NLRB General Counsel Seeks to Expand Use of Special Remedies*

Daniel R. Simandl, RyAnn M. Hooper & Michael F. McGahan

Introduction

The General Counsel for the National Labor Relations Board (the "Board"), Jennifer Abruzzo, recently directed regional offices of the Board to seek special remedies in a broad array of unfair labor practice charges. In a memorandum issued by General Counsel Abruzzo on September 8, 2021, Regional Directors were given wide latitude to seek special remedies against employers for unfair labor practices, even in circumstances previously excluded from the reach of special remedies.[1]

Historically, the imposition of special remedies was reserved for employer conduct considered so serious and extensive that imputable actions were assumed to have long-term coercive effects on employees.[2] These extraordinary remedies have included, but were not limited to: public reading of a notice by a high-ranking employer official to impacted employees; provision of employee names and address to the union upon request, for an extended period of time; allowing a union access to employer bulletin boards; giving a union access to employer captive audience meetings and providing it with equal time to address employees; mailing copies of a notice to all employees on the employer's payroll not just those affected by the unfair labor practice; publishing the notice in a local newspaper; along with myriad of traditional bargaining remedies that are often used in first contract cases.[3] Moving beyond the Board's practice, General Counsel Abruzzo called for the Regions to invoke "the full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices", including "new and alternative" special remedies.[4]

Since her appointment on July 21, 2021, General Counsel Abruzzo has wasted no time taking an aggressive approach to her responsibilities setting the Board's litigation and enforcement agenda. With President Biden's election and subsequent new appointments to the Board, the five-member Board itself transitioned from a 3-2 Republican majority to that of a 3-2 Democratic majority, providing the new Board the ability to act affirmatively on the agenda set by General Counsel Abruzzo.

The Board's Authority to Impose Remedies – Generally

The Board's remedial authority flows from section 10(c) of the National Labor Relations Act (NLRA or the "Act"), and without question, is explicitly remedial in nature.[5] In short, the Board is solely permitted to fashion appropriate remedies that will best effectuate the policies of the Act.[6]

In conjunction with the Section 10(c) power, the Board may also seek injunctions to preserve the status quo of employee terms and conditions of employment until the Board is able to fashion an appropriate remedy if there is merit to the unfair labor practice charge.[7]

A typical resolution of an unfair labor practice claim may include a cease and desist order, directing the

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[1] Jennifer A. Abruzzo, Gen. Counsel, NLRB, *Seeking Full Remedies*, Memorandum GC 21-06 (Sept. 8, 2021) ("GC Memo 21-06").

[2] *See Federated Logistics*, 340 N.L.R.B. 255, 256-57 (2003).

[3] GC Memo 21-06, *supra* note 1, at 3-5; *see also Beverly Health and Rehabilitation Services*, 335 N.L.R.B. 635, 640, n.30 (2001). *Cf. First Legal Support Services, Inc.*, 342 N.L.R.B. 350, 350-351 (2004).

[4] GC Memo 21-06, *supra* note 1, at 1.

[5] 29. U.S.C. §160(c); *see also, e.g.*, 79 Cong. Rec. 9704 (1935) (remarks of Representative Ekwall, discussing the Board's Section 10(c) authority: "The order will of course be adapted to the needs of the individual case; they may include such matters as refraining from collective bargaining with a minority group, recognition of the agency chosen by the majority for the purposes of collective bargaining, posting of appropriate bulletins, refraining from bargaining with an organization corrupted by unfair labor practices. The most frequent form of affirmative action required in cases of this type is specifically provided for, *i.e.*, the reinstatement of employees with or without back pay, as circumstances dictate.")

[6] *See Gissel Packing Co.*, 395 U.S. 575 (1969).

[7] 29 U.S.C. §160(j).

employer to stop conduct considered unlawful; an order demanding certain affirmative action such as bargaining in good faith, or imposition of a make whole remedy for a discharged employee; or an order to post a notice informing employees or union members of the charge and the remedial actions the employer or union must take. Even in instances of special remedies ordered by the Board, the overall goal is still to effectuate the policies of the Act. Consequently, expanding either the timing, scope, or general imposition of special remedies must still track the intended scope of the Board's remedial authority.

General Counsel Directive to Invoke Special Remedies

The stated purpose of Memorandum GC 21-06 is to extend the "full panoply of remedies available to ensure that victims of unlawful conduct are made whole for losses suffered as a result of unfair labor practices."[8] According to GC 21-06, when employers, including employers with unrepresented workforces, are found to have violated sections of the Act, the Board may impose several remedies to make the affected party whole from the perceived violations and the Board has wide discretion to issue remedies to make affected parties whole from unfair labor practices.[9]

General Counsel Abruzzo focuses on three key aspects of labor law that she perceives as ripe for advancing "new and alternative" special remedies: remedies for terminated discriminatees, union organizing campaigns, and unlawful failures to bargain.

Broader Definition of Make Whole Remedies for Terminated Discriminatees

In cases involving termination in violation of the Act, the Regions have regularly sought remedies including, backpay, reinstatement, restoring of benefits, and more. The General Counsel supports the application of the ordinary remedies, but insists that Regions should also seek consequential damages[10], front pay[11], back pay, as well as interest on any monetary make whole remedy. The Memorandum advises Regions in cases involving unlawful terminations of undocumented workers to seek remedies addressed in GC Memorandum 15-03, which included compensation for work performed at an unlawfully reduced rate[12], employer sponsorship of work authorizations[13], and other remedies to prevent the unjust enrichment of employers utilizing undocumented workers.[14]

Union Organizing Campaigns – Cleansing Laboratory Conditions

According to the General Counsel, labor law precedent is clear that a union organizing campaign or election must maintain "laboratory conditions" to recognize the true desires of employees.[15] When an employer violates the Act to taint such conditions, the Region may seek or impose a remedy to restore the laboratory conditions, such as requiring a new election take place. In General Counsel Abruzzo's perspective, however, mere restoration of the conditions may not adequately remedy the employer's violation.

In the General Counsel's view, an election's tainted "laboratory conditions" are often impossible to restore with ordinary remedies and traditional remedies, such as reinstatement and back pay for discharged workers, or postings of unlawful practices, simply do not make the employees or the union whole or restore the election process to what it was prior to the unlawful actions.[16]

According to General Counsel Abruzzo, the altered conditions cannot be reset without the imposition of special remedies.[17] General Counsel Abruzzo identified several special remedies used in prior Board cases that she believes may recreate these conditions more successfully. For example, General Counsel Abruzzo suggests greater union access to an employer's workplace after the finding of unfair labor practices could set an equal stage of communication from which employees would benefit.[18] She proposes such measures as gov-

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[8] GC Memo 21-06, *supra* note 1, at 1.

[9] GC Memo 21-06, *supra* note 1, at 1. ("It is well established that the Board possesses broad discretionary authority under Section 10(c) to fashion just remedies to fit the circumstances of each case it confronts."); *see also*, *e.g., NLRB v. J.H. Rutter-Rex Mfg. Co.*, 396 U.S. 258, 262-63 (1969).

[10] GC Memo 21-06, *supra* note 1, at 2 (citing *Vorhees Care and Rehabilitation Center*, 371 NLRB No. 22, slip. op., at 4, n.14 (2021)).

[11] GC Memo 21-06, *supra* note 1, at 2 (citing *HTH Corp.*, 361 N.L.R.B. 709, 718-19 (2014)).

[12] GC Memo 21-06, *supra* note 1, at 2 (citing *In re Tuv Taam Corp.*, 340 N.L.R.B. 756, 759 n.4 (2003)).

[13] GC Memo 21-06, *supra* note 1, at 2 (citing *Saipan Hotel Corp.*, 321 N.L.R.B. 116, 120-21 (1996), enfd. mem. 116 F.3d 485 (9th Cir. 1997)).

[14] GC Memo 21-06, *supra* note 1, at 3 (citing *Mezonos Maven Bakery*, 357 N.L.R.B. 376, 384 (2011)).

[15] *See General Shoe Corp*., 77 N.L.R.B. 124, 127 (1948).

[16] GC Memo 21-06, *supra* note 1, at 3.

[17] GC Memo 21-06, *supra* note 1, at 3.

[18] GC Memo 21-06, *supra* note 1, at 3 (citing *Haddon House Food Products, Inc.*, 242 N.L.R.B. 1047, 1059-60, *enfd. in relevant part* 640 F.2d 392, 400 (D.C. Cir. 1981)).

ernment sponsored and union conducted "captive audience" meetings about union representation – granting a union the level of access to employees historically reserved for employers who regularly have the ability to hold staff meetings with their employees in the days leading to an election.[19]

Employees are not General Counsel Abruzzo's sole focus for special remedies. She also seeks to advance special remedies directly to unions in instances when organizing campaigns and/or elections are thrown off course by an employer's alleged unfair labor practice. For instance, The Memorandum identifies reimbursement of organizational costs as a potential special remedy. In the event an employer violated the Act, it could be forced to pay for organizational costs incurred by the union to re-run an election.[20] The expansiveness of what could be covered under the guise of "organizational costs" is not defined.

In addition, General Counsel Abruzzo encouraged Regions to invoke remedies that would require individual employer representatives to read the Notice to Employees and the Explanation of Rights to employees with union representatives in attendance, potentially even video recording to produce and distribute to employees not in attendance.[21] As social media and the use of mass dissemination via technology becomes more widely recognized by the agency, it is not a far stretch for these special remedies to require use of a company's social media to disseminate a Notice message.

General Counsel Abruzzo also encouraged Regions to seek special remedies such as the following: (i) publication of the unlawful practice in a newspaper or other forum, (ii) visitation and discovery clauses to monitor compliance with Board orders, (iii) extended periods of posting unfair labor practice orders, (iv) specific NLRA training to supervisors and managers, (v) instatement of a qualified applicant of the union's choice in the event a discharged employee is unable to return to work, and (vi) broad cease and desist orders. In short, the remedies go beyond imposition of a remedy to restore conditions prior to the alleged unfair labor practice, and move into the territory of punitive actions.

[19] GC Memo 21-06, *supra* note 1, at 3.

[20] GC Memo 21-06, *supra* note 1, at 3 (citing *Texas Super Foods*, 303 N.L.R.B. 209, 209 (1991)).

[21] GC Memo 21-06, *supra* note 1, at 3 (citing *HTH Corp.*, 361 N.L.R.B. at 720-23).

Unlawful Failures to Bargain

General Counsel Abruzzo also focused her Memorandum on an employer's unlawful failure to bargain with unions lawfully recognized or elected as the employees' sole representative.[22] Historically, such cases have resulted in such remedies as an order to cease and desist from refusing to bargain, an order to bargain, and an order to post a Notice acknowledging the employer's violation. General Counsel Abruzzo wants to upend precedent prohibiting compensatory relief in refusal-to-bargain cases[23], making such relief available in these types of cases.[24] In particular, General Counsel Abruzzo wants the Regions to submit any case concerning *Ex-Cell-O Corporation* to the Division of Advice in an effort to identify a case with the appropriate set of facts to overturn that ruling which declined to impose a make-whole remedy for failure to bargain.[25]

General Counsel Abruzzo also seeks to revive the *Joy Silk* doctrine, a 1949 doctrine which held that if an employer did not possess a good-faith doubt when refusing to recognize a union that presented the employer with a request for recognition, the employer was to have violated Section 8(a)(5) of the NLRA and would be ordered to bargain with the union without an NLRB election.[26] The doctrine assumed that an employer who lacked a good-faith doubt was stalling for time to discourage employees' from selecting union representation. The *Joy Silk* doctrine existed for twenty (20) years until 1969, when replaced by the Board's analysis in *NLRB v. Gissel Packing*,[27], which imposed a bargaining order only where the unfair labor practice charges committed by the Employer destroyed any chance at a fair election.[28] *Gissel* has been the preferred practice of the Board for forty-three (43) years.

General Counsel Abruzzo outlines several other remedies outside the compensatory relief context to remedy refusal-to-bargain charges: (i) mandatory bargaining

[22] GC Memo 21-06, *supra* note 1, at 5.

[23] *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970).

[24] GC Memo 21-06, *supra* note 1, at 5.

[25] GC Memo 21-06, *supra* note 1, at 5 (referencing Jennifer A. Abruzzo, Gen. Counsel, NLRB, *Mandatory Submissions to Advice*, Memorandum GC 21-04, at 8).

[26] *See Joy Silk Mills, Inc.*, 85 N.L.R.B. 1263 (1949) overturned by *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969).

[27] 395 U.S. 575 (1969).

[28] Robert Iafolla, *NLRB Legal Chief Plans Back to Future Strategy on Board Powers*, (Aug. 24, 2021), *available at* https://news.bloomberglaw.com/daily-labor-report/nlrb-legal-chief-plans-back-to-future-strategy-on-board-powers.

schedules,[29] (ii) submission of periodic bargaining progress reports,[30] (iii) 12-month insulation periods, including extensions of the certification year,[31] (iv) reinstatement of unlawfully withdrawn bargaining proposals,[32] (v) reimbursement of collective bargaining expenses,[33] (vi) engagement of Federal Mediator and Conciliatory Services mediators, (vii) supervisor and manager training of bargaining violations and failures,[34] and (viii) broad cease and desist orders.

General Counsel Directive on Settlement

Continuing her focus on seeking the "full panoply" of remedies, General Counsel Abruzzo issued another Memorandum on September 15, 2021 ("GC Memorandum 21-07"), directed at the issuance of full remedies in settlement agreements involving unfair labor practice charges.[35] Ordinarily, if a Regional Director determines that a charge is meritorious, a complaint issues, and the Charged Party is often provided an opportunity to reach a pre-Complaint settlement, before the matter is tried before an administrative law judge. Discretionary authority is often delegated to the Regional Director to procure settlement; however, GC Memorandum 21-07 directed that Regions should seek the "most full and effective relief" in both informal and formal settlement agreements. The directive went on to state:

> [I]n negotiating settlement agreements, in addition to seeking no less than 100 percent of the backpay and benefits owed, Regions should always make sure to seek compensation for any and all damages, direct and consequential, attributable to an unfair labor practice.[36]

This is a stark departure from the Regional practice under previous General Counsels, where settlement was permitted at backpay levels of 80% or less of the total amount calculated – a practice which encouraged settlement over litigation. Moreover, the Memorandum provided suggestions for "consequential damages" to consider in the calculation: economic loss due to credit card interest or late fees incurred as a result of loss of income; loss of home or car because of inability to make payments; compensation for damage caused to a discriminatee's credit rating; and or penalties incurred from having to prematurely withdraw money from a retirement account to cover living expenses.[37]

The Memorandum further directed Regions to seek front pay in all matters where a discriminatee waives the right to return to work; to refrain from the use of non-admission clauses in informal settlements; to incorporate default language in all settlements; to seek legal fees; and to consider remedies which address sponsorship of work authorization in cases involving immigrant workers. While many of these remedies have individually existed at various points in the Board's eighty-six year history, it is unprecedented for this extensive arsenal of remedies to exist concurrently.

Special Remedies in Context

Context is extremely important to understand when and why special remedies are ordered. In her memorandum, General Counsel Abruzzo cites several cases to demonstrate previous application of special remedies; however, what is not included in the Memorandum are the extraordinary circumstances that led to such an order. Special remedies are intended to apply in special circumstances. General Counsel Abruzzo may want to normalize their use, but special remedies have not historically been applied in "run-of-the-mill" unfair labor practice decisions.

General Counsel Abruzzo cited the *Texas Super Foods* case as an example of a decision in which an ALJ ordered the reimbursement of organizational costs as a special remedy.[38] The facts of this case show particularly egregious behavior on the part of the employer that necessitated special remedy in the final order.

In *Texas Super Foods*, Local 455 of United Food and Commercial Workers Union campaigned to organize the front-line workers of Texas Super Foods grocery store.[39] The entire process consisted of four separate elections. The results of the first three elections were

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[29] GC Memo 21-06, supra note 1, at 5 (citing *Camelot Terrace*, 357 N.L.R.B. 1934, 1941-42 (2011) enfd. in relevant part 824 F.3d 1085 (D.C. Cir. 2016)).

[30] GC Memo 21-06, supra note 1, at 5-6 (citing *All Seasons Climate Control, Inc.*, 357 N.L.R.B. 718, 718 n. 2 (2011)).

[31] GC Memo 21-06, supra note 1, at 6 (citing *Mar-Jac Poultry Co.*, 136 N.L.R.B. 785, 787 (1962); *Metta Electric*, 349 N.L.R.B. 1088, 1089 (2007)).

[32] GC Memo 21-06, supra note 1, at 6 (citing *Universal Fuel, Inc.*, 358 N.L.R.B. 1504, 1505-06 (2012); *Mead Corp.*, 256 N.L.R.B. 686, 687 (1981), *enfd.* 697 F.2d 1013 (11th Cir. 1983)).

[33] GC Memo 21-06, supra note 1, at 6 (citing *Camelot Terrace*, 357 N.L.R.B. at 1942).

[34] GC Memo 21-06, supra note 1, at 6 (citing *NLRB v. United States Postal Service*, Nos. 14-1223 and 14-2575 (6th Cir. 2018)).

[35] Jennifer A. Abruzzo, Gen. Counsel, NLRB, *Full Remedies in Settlement Agreements*, Memorandum GC 21-07 (Sept. 15, 2021) ("GC Memo 21-07").

[36] GC Memo 21-07, *supra* note 35, at 2.

[37] GC Memo 21-07, *supra* note 35, at 2.

[38] GC Memorandum 21-06, *supra* note 1, at 3.

[39] *See Texas Super Foods*, 303 N.L.R.B. at 210.

overturned, despite votes not to certify the union, as a result of the employer's brash communications to employees.[40] The owner of the grocery stores provided written correspondence to each employee, individually, wherein each letter contained similar themes.[41] One major theme throughout the campaign, and included in the employee letters, was that the union would "PUT [the employees] OUT OF WORK just like the union [did] to thousands upon thousands of other employees . . ."[42] Prior to the fourth and final election, the owner and his managers held discussions with employees – 6 to 10 at a time – repeating the "truth": that the union would put the store out of business and lose the employees their jobs.[43]

The final decision and order held that the "effect of Respondent's conduct could not be overcome without the imposition of extraordinary remedial measures."[44] The employer's brazen allegations about the union's intended purpose for unionizing Texas Super Foods employees persisted despite holding after holding from the Region that the employer's communications were unlawful. In fact, several of the employer's letters admitted that the previous communications were objectionable, but pressed forward, insisting that it was the truth.[45]

General Counsel Abruzzo insists that special remedies are within the Board's panoply of remedies; however, she fails to acknowledge that special remedies have been historically applied only in the most egregious of circumstances.

Immediate Application & Immediate Disagreement

The General Counsel's authority is limited to directing the Regions as to the types of remedies to seek upon the issuance of a complaint. An Administrative Law Judge ("ALJ") then recommends the application of established remedies under existing Board precedent and the appointed Board may adopt the ALJ's recommended application. The General Counsel does not have the authority to direct an ALJ to make a specific remedial determination and also has no authority to direct the Board to adopt remedies which are in conflict with past precedent.

Some ALJ's have been quick to embrace some of the remedies encouraged by General Counsel Abruzzo. In *Absolute Healthcare d/b/a Curaleaf Arizona*[46] ("Curaleaf Arizona"), decided February 8, 2022, an ALJ implemented both traditional and special remedies following a determination that the Charged Party committed several unfair labor practice violations. Specifically, the ALJ determined that Curaleaf Arizona violated Section 8(a)(3) and (1) of the Act by "creating an impression that employees were under surveillance, threatened employees with losing tips if they formed a union, promised employees benefits if they did not form a union, and discharging [an employee] for allegedly engaging in protected concerted activity."[47] A cease and desist order was imposed, and the ALJ also recommended a traditional make whole remedy, including reimbursement of lost earnings, benefits, and taxes, and compensation for the employee's search-for work and interim employment expenses. The ALJ also imposed special remedies, including the reading of the Notice to employees by an officer of the Company in the presence of a Board agent and an agent of the union. Lastly, the ALJ permitted the union "equal time and facilities" to respond to any questions raised by the employees regarding union representation (otherwise known as a "captive audience" meeting).[48]

Alternatively, some ALJs have refused to issue special remedies because they believe that certain special remedies have no impactful meaning. For example, in *United Scrap Metal*, decided on January 18, 2022, an ALJ found that an employer retaliated against an employee who led a walkout to protest the employer's limited COVID-19 personal protective equipment.[49] General Counsel Abruzzo sought an order by the ALJ mandating the employer to write a letter of apology to the affected employee, but the ALJ refused.[50] In the ALJ's perspective, violations of Section 7 rights can only be remedied through meaningful action and the ALJ explained that a letter of apology was not meaningful action.[51]

It is very possible that General Counsel Abruzzo and the applicable Region will appeal ALJ decisions that limit the use of special remedies. The appeals process will ultimately dictate the future scope and limitations of special remedy considerations.

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[40] 303 N.L.R.B. at 209.

[41] 303 N.L.R.B. at 213.

[42] 303 N.L.R.B. at 213, (quoting Texas Super Foods owner, Jerry Savage, May 30, 1988, letter to employees).

[43] 303 N.L.R.B. at 215.

[44] 303 N.L.R.B. at 209.

[45] 303 N.L.R.B. at 213.

[46] 28-CA-267540, NLRB (JD(SF) Feb. 8, 2022).

[47] *See Absolute Healthcare*, 28-CA-267540, at 1.

[48] 28-CA-267540, at 12-13.

[49] *See United Scrap Metal PA, LLC*, 13-CA-268797, NLRB (JD(Philadelphia) Feb. 16, 2022).

[50] 13-CA-268797, at 21.

[51] 13-CA-268797, at 21.

Special Remedies in Federal Circuit Courts of Appeal

The Democratic-controlled Board may implement greater application of special remedies, but employers can still seek review in federal circuit court.[52] Multiple circuit courts of appeal have overturned special remedies. In one instance, the Sixth Circuit Court of Appeals agreed with the traditional remedies ordered by the Board but reversed the application of special remedies.[53]

In that case, several employees of the food supplier giant, SYSCO, began an effort to unionize that led to a representational election.[54] The employees voted 82-71 against union representation.[55] The union objected to the results and submitted alleged unlawful conduct charges against SYSCO.[56] The ALJ in the case ruled in the union's favor and ordered SYSCO to recognize the bargaining unit and begin negotiations on a collective bargaining agreement under the *Gissel* Doctrine[57]. Upon appeal to the Board by SYSCO, the Board reversed the recognition and, instead, ordered a notice-reading and union access provisions.[58]

SYSCO then appealed to the Sixth Circuit where the court upheld the traditional remedies, but overturned the special remedies imposed.[59] In its decision, the Sixth Circuit analyzed the facts around each special remedy. Regarding union access to the employer's premises, the Sixth Circuit explained that the union had collected 100 out of 162 employee authorization cards and also noted that neither the General Counsel nor the Union showed that SYSCO unlawfully restricted access to the union.[60] Because the union clearly had access to the majority of employees and failed to bring forth any evidence that access was unlawfully restricted, the Sixth Circuit determined that access to the workplace and the workforce could not "be justified as a remedial measure" unless it was "necessary to offset the direct consequences or effects of an employer's unlawful conduct," which was not the case in *SYSCO*.[61]

As to its ruling on the notice-reading order issued by the Board, the Sixth Circuit said that it would "join [its] sister circuits in their skepticism of such orders . . ."[62] The Sixth Circuit, quoting the D.C. Circuit, said "it is foreign to our system to force named individuals to speak prescribed words to attain rehabilitation or to enlighten an assembled audience."[63] To make the decision abundantly clear, the Sixth Circuit went on to say that "such orders mandate a 'confession of sins' and conjure up 'the system of 'criticism-self-criticism' devised by Stalin and adopted by Mao.'"[64]

Practical Advice for Employers

Employers in both union and non-union settings must closely analyze the potential for application of the new special remedies for unfair labor practices and should be aware that the potential costs of adverse outcomes before the NLRB will be increasing as the new Board begins to accept use of special remedies in a broader number of cases, and that reaching settlement of such cases with the Regions will likely incur greater costs, and more invasive remedies. In defending unfair labor practice complaints, employers should be prepared to litigate the appropriateness of the remedies sought by the General Counsel.

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Daniel R. Simandl is an associate at Epstein Becker Green. Ryann M. Hooper is Senior Counsel at Epstein Becker Green. Michael F. McGahan is a Member of the Firm at Epstein Becker Green.

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[52] The Board has no inherent authority to enforce the order. To secure enforcement of its order, the Board must apply to an appropriate United States Court of Appeals pursuant to Section 10(e) of the NLRB. Moreover, Section 10(f) of the NLRB provides that any person aggrieved by a final order of the Board has the right to petition the appropriate Court of Appeals for a review of such order. *See* 29 USC § 160(e), (f).

[53] *Syso Grand Rapids, LLC v. National Labor Relations Board*, 825 F. App'x 348 (6th Cir. 2020).

[54] 825 F. App'x at 351.

[55] 825 F. App'x at 351.

[56] 825 F. App'x at 351.

[57] *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). A *Gissel* order mandates that the employer bargain with the union, even without the typical certification by the Board following a formal election, when "an employer's unfair labor practices have made the holding of a fair election unlikely and have undermined the union's majority." *Ctr. Constr. Co. v. NLRB*, 482 F.3d 425, 433 n.3 (6th Cir. 2007).

[58] *Syso Grand Rapids*, 825 F. App'x at 352.

[59] 825 F. App'x at 356.

[60] 825 F. App'x at 361.

[61] 825 F. App'x at 360 (citing *United Steelworkers of Am. v. NLRB*, 646 F.2d 616, 639 (D.C. Cir. 1981)).

[62] 825 F. App'x at 359.

[63] 825 F. App'x at 359 (citing *HTH Corp. v. NLRB*, 823 F.3d 668, 677 (D.C. Cir. 2016); quoting *Conair Corp. v. NLRB*, 721 F.2d 1355, 1401 (D.C. Cir. 1983) (Ginsburg, J., dissenting)).

[64] 825 F. App'x at 359 (citing *Denton Cnty. Elec. Coop., Inc. v. NLRB*, 962 F.3d 161, 174 (5th Cir. 2020); quoting *HTH Corp*., 823 F.3d at 677).