual's consent authorization, or even without the individual's authorization by redacting information from PHI that may be used to identify the individual, a process that the Privacy Rule refers to as "de-identification" (id. at § 164.514(a)-(c)). Under Section 164.512(a)(1) of the Privacy

Rule, a covered entity may also use or disclose PHI without an individual's written authorization where the use or disclosure is required by law.

We concluded that the employer unlawfully refused to seek an accommodation through bargaining with the union over providing confidential information by insisting on employee consent because the option of redaction, proposed by the union, appeared to effectively accommodate the competing interests. We concluded that HIPAA did not alter the employer's duty to bargain over accommodations such as consent or "de-identification" of confidential medical records because HIPAA's exceptions to nondisclosure of PHI parallel confidentiality accommodations that have been approved or fashioned by the Board. See, e.g., LaGuardia Hospital, 260 NLRB 1455, 1463 (1982); Johns Manville Sales, 252 NLRB 368 (1980).

We also decided that portions of the OSHA-required injury report forms may not have even been HIPAA-covered PHI because they did not appear to be used or obtained in the employer's capacity as a covered entity. Rather, because OSHA regulations required the employer to complete and maintain the reports when a work-related injury or illness occurs, the reports would be "employee records held by a covered entity in its role as employer," which HIPAA expressly excludes from the definition of PHI. See 45 CFR § 164.504(f); see also 67 Fed. Reg. 53182, 53192 (2002). Further, even though the reports may have been held in employee medical files, HIPAA's "required by law" exception to the prohibition against disclosure of PHI would allow the employer to furnish those redacted portions of the document that OSHA regulations require be provided to an employee's collective-bargaining representative, 29 CFR § 1904.35(b)(v)(B). As such, the employee would have no reasonable expectation of privacy in those portions of the injury reports.

Case Two

An employer stated that it would no longer provide certain medical information to the union without employee consent because "HIPAA has taken effect." In this case, the Union requested access to forms listing employees' physical capacities upon their returns to work from workers' compensation or sickness/accident leave.

We initially decided that the employer, which manufactures hydrocarbon resins, was not a "covered entity" under HIPAA, despite its assertion that it was because it sponsored its own employee health benefits plan. We also decided that the physical restriction forms were held by the employer in its role as an employer, and the forms were therefore not PHI. Further,

we found no reasonable employee expectation of confidentiality, since the employer had always previously provided the forms to the union without seeking employee consent. Accordingly, we authorized complaint alleging that the employer unlawfully refused to provide the forms unconditionally.

General Counsel to Argue that Board Adopt Limitation to "Perfectly Clear" Successorship

In another case, we decided that an employer was a "perfectly clear" successor under NLRB v. Burns Int'l Security Services, 406 U.S. 272 (1972) and Canteen Co., 317 NLRB 1052, 1057 (1995), enfd. 103 F.3d 1355 (7th Cir. 1997), and therefore that it was not privileged to exercise a successor's usual privilege to unilaterally set initial terms and conditions of employment. However, we further decided to argue to the Board that it should limit the "perfectly clear" exception to situations where employees have been extended actual unconditional offers of hire by the successor, with no indication that the predecessor's terms would be changed, in agreement with the dissent's view in Canteen, 317 NLRB at 1057 (Members Stephens and Cohen dissenting).

In this matter, the union had represented employees at a facility of the predecessor which was then sold to the successor. Prior to holding a meeting with the predecessor's employees and before the purchase became effective, the successor's president had a short conversation with a union representative, during which the union representative asked what would happen to the unit employees after the purchase. The successor's president responded that "[w]e are going to hire all the employees." Shortly after that conversation, the union representative told the unit employees that the successor intended to retain them.

Later that afternoon, the successor held a meeting with the unit employees during which it described its hiring process and told the employees that their health and dental insurance would change to the successor's plans. When asked about wage rates and vacation amounts, the successor stated that it could not tell employees their specific wage rates or vacation amounts until the interview process. The successor then opened with a majority of its unit employees having been employed in the predecessor's unit represented by the union. The employees were employed at different wages and with different vacation benefits.

We authorized complaint alleging that the successor employer was a "perfectly clear" successor, without the freedom to unilaterally set initial terms and conditions, because it

initially informed the union of its plan to retain the predecessor employees without clarifying that employees would be working under different terms and conditions. The Board limits the "perfectly clear" exception to circumstances in which the new employer actively or implicitly misleads employees, directly or through their bargaining representative, into believing that they will be retained by the successor under the same terms and conditions, or fails to clearly state its intent to establish new terms and conditions before inviting predecessor employees to accept employment. In Canteen, for instance, the Board majority imposed a bargaining obligation under the "perfectly clear" exception because of the successor's silence regarding new wage rates when it initially announced to the union its intent to hire the predecessor's employees. Although the successor in Canteen told the union that it wanted employees to serve a probationary period and told the employees that it wanted them to apply for employment, it failed to mention in either discussion the possibility of other changes in initial terms and conditions. The successor first mentioned its reduced wage rate to employees one day after it had communicated to the union its plan to retain the predecessor employees. The Board found that the successor thereby violated Section 8(a)(1) and (5).

While the successor in the case under consideration would be a "perfectly clear" successor under the majority holding in Canteen, we decided that we would also argue to the Board that it adopt the view of the dissent in Canteen to limit the "perfectly clear" exception to situations where employees have been extended actual unconditional offers of hire by the successor prior to any indication being given that the predecessor's terms would be changed. Such a holding would protect employees from being misled into accepting employment with a successor under the belief that their terms and conditions would not change. 317 NLRB at 1056 (emphasis in the original).

## Employer Unlawfully Insisted on Negotiating Contract by Videoconferencing

In our next case, we decided that the use of a videoconference system to negotiate an initial collective-bargaining agreement with the Union is not comparable to face-to-face bargaining. As a result, the Employer's insistence on conducting negotiations in that manner violated the Act's requirement that it meet and confer in good faith with the Union.

After certification as the 9(a) representative of the employees, the Union requested bargaining for an initial contract. The Employer insisted that such bargaining be conducted via its videoconference system – i.e., the Employer's negotiating team in Florida would bargain with the Union's negotiating team, seated in the Employer's Portland, Oregon office, by way of a secure video link. The Union objected to that demand, proposing instead that the parties meet in person at either the Union's office, the Employer's Portland office, or a mutually agreed upon neutral site. The Union ultimately canceled the first session because the parties were unable to resolve this issue, and no bargaining had taken place.

The Employer asserted that negotiating by videoconference should satisfy the Board's "face-to-face" bargaining requirement, and further defended its position on the grounds that it widely utilized videoconferencing to train employees, to hold daily management briefings, and to conduct meetings with employees and vendors. The Employer also asserted that videoconference bargaining would be more cost effective and less time consuming than meeting in person, and would ultimately lead to more productive bargaining sessions.

On the other hand, the Union contended that videoconference negotiating was akin to bargaining by telephone, which the Board has held does not satisfy the face-to-face bargaining requirement. The Union further asserted that videoconference bargaining would not allow for a complete give-and-take of ideas and proposals or permit the parties to gain a "feel" for the other side. The Union was apprehensive about the fact that the videoconference system would allow only one person at a time to speak and would not permit the parties to see everyone on the other side's team. The Union was also concerned that the Employer would record bargaining sessions, as it had initially suggested, and that this possibility would engender reticence and distrust.

Although the Board, with court approval, has consistently interpreted Section 8(d) to require that parties negotiate face-to-face, and has determined that insisting on negotiating by telephone or mail is unlawful, it has never articulated its rationale for that determination. However, we decided that absent agreement, sound policies require in-person collective-bargaining negotiations, which necessarily involve the communication of difficult messages and the existence of strong differences of opinion.

First, we were concerned that videoconference bargaining, over the objections of one of the parties, would not permit parties to contemporaneously exchange draft language or written proposals (which in many instances are prepared or revised

spontaneously during the course of a bargaining session), sign-off on tentatively agreed-upon terms in the midst of bargaining, or hold sidebar conferences with members of the other side's negotiating committee. We were further concerned that videoconference bargaining would not permit the parties to observe nuances of eye contact and body language, both on the part of the individual speaking and on the part of those observing. In addition, the Union's apprehensions about speaking candidly when it could not be certain as to who was in the room and as to whether the sessions were being recorded were not unreasonable. These concerns were particularly germane where a newly certified Union was seeking to negotiate its first contract with the Employer, and the parties consequently had no history to guide them and had not yet established a relationship of trust. Finally, we noted that although the Employer argued that it used videoconferencing for a wide range of business activities, none of the other uses the Employer made of its system -- i.e., training employees and conducting meetings with management, employees, and vendors -- involved dynamics comparable to those involved in collective-bargaining.

Bargaining to Impasse over
Interim Health Insurance Coverage

In another case, we decided that an employer that was bargaining for an initial collective-bargaining agreement lawfully insisted on separate bargaining over interim health insurance coverage, but then unlawfully implemented its interim health insurance proposal before reaching a bona fide impasse.

The Employer had always provided its employees with a health insurance benefit. Every year, the Employer had solicited bids, under certain criteria, from various health insurance providers. After reviewing the bids, the Employer offered employees a choice of providers and plans for the following year.

The Union was certified in December 2001 and the parties began bargaining for an initial agreement. In August 2002, during this bargaining, the Employer learned that one of its existing health insurance providers would not offer its current plan after December 31. Since the Employer could not maintain the status quo during bargaining past that date, employees enrolled in the discontinued plan would have to change plans before the end of the year. The Employer therefore proposed separate bargaining over an interim agreement for health insurance. The Employer submitted its proposal for such an interim agreement, offering employees a choice of several health insurance plans including a catastrophic insurance plan as a default.

The Union opposed bargaining over health insurance on an individual, interim basis. The Employer responded that interim health insurance might be necessary because employees enrolled in the discontinued plan might be forced into the catastrophic default plan on January 1, 2003. Throughout September and October, the parties continued to disagree over both the necessity of an interim health insurance and also over the terms of any health insurance package.

In early November, the Employer stated that a deadline of November 30 for open enrollment in health plans may be necessary to avoid jeopardizing employee plan enrollments. The Employer also stated that the parties could continue to bargain over health insurance as part of an overall agreement. At the close of the parties' November 15 session, the Employer announced that it would implement its proposal for interim health insurance, effective January 1, 2003. The Employer stated that it did not think the parties could wait any longer and that the Employer's proposal was as close to the status quo as possible given the withdrawal of one of the existing plans. Later that day, the Employer posted a flyer to advise employees of its decision to implement.

We decided that the Employer was privileged to seek bargaining over the discrete issue of interim health insurance where some coverage was scheduled to expire during the parties' negotiations. Therefore, if the parties had bargained to a good-faith impasse over just this issue, the Employer would have been privileged to implement its proposal without reaching an overall impasse for an entire agreement. We also decided, however, that the parties were not at impasse over interim health insurance when the Employer implemented its alternative proposal. Thus, the Employer's implementation of its own interim insurance proposal was unlawful.

During negotiations for a new bargaining agreement, an employer may not unilaterally implement changes unless the parties have reached an overall bargaining impasse on the entire bargaining agreement. Pleasantview Nursing Home, 335 NLRB 961, 962 (2001). However, the Board recognizes an exception to this general rule: when a "discrete event" occurs during contract negotiations so that bargaining can not wait for an overall impasse, an employer may bargain to impasse over a single subject rather than over an entire agreement. Brannan Sand & Gravel, 314 NLRB 282 (1994); Stone Container, 313 NLRB 336 (1993).

We decided that this "discrete event" exception applied here because the parties might have had to act prior to an overall bargaining impasse in order to ensure continued health

insurance coverage of certain employees. We noted that the Employer proposed that the parties continue to bargain for an overall bargaining agreement which would also address health insurance coverage and could supersede any interim agreement.

Even though the Employer was privileged to bargain for an interim agreement on health insurance, we further decided that the Employer had unlawfully implemented its alternative health insurance proposal. There was no evidence that the parties had been at impasse prior to the Employer's implementation. In fact, the Employer had not even argued that the parties had reached impasse.

## Employer Lawfully Paid Strike Replacements Unilaterally Implemented Wage Rate

In one case, we decided that the Employer did not violate Section 8(a)(1) and (5) of the Act when it continued to pay strike replacements unilaterally implemented wage rates after the strike ended, but before any strikers had been recalled and before agreement was reached on a new contract. Similarly, the Employer did not violate the Act when it refused to engage in separate bargaining over the replacements' wages apart from negotiations over a successor agreement for the entire unit.

When the most recent collective-bargaining agreement expired, the Employer and the Union were unable to reach agreement on a successor contract, and bargaining unit employees engaged in an economic strike that lasted approximately one year. During the strike, the Employer hired permanent replacements at higher starting wage rates than provided for in the expired contract. After the Union made an unconditional offer to return to work, the Employer continued to operate with the permanent replacements. The Employer also continued to pay the strike replacements at the unilaterally set wage rates. The strikers were placed on a preferential hire list, but none of the strikers were recalled to work as there were no vacancies.

The parties did not resume negotiations for a successor contract until some seven months after the strike ended. However, approximately five months after the end of the strike, the Union claimed the Employer was violating the expired collective-bargaining agreement by failing to pay the strike replacements the contractual wage rates and periodic increases set forth in that agreement. The Union requested that the Employer bargain about the alleged contract violation. The Union argued that the Employer was required to pay the replacements in accordance with the wage rates and periodic increases in the parties' expired contract. The Employer argued

that it had no obligation to pay the replacements in accordance with the expired agreement.

The Employer's normal bargaining obligations do not extend to the terms and conditions of employment for replacements of striking employees during a strike because a union cannot be expected to represent the interests of the replacements equally with the interests of the strikers and an employer cannot be effectively prohibited from hiring replacements. Detroit Newspapers, 327 NLRB 871 (1999); Capitol-Husting Co., 252 NLRB 43, 45 (1980), enfd. 671 F.2d 237 (7th Cir. 1982). In Service Electric Co., 281 NLRB 633 (1986), the Board adopted the administrative law judge's determination that the employer was not required to pay strike replacements in accordance with the terms of an expired collective-bargaining agreement under the circumstances of that case. The administrative law judge based his decision primarily on his determination that the evidence failed to establish that the strike had ended. However, the administrative law judge further determined that even if the strike had ended, the Employer would not be required to pay the replacements the contractual wage rates because the underlying dispute had not been resolved, the strikers had not offered to return to work, and the replacements continued to work. The administrative law judge reasoned that because the unreinstated strikers' jobs continued to be occupied by replacements, the positions of the parties did not differ from their positions during the strike. The administrative law judge also noted that diverting the parties' attention from their principal focus of reaching agreement on a new contract to negotiating an agreement on the entirely separate issue of the replacements' wages would not further the overall bargaining process.

In Detroit Newspapers, 327 NLRB at 871, fn. 1 (1999), the Board refused to pass on the issue of the continuation of different terms and conditions of employment for replacements after a strike has ended. However, the Board noted that after the strike has ended and the underlying labor dispute has been resolved, it is clear that strike replacements become members of the bargaining unit, and their employment terms are governed by the newly negotiated contract. *Id.* at 871.

In Grinnell Fire Protection Systems, 332 NLRB 1345 (2000), enfd. in part, 272 F.3d 1028 (8th Cir. 2001), an information request case, the Board reiterated that once a strike is over, any replacements who remain employed assume the same status as other unit employees and the terms under which they work will be governed by any newly bargained contract. The Board noted that the union was entitled to information regarding strike replacements, not because it could insist on bargaining over the terms under which they worked as strike replacements, but because in bargaining for a new agreement, it was bargaining

over terms that would be applicable to all unit employees, including those who worked as replacements.

We determined that the Act does not require an employer to pay strike replacements in accordance with the expired collective-bargaining agreement under circumstances where the strike has ended, but no strikers have been recalled and no new contract has been reached. Service Electric Co, supra. Rather, the Union is in a position to bargain over the terms and conditions of employment of the strike replacements when it bargains for a new agreement on behalf of the entire unit. See Grinnell Fire Protection Systems, supra.

## UNION DUTY OF FAIR REPRESENTATION

### Unions May Not Compel *Beck* Objectors to Share Arbitration Costs or to Submit Multiple Objection Letters in Order to Receive Fee Breakdown

In another case, we decided that a local union violated an objecting nonmember's rights under Communications Workers of America v. Beck, 487 U.S. 735 (1988), by maintaining policies that required non-members who pay a reduced fee to send a second objection letter in order to receive a breakdown of the fee and that required challengers to share the cost of arbitration.

Under the local union's policies and procedures, employees who object to full membership and request non-member status are sent a letter from the union listing the percentage of fees to be paid by financial core members. Only an employee who submits a written objection to those percentages is considered to be an "objector." The union then provides the objector with an explanation of how the reduced fee was calculated and furnishes a detailed list of those categories of expenditures deemed to be "chargeable" and "nonchargeable." The union also includes its independent auditor's report indicating the union expenditures on which the reduced fee is based. We concluded that the union violated Section 8(b)(1)(A) of the Act because its initial disclosure failed to include a breakdown of the expenditures and calculations used to arrive at the reduced fee.

In California Saw & Knife Works, 320 NLRB 224 (1995), enfd. 133 F.3d 1012 (7th Cir. 1998), cert. denied, 525 U.S. 813 (1998), the Board held that when a non-member objects to a union's use of dues or fees for non-representational purposes, the union must reduce the fee so that it reflects representational expenditures only. The union also must apprise the objector of the percentage of the reduction, the basis for the calculation, and that there is a right to challenge the calculation. Id. at 233. In order to satisfy the duty of fair

representation, the information provided to the objector regarding the basis for the calculation of the reduced fee must be "sufficient...to enable objectors to determine whether to challenge" the calculation. Id. at 239. The Board cited Chicago Teachers Union Local 1 v. Hudson, 475 U.S. 292 (1986), for its finding that "[b]asic considerations of fairness, as well as concern for the First Amendment rights at stake...dictate that the potential objectors be given sufficient information to gauge the propriety of the union's fee." Id. at 233. The Board then noted that the notion of "fairness" clearly implicated a union's statutory duty of fair representation. Ibid.

In Hudson, supra, (a case arising in the public sector), the Supreme Court found unlawful a union's procedure that allowed nonmembers to raise objections only after a deduction was made. The Court reasoned that leaving nonunion employees in the dark about the source of the figure for the agency fee – and requiring them to object in order to receive information – placed an unfair burden on nonmembers. 475 U.S. at 306.

We determined that the requirement that the charging party had to submit a second letter to receive a breakdown of expenditures placed an undue burden on his exercise of his Beck rights. Therefore, the union violated its duty of fair representation by failing to include in its initial disclosure to the charging party a breakdown of the expenditures and calculations used to arrive at the reduced fee. Stated simply, there appeared no valid reason why the union needed a second letter.

We noted that the Board in Teamsters, Local 443 (Connecticut Limousine Service, Inc.), 324 NLRB 633 (1997), did not find unlawful a procedure similar to that used in the instant case. However, the validity of the procedure was not directly in issue in that case. Rather, the question before the Board was whether the Union had violated its duty of fair representation with respect to the adequacy of its disclosure. The Board was not faced with nor did it specifically address the issue of the timing of the disclosure of the audited breakdown of expenses. In footnote 5, the Board noted the General Counsel's assertion that the union's disclosure of certain information was untimely. However, the Complaint did not specifically allege an unlawful delay, and there was no exception filed to the administrative law judge's failure to find a violation based on unlawful delay. Therefore, the Board found no violation. Moreover, the development of the law since California Saw and Connecticut Limousine virtually mandates that unions have this information readily available. Thus, circumstances have changed since these cases, which virtually

eliminates any argument that the information is not immediately available and its production is burdensome.

We also concluded that the union violated Section 8(b)(1)(A) of the Act by requiring the challenger to the union's calculation of the reduced fee to pay half the cost of the arbitrator.

The Board in California Saw and Knife Works, supra, found that a union lawfully required a challenger to bear his own costs for transportation to the hearing, lost time, and legal fees; however, that case is silent on the issue of splitting the arbitrator's fee. By requiring that objecting nonmembers share the cost of arbitration, the union was conditioning the individual's use of the challenge procedure to have his dispute heard by an impartial arbitrator on a willingness to pay money. While it could be argued that employees merely have a right to some appeal procedure, it was decided that if a union establishes an arbitral procedure, employees should have an unfettered right to use that procedure. Therefore, it was determined that the union's procedure in this case, which requires employees to share the cost of arbitration, is unlawful.

## *Beck* Notice Must Include Auditor Letter or Otherwise Identify Auditor

In this case, we decided that the Union violated its duty of fair representation under Section 8(b)(1)(A) of the Act because its Beck notice did not include sufficient information to enable non-member objectors to determine whether to challenge the Union's dues calculations where the notice did not include a copy of the auditor's opinion letter or otherwise identify the auditor.

The Union provided non-member objectors with a Beck notice setting forth the major categories of Union expenditures and stating that the expenditures had been audited by an independent accountant. However, no further information was provided about the audit.

Under the duty of fair representation standard applicable to unfair labor practice charges, a union's breakdown of its expenditures in its Beck notice must be verified by an audit. California Saw & Knife Works, 320 NLRB 224, 240-242 (1995), aff'd. 133 F. 3d 1012 (7th Cir. 1998), cert. denied 525 U.S. 813 (1998). Although the auditor need not pass on the correctness of the union's allocation of expenditures to the chargeable and non-chargeable categories, the auditor must undertake an independent verification of selected transactions and confirm the reliability of the financial information contained in the

union's financial reports. Television Artists, AFTRA (KGW Radio), 327 NLRB 474, 476-477 (1999).

In a case arising in the public sector, the 9th Circuit found that the mere representation in an agency fee notice that the financial information had been audited was not sufficient. Rather, the Court held that an agency fee notice to objectors must include a certification from an independent auditor that the summarized figures had been audited and had been correctly reproduced. Cummings v. Connell, 316 F.3d 886 (9th Cir. 2003), cert. denied 123 S.Ct. 2577 (2003). See also Wessel v. City of Albuquerque, 299 F. 3d 1186 (10th Cir. 2002) (Notice to agency fee objectors in the public sector must include information about the audit itself so that objectors can determine whether to mount a challenge).

Unlike cases arising in the public sector, which are based on First Amendment considerations, the Board analyzes a union's duty to Beck objectors under the duty of fair representation standard. However, the same considerations that led the 9th Circuit to conclude that public sector unions must provide information about their audits to non-member objectors would also apply to unfair labor practice cases. The Court found that without information about the audit itself, objectors would not have sufficient information to make a determination as to whether to challenge the union's representational fees. 316 F.3d at 891-892. The Board has held that the duty of fair representation includes a duty to provide information sufficient to enable a Beck objector to determine whether to challenge the union's dues reduction calculations. See e.g., Television Artists, AFTRA, 327 NLRB at 477-478 (1999). Thus, we determined that the duty of fair representation includes a duty to provide information about the audit itself to enable the Beck objectors to determine whether to mount a challenge. We further determined that a union can fulfill its duty in this regard if it includes in its Beck notice a statement that the figures therein were based on an independent audit and provides a copy of the auditor's opinion letter.

## SECONDARY BOYCOTTS

### Filing of Comments by Union with State Administrative Agency Constituted Unlawful Secondary Boycott When Done Solely to Impose Additional Costs on Employer

In a case involving a novel application of BE & K Construction Co. v. NLRB, 536 U.S. 516 (2002), we decided that the Union violated Section 8(b)(4) by filing comments with a state environmental agency in opposition to the licensing of a construction project.

The Employer had received a license from the state environmental agency to build a hotel near a local waterfront. The Employer then applied for an amendment to the construction license to allow it to convert the top floors of the building to residential use. The Employer began the initial construction of the project while the application was pending. The Union picketed the site in objection to the Employer's use of a nonunion subcontractor. Union agents indicated that the Union would be "relentless" until they succeeded in making the project a union job, and that if the Employer gave the work to a union contractor, "all this would go away."

Several days after the Union withdrew its pickets as part of a settlement with the Employer, it filed comments with the state environmental agency objecting to the Employer's proposed license amendment. A local city official met with representatives of the parties in an attempt to resolve their dispute. At that meeting, an Employer representative asked a Union agent why the Union had submitted "its frivolous" comment to the environmental agency. The Union agent responded that he would do "whatever he had to do or use any means to get the job." The state environmental agency granted the Employer's request for an amendment of its construction license and the Union has filed an appeal with the agency.

We decided that the Union filed its comments with the unlawful secondary object of forcing the Employer to cease doing business with a nonunion subcontractor. We then decided that the comment filing was unlawful because the Union would not have filed the comments but for a motive to impose the costs of the litigation process, regardless of the outcome.

We first noted that union lobbying or petitioning a state environmental agency is activity of the type generally protected by the First Amendment. As such, under Edward J. Bartolo Corp. v. Florida Gulf Coast Building Trades Council, 485 U.S. 568 (1988), the fact that the Union's conduct may have a secondary object would not necessarily cause it to lose the protection of the First Amendment. However, we further noted that in BE & K, the Supreme Court provided guidance as to when governmental petitioning might not enjoy First Amendment insulation from an unfair labor practice proceeding. In that decision, the Court majority suggested that a reasonably based lawsuit might be considered unlawful if the suit would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case. Although this case did not involve a lawsuit, we applied BE & K because it addresses the First Amendment issues implicated by government petitioning.

Though they seemed frivolous, we were unwilling to characterize the Union's environmental comments as baseless. We

recognized the wide discretion accorded to the state agency in determining when the granting of a license would serve the public interest. Given that these comments were filed in the context of a discretionary administrative proceeding, we could not say that the comments would not, in some respect, influence the state agency's decision.

Nonetheless, we decided that the Supreme Court's language in BE & K provided a basis for finding a violation under the Act. Thus, even assuming the comments were reasonably based, the Union violated Section 8(b)(4) because they would not have filed the comments "but for a motive to impose costs on the defendant, regardless of the outcome of the suit." BE & K, 536 U.S. at 536-537. The evidence showed that the only reason the Union filed the comments with the state environmental agency was to coerce the Employer to use union contractors. The Union never offered a non-coercive motive for its filing of the comments or showed that it had any real interest in the outcome of the environmental process. In these circumstances, the Union's filing was not genuine petitioning, entitled to First Amendment protection, but was intended solely to impose costs and delay on the Employer until it was coerced into using a union contractor. And, because the Union's ultimate success in filing its comments was irrelevant under this standard, there was no need to hold the matter in abeyance to await the decision of the state environmental agency.

## PICKETING FOR RECOGNITION

### Union Unlawfully Picketed to Compel Employer to Agree to Neutrality Agreement with Recognitional and Organizational Object

In our final case, we decided that the Union violated Section 8(b)(7)(C) by picketing the Employer for more than 30 days to obtain a signed neutrality agreement. We concluded that both the picketing and the neutrality agreement had a recognitional and organizational object.

The Union asked the Employer to sign a neutrality/card check agreement and warned that it would begin picketing in three days if the Employer did not sign. When the Employer did not sign the Agreement, the Union picketed for nine days over the course of six weeks. The Union informed the Employer that it would stop picketing if the Employer signed the Agreement.

The Agreement contained typical neutrality provisions such as prohibiting the Employer from stating or implying its opposition to the Union, promising to take a positive approach to unionization, granting the Union access to the Employer's

premises, and furnishing the Union with a list of employee names and addresses. The Agreement also provided that the Employer would "recognize the Union if the Union submits authorization cards from a majority of employees as verified by a disinterested third party agreeable to both parties," and that it would "not file a petition with the Board in connection with any Union demands for recognition made under the Agreement."

We decided that the Union's picketing was unlawful because it encompassed both an organizational and recognitional object, and because the Union maintained the picketing for these objects for more than 30 days without filing an election petition.

We first decided that the picketing had an organizational object. The Union essentially conceded that the object of its picketing was to obtain the Employer's signature on the Agreement. It initially threatened to picket unless the Employer signed the Agreement, and then later stated that it would stop the picketing if the Employer signed the Agreement. And, it was clear that the Agreement itself had an organizational object, since it required the Employer to grant the Union access to its facility for the express purpose of organizing its employees, and to provide employees' names and addresses. This object was underscored by the Agreement's requirement that the Employer not only remain neutral, but also affirmatively advise its employees that it "welcomes their selection of a collective bargaining agent."

We then decided that the picketing also had a recognitional object. We noted that in New Otani Hotel, 331 NLRB 1078, 1081 and 1080, n.6 (2000), the Board left open the issue of whether picketing for a neutrality/card check agreement would violate Section 8(b)(7) where the object is ultimately recognitional. While the Agreement did not require immediate recognition, it did require that the Employer give up its right to an election and recognize the Union once it was presented with a verified card majority. We compared this to cases where the Board has found that an immediate recognitional demand is not necessary for a violation of Section 8(b)(7)(C). For instance, when a non-certified union pickets in excess of thirty days without filing an election petition, and that picketing is in support of interim objectives such as requiring that the Employer make offers of reinstatement to employees, the Board will find that recognitional picketing in violation of Section 8(b)(7)(C) where those offers, if accepted, would result in a bargaining obligation. See HERE Local 737 (Jets Service), 231 NLRB 1049, 1053 (1977).

## SUMMARY EXCERPTS OF ETHICS ISSUES

### Arizona's Version of 4.2 (3/18/04)

Issue:

One Region sought advice about a case development that implicated Arizona's Bar rules. In this case there was a dispute among the president and other officers of the Governing Board of the Employer as to whether the Doe law firm represented the corporation regarding the 8(a)(1) charge in this case. Earlier in the processing of the case the Doe firm had filed a notice of appearance with the Region on behalf of the Employer. One of the Governing Board members stated in an e-mail correspondence to the Region that action would not be taken to remove the law firm for several months.

Determination:

Under these circumstances we determined that it was appropriate to consider the company "represented" based on the notice of appearance that the Region had on file. In addition, one of the Governing Board members stated that action would not be taken to remove the law firm for several months.

ABA Formal Op. 95-396 (July 28, 1995) discusses what to do when contact is initiated by a person known to have been represented by counsel in the matter, but who declares that the representation has been or will be terminated. The opinion states, "As a practical matter, a sensible course for the communicating lawyer would generally be to confirm whether in fact the representing lawyer has been effectively discharged. For example, the lawyer might ask the person to provide evidence that the lawyer has been dismissed. The communicating lawyer can also contact the representing lawyer directly to determine whether she has been informed of the discharge." The opinion goes on, however, to describe circumstances where the communicating lawyer may need to go beyond determining that the person has discharged the lawyer. Thus, "if retained counsel has entered an appearance in a matter, whether civil or criminal, and remains counsel of record, with corresponding responsibilities, the communicating lawyer may not communicate with the person until the lawyer has withdrawn her appearance."

## California's version of Rule 4.2 (3/18/04)

Issue:

In one case the charge alleged that the Employer made unlawful statements to employees. The employees were Spanish speakers and the Employer representative spoke in English, using an employee translator to translate into Spanish. The message that the employees heard came from the employee translator, who was designated by the Employer to translate statements that the Employer made at the meeting into Spanish. The question presented by the Region was whether, because the Employer designated the employee as its translator, it was responsible for whatever the employee said to the employees in Spanish. Given this limited agency status, do the skip counsel rules preclude the Region from interviewing this employee translator out of the presence of Employer counsel?

Determination:

Regardless of whether or not the witness actually translated the Employer's message correctly, if the message conveyed to the employees is proven to be an unfair labor practice, the witness can impute liability to the Employer. Accordingly, we advised that the witness falls within Rule 2-100(b)(1) of California's version of the skip counsel rule, Rule 4.2, and that we could not interview the witness ex parte without prior consent from the Employer's counsel.

Rule 2-100(A) of California's Rules of Professional Conduct provides that an attorney may not communicate, either directly or indirectly, with a "party" the attorney "knows to be represented by another lawyer in the matter," without the consent of the other lawyer. Rule 2-100(B)(1) defines "party" to include "[a]n officer, director, or managing agent of a corporation," and Rule 2-100(B)(2) provides that a "party" also includes any employee of a corporation where "the subject of the communication is any act or omission of such person in connection with the matter which may be binding upon or imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization."

Hawaii's Version of 4.2 (3/18/04)

Issue:

The Region was investigating charges alleging that Employers A, B and C violated Section 8(a)(1) and (5) by refusing to bargain with the Union and to abide by the collective-bargaining agreement. The charges further allege that Employer C had no business purpose other than to supply labor to Employers A and B, and that the three companies constitute a single employer/ alter ego.

Mr. Smith owns all three companies. Smith is also the President of C and an Officer/ Director of A and B. A and B are represented by the same counsel, who advised the Region that there is no representational relationship with C. No attorney has entered an appearance on C's behalf.

The Region is aware that it may not interview Mr. Smith ex parte concerning A and B without the prior consent of company counsel. However, the Region wishes to separately interview Mr. Smith ex parte regarding C's position, with hopes of soliciting information establishing that C is an alter ego of A and B, and that C unlawfully refused to bargain with the Union.

The relevant jurisdiction is Hawaii.

Determination:

The Region was instructed to issue Mr. Smith an investigatory subpoena with notice to A and B's counsel. With this subpoena, the Region can question Mr. Smith about matters pertaining to all three companies. If, however, Mr. Smith retains a personal attorney concerning the alter ego/ refusal to bargain charges, the company attorney for A and B need not be present when the Region interviews Mr. Smith.

Rule 4.2 of Hawaii's Rules of Professional Conduct mirrors the language of the ABA's 1995 Model Rule. Hawaii's rule provides that "In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other

lawyer or is authorized by law to do so."[1] Comment 4 to Rule 4.2 provides in relevant part that "[T]his rule prohibits communications by a lawyer for another person or entity concerning the matter in representation with persons having a managerial responsibility on behalf of the organization, and with any other person whose act or omission in connection with that matter may be imputed to the organization for purposes of civil or criminal liability or whose statement may constitute an admission on the part of the organization." No cases or ethics opinions in Hawaii address Rules 4.2.

Mr. Smith plainly falls within Rule 4.2 in his capacity as owner, officer, and director of the alleged alter ego/single employer companies, A and B, which are represented by counsel.[2] Further, in view of the nature of the alter-ego/single employer allegations and the information needed to support alter ego/single employer status, we advised that, as a practical matter, the questioning about the relationships between the companies could not be segregated to matters pertaining only to C. Thus, the questions posed to Mr. Smith about C would tend to focus on the relationships between the companies.

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[1] The ABA Rules and Comments were amended in 2002. The Hawaii Disciplinary Board of the Supreme Court is currently conducting a review of the revisions.

[2] The Hawaii Disciplinary Counsel's report defines managerial employees for purposes of Rule 4.2 as "[T]hose near the apex of authority within an organizational hierarchy. Such employees would have the power to legally bind the organization concerning the subject litigation and would normally be considered within the entity's 'control group'." "Control group" is defined by the report as "Those top persons who have the responsibility of making final decisions and those employees whose advisory roles to top management are such that a decision would not normally be made without those persons' advice or opinion or whose opinions in fact form the basis of any final decision." (*quoting* Fair Automotive Repair, Inc. v. Car-X Service System, Inc., 128 Ill. App.3d 763, 771, 471 N.E.2d 554, 560 (1984)). Because Mr. Smith is an owner, officer, and director, he is in the "apex of authority" with "responsibility of making final decisions" for A and B, and he therefore falls within Rule 4.2.

As we further discussed with the Region, if Mr. Smith retains a personal attorney concerning the alter ego/ refusal to bargain charges, then A and B's attorney need not be present when the Board Agent interviews Mr. Smith or be given notice of the interview. Comment 4 of Hawaii's Rule 4.2 provides that "If an agent or employee of the organization is represented in the matter by his or her own counsel, the consent by that counsel to a communication will be sufficient for purposes of this rule." However, during such interview, the Board Agent would have to be careful not to elicit or obtain information protected by A or B's attorney-client privilege. In particular, we would recommend that the Board Agent inform Mr. Smith at the beginning of his interview not to divulge any such privileged communications, including communications with or instructions from A and B's counsel.

Maryland's Version of 4.2 (3/18/04)

Issue:

The Region issued a Complaint alleging that Employer A violated Section 8(a)(1) by unlawfully refusing to convert the Charging Party's status from temporary to permanent, by then terminating the employee, and by later refusing to rehire. Employer B is a temp agency that supplied employees to Employer A.

The Region would like to pretry a current supervisor of Employer B in connection with its case. This current supervisor's signature appears on a letter terminating the Charging Party. The Region believes that this supervisor could provide testimony regarding the Charging Party's termination. The Region further believes that this testimony would support the Region's allegations in its Complaint that the supervisor acted as Employer A's agent in the alleged unlawful conduct, for example by notifying the Charging Party of the termination.

Employer A is represented by counsel. The supervisor and Employer B are unrepresented. The relevant jurisdiction is Maryland.

Determination:

The Region may not contact the supervisor ex parte without obtaining prior permission from Employer A's counsel.

Maryland's version of Rule 4.2, the ex parte communication rule, provides that in the case of a represented organization, the Rule's prohibitions extend to "(1) current officers, directors, and managing agents, and (2) current agents or employees who supervise, direct, or regularly communicate with the organization's lawyers concerning the matter or whose acts or omissions in the matter may bind the organization for civil or criminal liability."

Because Employer B is unrepresented, there are no skip counsel issues vis-à-vis the witness's employment relationship with Employer B. However, as a general rule, Rule 4.2 encompasses "agents" who act on behalf of a represented organization as well as employees.[3] Although the supervisor is an employee of B, as the individual who notified the Charging Party of the termination, the supervisor is an "actor" in the underlying unfair labor practice. The Region wants to talk with the supervisor to establish that the supervisor acted on behalf of Employer A in signing the termination letter. As an actor/agent of Employer A, the supervisor falls within Maryland's Rule 4.2 and is therefore presumed to be represented by Employer A's counsel.

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[3] See, e.g., Reynoso v. Greynolds Park Manor, Inc., 659 So.2d 1156, 1160 (Fla. Dist. Ct. App. 1995) ("[T]hose addressed by the Comment [4.2] are not denominated 'employees' but 'persons.' The Rule presumably covers independent contractors whose relationship with the organization may have placed them in the factual position contemplated by the Comment"); Palmer v. Pioneer Inn Associates, Ltd., 59 P. 1237, 1245 (Supr. Nevada 2002) (The Rule 4.2 test prohibits "direct contacts with employees and agents").

## Minnesota's Version of 4.2 (3/18/04)

Issue:

The Region was investigating charges against the Employer, which is affiliated with a recognized religious denomination. The Region anticipates that a religious official of the church is going to contact the Board's Regional Director in order to obtain information about the unfair labor practice allegations and determine if he should become involved in the Employer's handling of the case. The religious official is an ex-officio member of the board of directors of the Employer. The Employer is represented by an attorney. The Regional Director wants to know whether it would be appropriate to talk with the official ex parte. The Regional Director is licensed in Minnesota, which is where the contact would occur.

Determination:

The Region was instructed not to communicate with the official ex parte without prior permission from the Employer's counsel. There were two considerations that entered into that determination:

(1) The term "ex officio" describes someone who has a right because of an office held. Here, for example, the official sits on the Employer's board of directors by virtue of his being an official of the religious organization with which the Employer is affiliated. Under Minnesota's version of Rule 4.2, an attorney may not conduct *ex parte* interviews with five classes of current employees/agents of a represented party. These five classes include:

- Managers
- Employees whose acts or omissions in connection with the matter may impute liability to the organization
- Individuals who are responsible for implementing the advice of the organization's lawyers
- Individuals whose own interests are directly at stake in the representation
- Persons who can make binding evidentiary admissions, and who are not mere fact witnesses to an event for which the organization is being sued.

Paulson v. Plainfield Trucking, Inc., 2002 WL 31397850, slip op. at 3 (D.Minn. 2002).

A member of a board of directors is considered a "manager" under Minnesota ethics law. See Fleetboston Robertson Stephens, Inc., 172 F.Supp.2d 1190, 1192 (D.Minn. 2001)(former chairman of the board/CEO was a former managerial employee). We concluded that an ex officio member of a board is the same as a "member" and therefore a "manager", or falls within any of the other classifications covered by Minnesota's version of Rule 4.2.

(2) Our determination that the Region should not interview the witness without the consent of counsel was also based on the fact that it appeared the witness was in a position to implement the advice of counsel as he indicated that he was considering becoming involved in the litigation. Because the official wanted to talk with the Region to obtain rather than provide information, we determined that the Region should go through counsel to make sure the official was someone entitled to the information.

For these reasons, the Region should obtain prior permission from the attorney before talking directly with the official and should ask the Employer's attorney if he or she wants to be present during the conversation with the official about the ulps.

## Nevada's Version of Rule 4.2 (3/19/04)

Issue:

The Region was investigating alleged unlawful conduct directed against employees. The charges also alleged that the Employer unlawfully subcontracted bargaining unit work, interrogated employees, and discharged employee Smith because of her union activity. The Region wanted to talk with some of the Employer's former supervisors. These former supervisors were first-line supervisors and were not involved in the decision to subcontract the work or discharge Smith although one of them, Supervisor X, is alleged to have interrogated Smith about her and other employees' union activities.

The Region believes that the former supervisors would provide evidence of the Employer's knowledge of the employees' union activity and union animus. Specifically, the Region believes Supervisor X would testify that he overheard two managers discussing getting rid of employees and that the other former supervisors would testify that they were told to fire the employees for any infraction.

The relevant jurisdiction is Nevada.

Determination:

The Region was instructed that it could interview the former supervisors, ex parte, but could not solicit or obtain attorney-client privileged information.

Nevada SCR Rule 182 provides that "In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so."

In a recent case involving current employees, the Supreme Court of Nevada adopted the "managing-speaking agent" test as set forth by the Washington State Supreme Court in Wright v. Group Health Hospital, 691 P.2d 564, 569 (1984). According to this test, Nevada's Rule 182 prohibits ex parte contact with "only those employees who have the legal authority to 'bind' the corporation in a legal evidentiary sense, *i.e.*, those employees who have 'speaking authority' for the corporation." See Palmer v. The Pioneer Inn Associates, Ltd., 2002 WL 31886885, slip op. 10-11 (Nv. 2002). The Court also stated that "an employee does not 'speak for' the organization simply because his or her statement may be admissible as a party-opponent admission. Rather the inquiry is whether the employee can bind the organization with his or her statement." Id. Additionally, the managing-speaking agent test does not include "employees whose conduct could be imputed to the organization based simply on the doctrine of respondeat superior." Id. We note that if Nevada were to impose limitations on contacts with former employees, those limitations would not be more stringent than those imposed on current employees.

In the present case, it appears that none of the former supervisors was a "managing-speaking agent." As first-line supervisors, they would not have the necessary authority to speak on behalf of the Employer. Moreover, regarding Supervisor X, it is important to note that Nevada does not equate managing-speaking agent and actor. Rather, the relevant factor is the level of authority the former supervisor possessed. Here, none of the witnesses possessed sufficiently high authority to speak for the Employer. Accordingly, the Board agent's contact with each of the former supervisors in the present case would be permissible under Nevada's ethics rules.

## Section 10(j) Authorizations

During the six-month period from July 1, 2003 through December 31, 2003, the Board authorized a total of 14 Section 10(j) proceedings. Most of the cases fell within factual patterns set forth in General Counsel Memoranda 01-03, 98-10, 89-4, 84-7, and 79-77.

Three cases were somewhat unusual and warrant discussion.

The first case involved an employer's withdrawal of recognition from an incumbent union. The employer and the union had negotiated a new tentative collective-bargaining agreement in December 2002 to cover a unit of some 62 nursing home employees. The union membership ratified the new contract in late December. In early January 2003, the employer paid the employees a ratification bonus and implemented a contractual wage increase. The union's president signed this printed agreement in February. In March, however, the employer withdrew recognition from the union, based upon the receipt of a document showing signatures of 31 unit employees desiring to no longer be represented by the union.

The Region concluded that (1) the parties' tentative December 2002 labor agreement barred any attempt of the employer to question the union's majority status during the term of the agreement, and (2) the union's subsequent execution of the printed agreement prevented the employer from thereafter lawfully withdrawing recognition from the union. The Region thus issued a Section 8(a)(5) complaint alleging that the employer's withdrawal of recognition from the union was unlawful.

We concluded, and the Board agreed, that 10(j) relief was warranted to restore and maintain the status quo ante of union

representation in order to prevent irreparable harm to the parties' collective-bargaining relationship and to employees by their loss of the benefits of collective bargaining pending Board adjudication. Further, the employer's continued disregard of the union's representational role could be expected inevitably to lead to even further erosion of employee support for the union over time, and would promote instability in labor relations during the contract term.

The district court granted the requested injunctive relief.

The second case involved the warrant for an interim bargaining order under NLRB v. Gissel Packing Co., 395 U.S. 575 (1969). The employer responded to a successful union organizing campaign among its five truck drivers by making numerous coercive statements to employees, including threats of plant closure and discharge, discharging four drivers for supporting the union, and subcontracting all of the driving work to a labor broker in order to avoid the union. Shortly thereafter, the union withdrew its representation petition. The Region concluded that the employer's serious and pervasive violations of Section 8(a)(1) and (3), including its discharge of 80% of the unit and its subcontracting of unit work, prevented the holding of a fair election and support a Gissel bargaining order remedy.

The Board concluded that 10(j) relief, including interim rescission of the subcontract and restoration of the driving work to the bargaining unit, reinstatement of the four discriminatees, and a remedial Gissel bargaining order, was warranted to restore the lawful status quo ante, prevent the inevitable irreparable erosion of union support among the unit employees, and prevent the irreparable loss to unit employees of the benefits of collective bargaining pending a final Board decision.

The district court granted the requested injunctive relief.

The third case involved a union organizing campaign which had resulted in an unresolved Board election and also implicated employee access to the Board’s processes. During the union's organizing campaign, the employer engaged in various 8(a)(1) conduct. Nonetheless, the union proceeded to an election. The election ended with 14 votes in favor of union representation, four against, and 17 determinative challenges. After the election, the employer's 8(a)(1) conduct escalated. The employer, among other things, twice directed employees to go to the Regional Office to attempt to withdraw the union’s election petition, ordered employees to file unfair labor practice charges against the union in an effort to leverage the union to

withdraw the petition, commanded employees to sign a letter to the Region demanding that copies of their investigative affidavits be sent to the employer's facility, and directed employees to sign letters retaining specific counsel paid for by the employer. The Region's Section 8(a)(1) complaint alleged as unlawful the employer's conduct dealing with the employees' participation in Board processes.

We concluded and the Board agreed, that injunctive relief under Section 10(j), as well as a temporary restraining order, were just and proper to preserve the union's status at the employer's facility during the Board's resolution of the consolidated representation case, and to protect the Board's investigative and prosecutorial processes and guarantee that employees have full and free access to participate in the Board's processes.

Prior to filing the 10(j) petition, the parties entered into a settlement of the unfair labor practice charges which also resolved the pending representation proceeding.

The 14 cases authorized by the Board fell within the following categories as described in General Counsel Memoranda 01-03, 98-10, 89-4, 84-7 and 79-77:

| Category | Number of Cases In Category | Results |
|---|---|---|
| 1. Interference with organizational campaign (no majority) | 3 | Two cases settled before petition; one case settled after petition. |
| 2. Interference with organizational campaign (majority) | 2 | Won one case; one case is pending. |
| 3. Subcontracting or other change to avoid bargaining obligation | 1 | Case settled after petition. |
| 4. Withdrawal of recognition from incumbent | 5 | Won four cases; one case is pending. |
| 5. Undermining of bargaining representative | 1 | Won case. |
| 6. Minority union recognition | 1 | Case settled before petition. |
| 7. Successor refusal to recognize and bargain | 1 | Case was withdrawn based upon changed circumstances. |
| 8. Conduct during bargaining negotiations | 0 | - - - |
| 9. Mass picketing and violence | 0 | - - - |
| 10. Notice requirements for strikes and picketing (8(d) and 8(g)) | 0 | - - - |
| 11. Refusal to permit protected activity on property | 0 | - - - |

| Category | Number of Cases In Category | Results |
|---|---|---|
| 12. Union coercion to achieve unlawful object | 0 | - - - |
| 13. Interference with access to Board processes | 0 | - - - |
| 14. Segregating assets | 0 | - - - |
| 15. Miscellaneous | 0 | - - - |

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