

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 24-01

November 2, 2023

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Jennifer A. Abruzzo, General Counsel

SUBJECT: Guidance in Response to Inquiries about the Board's Decision in *Cemex Construction Materials Pacific, LLC*

Introduction

"Representation delayed is often representation denied" and "employees are harmed by delay when they must wait for their chosen representative to be able to bargain on their behalf", said the Board on August 25, 2023 when it issued its decision in *Cemex Construction Materials Pacific, LLC*,¹ which has retroactive application.² The *Cemex* Board, agreeing with the General Counsel's position, overruled *Linden Lumber Division, Summer & Co.*,³ because it found that the scheme under that case for remedying unlawful failures to recognize and bargain with employees' designated representatives was inadequate to safeguard the fundamental statutory right to organize and bargain collectively.

Overruling *Linden Lumber* and Addressing the *Gissel* Standard

In overruling *Linden Lumber* by choosing a different, permissible interpretation of the Act, the *Cemex* Board said it will no longer look to *Gissel* bargaining orders in this context as they proved insufficient to accomplish the twin coequal aims identified by the Supreme Court in *Gissel* of effectuating ascertainable employee free choice and deterring employer misbehavior.⁴ The *Cemex* Board took issue with the prior focus on the potential impact of an employer's unfair labor practices upon a future election, as experience showed that it created perverse incentives for employers to delay or disrupt election processes and to

¹ 372 NLRB No. 130 (2023).

² Thus, pursuant to its usual practice, its new standard will be retroactively applied to all pending cases in whatever stage as doing so would not work a manifest injustice. The Board was clear that it would not recognize any claim to a legitimate reliance interest by an employer under the old standard based on an expectation of being able to engage in some degree of unlawful conduct without triggering a bargaining order. *Id.* at 36.

³ 190 NLRB 718 (1971), *rev'd sub nom. Truck Drivers Union Local No. 413 v. NLRB*, 487 F.2d 1099 (D.C. Cir. 1973), *aff'd*, 419 U.S. 401 (1974).

⁴ *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 614 (1969).

put off indefinitely its obligation to bargain.⁵ Instead, the *Cemex* Board, consistent with the Supreme Court’s reasoning in its *Gissel* decision, appropriately focused on the current time period – the time of card solicitation and the runup to an initial election – so that employers will be incentivized not to commit unfair labor practices in response to a union campaign both before and after the filing of the election petition.⁶

Cemex Standard

Given the strong statutory policy in favor of prompt resolution of questions concerning representation, which can trigger labor disputes, the *Cemex* Board has adopted a new standard wherein an employer confronted with a verbal or written demand for recognition, which should clearly state to an employer’s representative or agent⁷ the unit for which the union is claiming majority support,⁸ may: 1) agree to recognize a union that enjoys majority support;⁹ 2) promptly file an RM petition to test the union’s majority support and/or

⁵ Regions should consider seeking a *Gissel* bargaining order in the alternative, where appropriate, in other situations, such as where a union’s demand for recognition may be at issue and the employer’s unfair labor practices caused a loss of majority support. For example, Regions may seek a *Gissel* remedy where there was no (or insufficient) demand, but there was majority status, an RC petition, and an ULP(s) that would interfere with the election. See, *Peaker Run Coal Co.*, 228 NLRB 93 (1977); *Lapeer Foundry & Machine, Inc.*, 289 NLRB 952 (1988).

⁶Unfair labor practice(s) occurring before the filing of a petition will also be considered when determining whether the election was invalidated. See, *Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130, fn. 84 (2023) (citing *Alumbaugh Coal Corp.*, 247 NLRB 895, 914, fn. 41 (1980) (Board considers all unfair labor practices, not just those during critical period), enfd. in relevant part, 635 F.2d 1380 (8th Cir. 1980). Board law recognizes exceptions to the rule set forth in *Ideal Electric Mfg. Co.*, 134 NLRB 1275 (1961). See, for example, *Harborside Healthcare*, 343 NLRB 906, 912 n.21 (2004). *Accord Madison Square Garden CT, LLC*, 350 NLRB 117, 122 (2007). See also, *Servomation of Columbus*, 219 NLRB 504, 506 (1975).

⁷ The demand does not need to be made on any particular officer or registered agent of an employer so long as it is on a person “acting as an agent of an employer” under Sections 2(2) and 2(13) of the Act, as defined by the Board. See *Longshoremen & Warehousemen Local 6 (Sunset Line & Twine Co.)*, 79 NLRB 1487, 1509 (1948) (applying common law principles of agency). Cf. *Eldorado, Inc.*, 335 NLRB 952, 954 n.9 (2001) (finding successful demand to successor employer to recognize and bargain where letters were addressed to the company president but misnamed the company); *Central Distributing Co.*, 187 NLRB 908, 915 (1971) (finding demand for recognition and bargaining on warehouse manager valid despite his protestations that he was without authority).

⁸ Regions are to apply existing Board law on the sufficiency of the bargaining demand. See, e.g., *Al Landers Dump Truck*, 192 NLRB 207, 208 (1971) (holding that a valid request to bargain “need not be made in any particular form, or in *haec verba*, so long as the request clearly indicates a desire to negotiate and bargain on behalf of the employees in the appropriate unit”), enfd. sub nom. *NLRB v. Cofer*, 637 F.2d 1309 (9th Cir. 1981). Thus, a union’s demand for recognition may take many forms, including the filing of an RC petition as long as the union checks the request for recognition box on line 7a of the NLRB petition form and notes in section 7a of the form that the petition serves as its demand. See, *Alamo-Braun Beef Co.*, 128 NLRB 32, 33 n.5 (1960); See also *MGM Grand*, 28-RC-154099, 2015 WL 6380396 (2015); *Advance Pattern Co.*, 80 NLRB 29 (1949).

⁹An employer may ask to view evidence of majority support, but a union is not obligated to show it. A neutral third party may be engaged to review such evidence; however, a card check procedure by a neutral third party will not toll the employer’s two-week deadline for filing an RM petition.

challenge the appropriateness of the unit;¹⁰ or 3) await the processing of an RC petition previously filed.¹¹ This approach effectuates the fundamental purpose of the Act to encourage the practice and procedure of collective bargaining and protect employees' free choice of representatives.

ULP Charge Alleging Unlawful Refusal to Recognize and Bargain

If the employer neither recognizes the union upon demand, nor files an RM petition within two weeks of that demand,¹² and there is no other petition for a Board-conducted election being processed by the Region, the union may file a Section 8(a)(5) charge against the employer.¹³ The employer will be permitted to challenge the basis for its bargaining obligation during the investigation of the unfair labor practice case.¹⁴ However, if majority support in an appropriate unit is demonstrated,¹⁵ the General Counsel will issue a complaint, absent settlement¹⁶, and, if the Board agrees, it will find that the employer violated the Act by failing and refusing to recognize and bargain with the union as the employees' designated collective-bargaining representative and will issue a remedial

¹⁰ Regions are to consider, on a case-by-case basis, an employer's claim of unforeseen circumstances when it defends its failure to file an RM petition within two weeks of a demand by applying Section 102.2 of the Board's Rules and Regulations.

¹¹ Filing an RC petition does not waive a union's right to file a timely charge alleging an unlawful refusal to recognize and bargain, just as the existence of an RC petition does not prevent issuance of a bargaining order based on an employer's unfair labor practices. And, if, before an election, a union withdraws an RC petition that formed the basis of its demand, but it still wants to be recognized as the unit employees' representative, the union should communicate to the employer that it continues to demand recognition and the employer may then promptly file an RM petition if it wishes to challenge the validity of the union's majority support and/or the appropriateness of the unit.

¹² Should an employer believe the Board lacks jurisdiction over it, as opposed to questioning the validity of majority support and/or unit appropriateness, the proper forum for raising that argument is in the unfair labor practice context, not in the representation case context. Thus, any RM petition it files raising that sole jurisdictional issue would be inconsistent with its position and would not block a Section 8(a)(5) charge alleging a failure and refusal to recognize and bargain in good faith.

¹³ Where there are no cases being processed in the representational case context, and no meritorious Section 8(a)(1) or (3) allegations, a Section 8(a)(5) charge would need to be filed in order to initiate an investigation that may lead to issuance of a bargaining order. The Section 10(b) period for such a ULP filing would commence 15 days after the union's demand as that is post the two-week time period that the employer could have, but did not, file an RM petition.

¹⁴ However, consistent with standard practice, Regions should not be investigating the employer's challenge to the validity of the union's showing of majority support and/or the appropriateness of the union's claimed unit that was already raised and resolved in the representation case context.

¹⁵ It is the General Counsel's burden to prove that the union enjoyed majority support in an appropriate unit under principles that would be applied in a representation case proceeding. However, Regions will not conduct an investigation that is akin to a full-blown representation case proceeding prior to issuing complaint. Rather, the investigation will be largely limited to majority status issues, where Regions would authenticate cards similar to what has been done in *Gisse/* situations, unless the employer raises unit appropriateness issues, barring a unit that is obviously inappropriate or unlawful on its face. If an employer does not cooperate in the investigation, and the Region issues complaint, an employer has the opportunity to raise its issues about the unit to the Administrative Law Judge and/or the Board.

¹⁶ Of course, consistent with standard practice, if there are no genuine issues of material fact regarding the union's majority support in an appropriate unit, Regions should file a Motion for Summary Judgment with the Board.

bargaining order directing the employer to bargain with the union.¹⁷ The bargaining obligation would attach from the date of the union's demand for recognition. Thus, pursuant to longstanding Board precedent, employers act at their own peril in refusing to recognize and bargain and in making unilateral changes in employees' terms and conditions of employment after such a demand is made.¹⁸

Independent Violations of the Act Requiring a Bargaining Order

If a demand is made and an election petition is filed by the employer¹⁹ and/or the union,²⁰ and the employer commits an unfair labor practice(s) during that time period,²¹ which renders a recent or pending election a less reliable indicator of current employee sentiment than a current alternative nonelection showing, the petition(s) – whether filed by the employer and/or the union – will be dismissed²² and the employer will be subject to a remedial bargaining order.²³ Thus, if an employer's unfair labor practice(s) invalidated the election process such that an uncoerced choice of its employees cannot be reflected, the Board will rely upon the prior designation of a representative by a majority

¹⁷ An affirmative bargaining order gives the bargaining relationship a reasonable period in which it can be given a fair chance to succeed. *Franks Bros.*, 321 U.S. 702, 705 (1944).

¹⁸ *Mike O'Connor Chevrolet Buick-GMC Co.*, 209 NLRB 701, 703 (1974), *enforcement denied on other grounds*, 512 F.2d 684 (8th Cir. 1975).

¹⁹ In the event that an employer chooses to file an RM petition, it should reference the union's claimed unit in section 5 of the petition form, and per the form's instructions, advising an employer that the petition must be accompanied by evidence supporting the statement that a labor organization has made a demand for recognition on the employer, the employer's documentation supporting its evidence should also reflect its position regarding the appropriateness of the union's claimed unit and should provide a unit description of what it believes is an appropriate unit when it's in disagreement with the union's claimed unit, which, along with the petition, should be served on all parties. Regions should continue their standard practice of determining the appropriateness of the unit that the union is seeking to represent, as the employer bears the burden to demonstrate, in an RM or RC proceeding, that the unit the union originally sought to represent is inappropriate.

²⁰ If both an RC and RM petition are filed simultaneously or very close in time to one another, such that the initial petition processing will not be delayed by the subsequent filing, Regions should consolidate the processing of those petitions. However, the Regions should hold in abeyance its processing of a subsequent petition not filed very close in time to the initial petition, after the parties comport with their filing obligations under the Board's new election rules effective December 26, 2023, and that subsequent petition may ultimately be dismissed after resolution of the initial petition processing.

²¹ The critical period would begin on the date of the demand.

²² Regions are to dismiss the petition, subject to potential reinstatement, and revoke any certification of election results that may have issued, as there no longer is a Question Concerning Representation, and, absent a settlement that includes a requirement to recognize and bargain, Regions are to issue complaint seeking a bargaining order.

²³ Although in the vast majority of cases, a party typically files unfair labor practice charges, alleging Section 8(a)(1) and/or (3) conduct, along with related objections, meritorious unfair labor practice charge allegations timely filed would suffice for purposes of issuing a bargaining order even if related objections are not filed. And, although an additional charge alleging a Section 8(a)(5) violation is preferable, it is not a legal necessity. The *Cemex* decision did not require the filing of a Section 8(a)(5) charge in order for a remedial bargaining order to issue. Thus, Regions may seek a non-Section 8(a)(5) bargaining order remedy under the Board's decision in *Steel-Fab, Inc.*, 212 NLRB 363 (1974) (holding that a Section 8(a)(5) finding was not necessary to impose a *Gissel* remedial bargaining order).

of employees by nonelection means, such as valid union authorization cards,²⁴ as permitted by Section 9(a) of the Act. That is the best present objective evidence of current employees' representational preference.

The *Cemex* Board advised that its new standard would likely result in finding an unlawful refusal to recognize and bargain based on fewer (even one) and less serious (non-“hallmark”) violations of Section 8(a)(1) and (3); however, it noted that the standards governing those violations have not changed. Thus, under longstanding Board law, an election will be set aside when an employer violates Section 8(a)(3) of the Act during the critical period.²⁵ And, an election will be set aside based on an employer's critical period violations of Section 8(a)(1) unless the violations are so minimal or isolated that it is virtually impossible to conclude that the misconduct could have affected the election results.²⁶ Thus, comporting with its precedent related to setting aside elections based on conduct disruptive of the election process, the Board will consider all relevant factors, including the number of violations, their severity, the extent of dissemination, the size of the unit, the closeness of the election (if one is held), the proximity of the misconduct to the election date, and the number of unit employees affected.²⁷

Regions should continue to seek Section 10(j) injunctive relief in appropriate cases in order to restore the status quo ante following serious unfair labor practices and to prevent the remedial failure of a Board order issued in due course.

Situations Not Addressed by the New *Cemex* Standard

Notably, the *Cemex* Board's new standard does not address other situations where an employer may have forfeited or waived its avenue to seek a Board-conducted election, such as where it reneged on a previous agreement to recognize and bargain with a union based upon a showing of majority support or where an employer has independent knowledge of the union's majority support and, yet, disputes the union's majority support and refuses to recognize and bargain with the union.²⁸ These cases should be submitted to the Division of Advice.

²⁴ The *Cemex* Board confirmed the *Gissel* Court's determination that, absent evidence to the contrary, cards are reliable indicators of a union's majority status. See, for example, *Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130, 13 at fn. 72, and 33. Thus, cards that clearly state their purpose are a reliable indicator of employee sentiment, and employers have the burden to provide evidence proving otherwise. Of course, during the investigation, Regions are to consider employer allegations and evidence that may invalidate cards, such as misrepresentations about the card's nature or purpose. *Cumberland Shoe Corp.*, 144 NLRB 1268, enfd. 351 F.2d 917 (6th Cir. 1965); *Clement Bros.*, 165 NLRB 698 (1967).

²⁵ See, e.g., *Lucky Cab Co.*, 360 NLRB 271, 277 (2014) (citing *Baton Rouge Hospital*, 283 NLRB 192, 192 fn. 5 (1987)).

²⁶ *Id.* at 277 (quoting *Longs Drug Stores California*, 347 NLRB 500, 502 (2006) and *Clark Equipment Co.*, 278 NLRB 498, 505 (1986)).

²⁷ See, *Bon Appetit Management Co.*, 334 NLRB 1042, 1044 (2001) (citing cases).

²⁸ *Cemex Construction Materials Pacific LLC*, 372 NLRB No. 130, fn. 143 (2023).

Conclusion

This guidance is aimed to assist all in comporting with the goals of the Board's *Cemex* decision to eliminate delays in effectuating employees' expressed free choice of bargaining representative.²⁹ Should you have any specific case-related questions, please contact the Division of Advice or the Division of Operations-Management.

/s/
J.A.A.

²⁹ A *Cemex* webpage on our public website (www.nlr.gov) is available here [NLRB General Counsel Resources on the Board's Cemex Representation Framework | National Labor Relations Board](#). As law and procedures in this area progress, through Board decisions or otherwise, further information will be shared.