Labor Board's GC Gets Tough(er) On First Contract Shenanigans

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According to Ronald Meisburg, general counsel of the National Labor Relations Board, the negotiation of the first contract after the certification of a bargaining representative is critical to whether the collective bargaining relationship will continue indefinitely into the future or die a quick death. This is without regard to whether the recognition of the union was compelled following a Board-supervised election or voluntary following a card check. It is during this period when the employees are the most insecure and their confidence in their union is fragile. For this reason, employers with union animus frequently engage in conduct intended to undermine employee support for their chosen representative in an effort to stimulate the employees to file for the decertification of the union or abandonment of the employees by the union. Indeed, about half of all refusal to bargain charges are filed during the bargaining of first contracts and half of the Labor Board's §10(j) injunction cases deal with charges of employer conduct apparently intended to subvert the union's representative status.

Unlawful conduct most common during the negotiation of first contracts, Meisburg notes, includes refusals to provide the union with information necessary to enable it to bargain effectively, refusals to meet with sufficient frequency or in convenient places, unilateral changes in policies that result in the injection of extraneous issues into bargaining, use of bargaining agents with insufficient authority to make agreements and discharges of union supporters.

Meisburg, in an apparent attempt to repair the Board's tattered credibility as guardian of the Congressional policy in favor of employee organization and collective bargaining, has issued a series of memoranda to the Board's regional offices: GC 06-05 (April 19, 2006), GC 07-01 (December 15, 2006) and GC 07-08 (May 29, 2007). In these memoranda, Meisburg took direct aim at conduct intended to diminish union support and employers that use them "to ensure that employees have freedom of choice on the issue of union representation, free of coercion by any party, and that their decision is protected by this Agency."[1]

> …initial contract bargaining constitutes a critical stage of the negotiation process in that it provides the foundation for the parties' future labor-management relationship. Unfair labor practices by employers and unions during this critical stage may have long-lasting, deleterious effects on the parties' collective bargaining and frustrate employees' freely exercised choice to unionize.[2]

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In the first of these memoranda, GC 06-05, Meisburg instructed the regional offices of the Board to "consider" seeking § 10(j) injunctions and special remedies (e.g., extension of the certification/insulation year, periodic reports on the status of bargaining and bargaining/litigation expenses) in *every* case involving charges of unfair labor practices committed during union organizing or in connection with the negotiation of first contracts. Regional offices also were directed to submit all meritorious unfair labor practice cases that involve conduct during organizational campaigns and first contract bargaining to the General Counsel's Office of Advice for assistance in determining the appropriate remedy to be sought by the region. GC 07-01[3] directed the regions to seek authorization to bring §10(j) injunction applications routinely in several classes of unfair labor practice cases, including those involving representation and initial contract bargaining. In GC 07-08, Meisburg again upped the pressure by directing the regions to seek specifically tailored remedies regularly and to submit all meritorious cases involving violations that have interfered with first contract negotiations to the GC's Division of Advice for assistance in the fashioning and pursuit of remedies and the Litigation Branch of the Division of Advice for determination whether the Board would seek §10(j) injunctive relief from the applicable federal district court.[4]

The stated focus of Meisburg in these memoranda is to ensure that employers and unions will engage in meaningful first contract negotiations with a sincere intent to reach an agreement. This, apparently in his view, cannot be accomplished with simple remedial cease and desist and good faith bargaining orders but requires actions specifically structured to meet the individual circumstances of each case. Meisburg detailed some of the things the regions should consider in fashioning tailored remedies:

• *Bargaining on a prescribed or compressed schedule*. Up to the date of the issuance of the Memorandum, mandated bargaining schedules were reserved for recidivist employers. Now, they will be considered even for first-time offenders. These orders would require that the parties meet at prescribed intervals, for a minimum number of days per week or for a minimum number of hours per week, until an agreement or good-faith impasse is reached.

• *Periodic status reports*. Where the Regional Director and the Division of Advice have a reasonable concern that the failure to bargain will be repeated, the GC believes that an appropriate remedy should include a requirement of periodic status reports. This monitoring activity is intended to ensure that delaying and other tactics will be discovered as they occur and not be hidden for significant periods of time.

• *Extension of certification year.* The Board has long held to a policy that newly certified unions should have at least one full year in which to achieve a collectively bargained agreement without having their focus diverted due to decertification efforts. Where an employer's unfair tactics have diminished a union's "fair chance to succeed," the region is encouraged to include in its remedial order an extension of the insulated period. Six-month extensions, said Meisburg, should be "routine." In special cases, the extension could be as much as a year. Decisions to grant extensions beyond six months, however, need to weigh the policy in favor of collective bargaining against the delay an extension would cause to employees who wish to exercise their right to decertify a union they no longer wish to represent them. Where there has been no meaningful negotiations in the year following the certification of the union, of course, a longer extension would be warranted.

• *Reimbursement of bargaining costs*. Where the conduct of the violator has been unusually egregious and "it may fairly be said that a respondent's substantial unfair labor practices have infected the core of a bargaining process to such an extent that their effects cannot be eliminated by the application of traditional remedies,"[5] regions are told to consider requiring financial reparations, such as the payment of the lost wages of bargaining committee members, agent salaries, mileage, meals, lodging expenses and other costs related to the torpedoed bargaining sessions.

Perhaps more significant than the detail of the various special remedies being suggested by Meisburg is the change in focus that he has directed in the decisional process. In fashioning the appropriate remedies, the regions are instructed not to make determinations based primarily on the egregiousness of the violations but on what can be done that will have the greatest curative effect on the bargaining process and relationship. This refocus will require the regional counsel, when trying these cases, to present significantly different evidence than before. As a consequence, defense counsel will also be required to structure their cases in a completely different way.

For example, assume a situation in which an employer engages in numerous unilateral policy changes calculated to undermine the union's effectiveness and employee respect. Unsure that any of the discrete acts constitute a refusal to bargain and to avoid an appearance of strident adversarialism, the union does not file unfair labor practices but brings the employer's actions to the bargaining table for discussion. These extraneous subjects occupy all or nearly all of the bargaining sessions, and while the record will show that the parties met on many occasions and that there was much apparent discussion of work-related issues, there is no progress on the core issues of employee concern, such as wages and hours. As the unproductive negotiations drag for months, employee frustration over the futility of the process grows. Finally, in desperation, the union files an unfair labor practice charge, alleging that the employer's conduct, back to the inception of bargaining, was a refusal to bargain in good faith in violation of Section 8(a)(5) of the Act.

The facts in this hypothetical suggest that this is a "course of conduct" case in which the employer's bad faith bargaining will depend on linking discrete acts occurring over a substantial period of time, because the significance of each act is capable of discernment only in retrospect. Since this is a first contract case and the obligation of the region is now to propose a remedy that is specifically tailored to re-establish the status quo ante is this particular situation, the regional counsel must establish not only that a violation has occurred but also the factual basis and justification for whatever tailored remedy the region may seek. Both in the liability and remedy phases of the administrative law judge proceedings, therefore, the regional counsel will be compelled to present evidence, including employee and expert testimony, concerning the effect of the employer's conduct on employee confidence in the union as a representative and employee attitudes of futility, as well as what measures will be effective and should be taken to enable the parties to bargain consistent with the intent of the Act. Of course, defense counsel will be compelled to include in its defense similar evidence and expert testimony that will counter the regional counsel's arguments and support a conclusion that one or a combination of the remedies suggested by the general counsel will not be necessary and that a simple cease and desist order and pledge to bargain in good faith will be sufficient.

Whether General Counsel Meisburg's push for more effective remedies in first contract unfair labor practice cases will have the unintended consequence of turning ALJ proceedings into a playground for psychologists, sociologists, economists and/or industrial relations experts is unknown. What is known, however, is that the stakes for these cases and how they will have to be tried going forward have been changed.

In both GC 07-01 and public statements concerning his special interest in "ensuring that employees have freedom of choice on the issue of union representation, free of coercion by any party and that their decision is protected by this Agency,"[6] Meisburg has emphasized the importance of encouraging the use of and confidence in Board processes by both organized labor and employers. Indeed, the general counsel's memoranda may be viewed as a thinly veiled defense of the Board and counter-offensive against the Employee Free Choice Act, which is at the top of organized labor's political and legislative agenda. Regardless of the motive, employers and unions alike are on notice that the Board will be more aggressive in litigating unfair labor practice cases that involve conduct intended to subvert the representational status and collective bargaining effectiveness of unions, and defense counsel must be prepared for a new kind of trial.

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[1] *Memorandum GC 07-08, May 29, 2007, p.1.*

[2] Id.

[3] *This Memorandum was focused primarily on the use of § 10(j) injunctions in egregious cases, cases involving charges that may block an election and cases involving recidivist employers. The specific reference to GC 06-05 emphasized Meisburg's special interest in first contract bargaining cases.*

[4] *This article will discuss GC 06-05, 07-01 and 07-08 as if they were a single Memorandum, since all deal primarily with the same subject. It is noted that GC 06-05 was issued originally with a six-month life. Eight months later, in GC 07-01, Meisburg references GC 06-05 without mentioning the fact that its life had expired. Indeed, in GC 07-08, Meisburg, ignoring that GC 06-05 was then more than seven months beyond its scheduled life, extended GC 06-05 for another term of six months, coincidental with the effective life of GC 07-08. It is unlikely that either GC 06-05 or GC 07-08 will lapse at the end of their current six-month terms, and therefore, the requirements will be discussed as if they will be ongoing.*

[5] Dish Network Service Corp., *347 NLRB No. 69, slip op. at 53 (2006).*

[6] *GC 07-08, May 29, 2007, p. 1.*

Please email the author at jredeker@wolfblock.com with questions about this article.