Stericycle, Inc. *and* International Brotherhood of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers, and Helpers, Local No. 70 of Alameda County, California, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Petitioner. Case 32–RC–5603

August 23, 2011

DECISION AND DIRECTION OF SECOND ELECTION

BY CHAIRMAN LIEBMAN AND MEMBERS BECKER, PEARCE, AND HAYES

Employees joining together with union assistance to initiate legal action to redress unlawful employment practices lies at the core of conduct protected by the National Labor Relations Act. Whether the filing of such a lawsuit, financed by a union, prior to a representation election interferes with a fair election has generated considerable controversy, however, creating uncertainty over election results and the application of our objections jurisprudence to this protected activity aimed at vindicating important employee rights. The current state of the law leaves labor and management without clear guidance on the line separating objectionable from unobjectionable conduct. We accordingly announce today a new approach in an effort to draw a clear line in this important area: we hold that a union engages in objectionable conduct warranting a second election by financing a lawsuit filed during the narrow time period—known as the "critical period"—between the date of the filing of the representation petition and the date of the election, which States claims under Federal or State wage and hour laws or other similar employment law claims on behalf of employees in the unit.[1] We also seek to give clear guidance concerning the broad, nonobjectionable scope of the protected pursuit of such legal redress prior to the filing of an election petition, after the election has taken place, and during the critical period by parties other than the union seeking to represent the employees in collective bargaining.[2]

[1] Members Becker, Pearce, and Hayes join in this holding. Chairman Liebman dissents, for the reasons set forth in her separate opinion.

[2] Chairman Liebman and Members Becker and Pearce join in this portion of the opinion. Member Hayes dissents, for the reasons set forth in his separate opinion.

The Facts and the Judge's Decision[3]

In approximately September 2008,[4] the Union began an organizing campaign among a unit of the Employer's route drivers and dispatchers employed at its San Leandro, California location. The Employer is in the business of picking up, transporting, treating, and disposing of waste from medical facilities. The route drivers are responsible for picking up the medical waste, transporting it to the Employer's treatment facilities, and completing posttrip paperwork and inspections of their vehicles. During the early stage of the employees' organizational efforts, some drivers voiced concern that they were not being paid for meal times, break times, and overtime work. These drivers felt "pushed" by the Employer to complete their routes without claiming overtime or taking meal or other breaks, and that their sacrifices in this regard were not acknowledged by the Employer, who failed to appreciate how long it took a driver to complete his route.

In order to determine if the employees' concerns could be addressed through legal means, the Union, at an organizing meeting in September or October, introduced the drivers to its outside counsel.[5] The attorneys informed the employees about their rights under Federal and State law in regard to the Employer's failure to pay overtime wages and provide meal and break periods. Copies of an "Attorney-Client Representation Agreement" were distributed relating to litigation against the Employer in this same regard, which provided that the Union "has agreed to the payment of all fees, costs, disbursement and litigation expenses." Sixteen employees signed such agreements, and returned them to either the Union or the attorneys.

On November 14, the Union filed an election petition seeking to represent a unit of the Employer's drivers and dispatchers. On November 19, the attorneys filed an action in the United States District Court for the Northern District of California on behalf of the 16 unit employees and others similarly situated alleging the Employer's failure to pay wages to the drivers in accordance

[3] On April 24, 2009, Administrative Law Judge Jay R. Pollack issued a report on objections and recommendations to the National Labor Relations Board in this proceeding. The Employer filed exceptions and a supporting brief. The Union's Motion for Late Filing of Brief was denied by Order of the Executive Secretary dated July 17, 2009.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to affirm the judge's rulings, findings and recommendations only to the extent consistent with this Decision and Order.

[4] All dates are in 2008, unless otherwise noted.

[5] Counsel maintained a law firm that was frequently retained by the Union.

with the Federal Fair Labor Standards Act[6] (FLSA) and California law.

The election was conducted on February 3, 2009.[7] The tally of ballots showed 23 votes for and 12 against the Union. The Employer thereafter filed objections to the election, asserting, inter alia, that the Union had impermissibly influenced the outcome of the election by filing and funding the lawsuit during the critical period prior to the election.

The judge overruled the objection. He observed that existing Board precedent holds that a union does not engage in objectionable conduct by providing unit employees free legal services to investigate, prepare, and file a lawsuit, even during the critical period prior to an election, asserting their claims under the FLSA. *Novotel New York*, 321 NLRB 624 (1996). The judge acknowledged that the United States Court of Appeals for the District of Columbia Circuit has disagreed with *Novotel*, finding that the provision of free legal services during the critical period constitutes an objectionable grant of benefits to employees that improperly influences employee free choice in an impending election. *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999).[8] Nevertheless, the judge, duty bound to apply Board law, found the Union's conduct here to be unobjectionable under *Novotel*.

Analysis

I.

Sixteen employees here joined together to file a lawsuit to secure payment of wages in accordance with law. The Supreme Court has made clear that Section 7 of the Act specifically affords protection to employees "when they seek to improve working conditions through resort to administrative and judicial forums." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978). Individually, and even as a group, however, employees often lack the information, resources, money, and security needed to pursue such litigation. Union assistance in the form of education about legal rights, referral to knowledgeable lawyers, and financing of litigation designed to vindicate workplace rights lies at the core of the union and other concerted activity for mutual aid and protection which the Act was intended to protect. It is thus further settled that efforts by a union to educate its members about their employment rights and to initiate and fund litigation on behalf of its members enjoys both statutory and constitutional protection. See *In Re Primus*, 436 U.S. 412, 426 (1978); *Transportation Workers v. Michigan Bar*, 401 U.S. 576, 585–586 (1971); *Mine Workers District 12 v. Illinois State Bar Assn*., 389 U.S. 217, 221–222 (1967); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1, 8 (1964). These protections exist when unions assist workers to obtain legal redress even at times when the employees are not union members and when the union does not represent the employees for the purpose of collective bargaining. In fact, those are likely to be the times when employees are most in need of such assistance because, lacking union representation, they cannot remedy their grievances through the simpler and less expensive process created by collective-bargaining agreements. We affirm today that union assistance to nonmember employees in the form of education about their rights, referral to competent counsel, and funding of legal action, is protected under Section 7 concomitant with the nonmember employees' undisputed Section 7 right to join together for their mutual aid or protection through resort to a judicial forum.

Of course, important public policies beyond those embodied in our Act are at stake here, including furthering the statutory objectives of the FLSA and other Federal and State employment laws. Workers without the protection of union representation or a collective-bargaining agreement are more vulnerable to unlawful terms and conditions of employment.[9] Unions play an important role in protecting the rights of such workers under a variety of workplace laws.[10] The Board, in construing the protections of the Act, must consider the implications of the policies embodied in other laws amidst the changing realities of the workplace. See *Hoffman Plastic Compounds, Inc. v. NLRB,* 535 U.S. 137 (2002) (the Immigration Reform and Control Act of 1986 precludes the Board from awarding backpay to discriminatees not lawfully entitled to be present and employed in the United States); *Southern Steamship Co. v. NLRB*, 316 U.S. 31, 47 (1942)(Board should accommodate other statutory objectives when administering the NLRA); *Rutherford Food Corp. v. McComb*, 331 U.S. 722, 723 (1947)(relationship between NLRA and FLSA); *NLRB v. Savair Mfg. Co.*, 414 U.S. 270, 276 (1973)(Board has leeway to modify its policy in light of its ongoing experience); *Sundor Brands, Inc*., 334 NLRB 755, 757 (2001).

These strong statutory, constitutional, and policy interests were the foundation of the Board's decision in *Novotel,* supra. They continue to animate our decision

[6] 29 U.S.C. § 201 et seq.

[7] About a month before the election, on January 7, 2009, the attorneys advised the 16 employees by letter that the Union was not paying legal fees associated with the lawsuit and that the attorneys were handling the case on a contingency basis.

[8] The judge further correctly observed that the Sixth Circuit reached a similar holding in a pre-*Novotel* decision. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995).

[9] See Catherine Fisk, *Union Lawyers and Employment Law,* 23 Berkeley J. Emp. & Lab.L. 57, 58–59 (2002).

[10] Id.

today, as does the Board's responsibility to safeguard those interests.

II.

The important and protected forms of education and assistance described above are often provided during an organizing drive. Unions are rarely in a position to identify violations of law or provide assistance until they are called into the workplace by employees seeking representation for purposes of collective bargaining. It is not until the process of organizing begins, when union agents are talking to employees, learning about their terms of employment, and listening to their grievances, that unions are likely to be in a position to assist employees to vindicate their employment rights. See, e.g., *Novotel*, supra, 321 NLRB at 633 ("At the inception of the organizing campaign, complaints of alleged irregularities regarding Novotel's payment of overtime wages were received by the Petitioner from employees."). The practical realities of the timing typical of this form of assistance is what brings this case before us today and has repeatedly brought this issue before the Board and the courts of appeals over the last decade and a half.

The timing of such assistance raises a question because employers and unions are generally prohibited from granting benefits to employees during the critical period prior to a representation election.[11] The Board has long held that a union's actual grant of benefits to potential voters during the critical period is "akin to an employer's grant of a wage increase in anticipation of a representation election . . . [which] subjects the donees to a constraint to vote for the donor union." *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967). See *Mailing Services,* 293 NLRB 565, 565–566 (1989). The Board has accordingly found objectionable the grant of a variety of benefits by employers and unions during the critical period as impermissibly influencing voter free choice and the outcome of the election.[12]

The policy underlying this prohibition is that an employee's vote should be governed by consideration of the advantages and disadvantages of union representation and not by inducements unrelated to the merits of such representation. See, e.g., *NLRB v. L & J Equipment Co.*, 745 F.2d 224, 231 (1984). The funding of legal services by the Union here, in contrast, related to the chief workplace concern expressed by employees and leading them to consider unionization. The Board in *Novotel* found such benefits to be meaningfully distinguishable from a typical grant of extraneous inducements during the critical period which impermissibly influence employees' votes. *Novotel*, 321 NLRB at 634–635.

III.

As the judge correctly observed, however, the Board's position on this issue has been viewed by the courts in *Freund* and *Nestle,* supra, as incompatible with the general prohibition against the conferral of benefits during the critical period. Those courts have held that a narrow limitation on this form of protected conduct during the critical period is conducive to a free and fair choice of bargaining representative by employees, which it is the Board's fundamental responsibility to ensure.[13] As the *Freund* court observed in denying enforcement to *Novotel*, even conduct protected by Section 7 and the Constitution may be required to yield during the critical period to ensure employee free choice in a representation election. See *Freund Baking v. NLRB*, supra, 165 F.3d at 935 ("the parties to a representation election do not retain their full panoply of rights during the critical period").

In view of the courts' decisions, the time has come to reconsider and clarify this area of the law for the benefit of the parties involved in Board representation proceedings, the employees participating in those elections, and the efficient functioning of the Board's electoral process which should provide conclusive and expeditious results. See *Atlantic Limousine*, 331 NLRB 1025, 1028 (2000).

Having reexamined our precedent in light of the reasoning expressed by the courts in *Freund* and *Nestle,* we are persuaded that protection of employee free choice in a representation election is better achieved by holding a union's filing of a wage and hour lawsuit on behalf of unit employees during the critical preelection period objectionable, as the filing of such a lawsuit during the critical period could be viewed by unit employees as a gratuitous grant of benefits even though it is related to the workplace concerns leading them to consider unionization. Further, this regulation of a union's filing of such lawsuits will impinge only modestly on the Section 7 and First Amendment rights implicated by the initiation of such lawsuits, as the regulation is limited to the narrow time period between the filing of the election petition and the holding of the election. Accordingly, we adopt a new

[11] See *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678, 686 (1944)("[t]he action of employees with respect to the choice of their bargaining agents may be induced by favors bestowed by the employer as well as by his threats").

[12] See, e.g., *Speco Corp.*, 298 NLRB 439 (1990)(employer grant of improved medical insurance benefits); *Delta Data Systems Corp.*, 279 NLRB 1284, 1290–1291 (1986) (employer grant of improved policies regarding grievance procedure, absenteeism, and performance evaluations); *Mailing Services,* supra, 293 NLRB at 565–566 (union's provision of free medical screenings); *Wagner Electric Corp.*, supra, 167 NLRB at 533 (union provision of life insurance).

[13] See, e.g., *NLRB v. A. J. Tower Co.*, 329 U.S. 324, 330–331 (1946).

rule today[14] that a union ordinarily[15] engages in objectionable conduct warranting a second election by financing a lawsuit filed during the critical period, which states claims under Federal or State wage and hours laws or other similar employment law claims on behalf of employees in the unit.[16] Applying this new rule to this proceeding, we find that the election must be set aside and a new election held. The Union here expressly agreed to fund "the payment of all fees, costs, disbursement, and litigation expenses" of the lawsuit that was filed during the critical period. The unit employees were explicitly so notified, moreover. The 11th-hour notice to employees that the Union was not funding the lawsuit, but that the attorneys were handling the case on a contingency basis, is not sufficiently ameliorative of the Union's conduct here.[17]

IV.

In light of the recurrence of this issue and the conflicting decisions that have resulted, we believe we have an obligation to do more here than simply announce a new rule and apply it to the particular facts of this case.[18] Our duty to give clear guidance to parties, and the importance of the employee rights at stake here, compel us to further specify the scope of unobjectionable conduct in this area.[19] The obligation is particularly weighty here where we have placed temporal limits on otherwise protected conduct, the violation of which results in overturning the express will of a majority of employees. Moreover, because out decision conflicts to some degree with the important public policy favoring full and vigorous enforcement of workplace laws and may be subject to attack for that reason, it is imperative that we articulate and explain the limits of its reach. In other words, our decision today represents a balance of interests and can only be understood by specifying what remains on the unobjectionable side of the scale.[20]

Union conduct to educate employees concerning their rights under labor laws remains protected and unobjectionable during the critical period before a representation election (as well as before and after the critical period). Unions can inform employees about their rights, assist them in identifying violations, urge them to seek relief, and even refer them to competent counsel without casting into question subsequent election results. "Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). "[E]spousal of the cause of labor is entitled to no higher constitutional protection than the espousal of any other lawful cause. It is entitled to the same protection." *Thomas v. Collins*, 323 U.S. 516, 538 (1945). Protected communication includes, but is not limited to, discussion of collective bargaining and the right to organize under the NLRA, employee rights under safety, health, and wage, and hour laws, and the right of employees to act together for their mutual aid or protection under the NLRA and other laws. Finally, just as a union may refer employees to competent counsel without provoking a colorable objection, such counsel may file suit on behalf of employees, even during the critical period, so long as the union does not fund the litigation directly or indirectly, and the lawyers are acting solely in the interest of their employee clients and not as the union's agents.

[14] See *Beth Israel Hospital v. NLRB,* 437 U.S. 483, 508 (1978) ("The authority of the Board to modify its construction of the Act in light of its cumulative experience is, of course, clear.").

[15] One exception to this rule would be where provision of counsel or other financial assistance in the vindication of legal rights is an existing benefit of union membership and the union extends such assistance only to union members. See *NTA Graphics*, 303 NLRB 801, 803–804 (1991); *Dart Container*, 277 NLRB 1369, 1369–1370 (1985). Of course, the provision of an existing benefit of union membership would be objectionable if unit employees could obtain it by joining the union before the election but would be ineligible if they joined the union after the election. Id. at 1370 fn. 8.

[16] We hold only that such conduct is objectionable in a representation proceeding, not that it is an unfair labor practice. Moreover, our new rule does not extend to the filing of unfair labor practices. See *Freund Baking*, supra at 934.

[17] In light of our holding, it is unnecessary to address the Employer's exception that the judge erred in excluding evidence that the Union offered to drop the lawsuit in exchange for a card-check agreement.

[18] See *Smith's Food & Drug Centers*, 320 NLRB 844, 846 (1996) ("The Board has an obligation to provide clear guidance wherever possible so that parties can understand the legal requirements imposed on them and reasonably predict the consequences of their actions.").

[19] Our concurring colleague criticizes our provision of such guidance as "creat[ing] what is essentially a road map for how unions can provide gratuitous benefits, in the form of legal services, to voting employees without running afoul of the Act." However, we believe it is our statutory duty to provide clear guidance to employees, employers, and unions to the extent possible when construing the Act. We also believe that petitioning the Government for redress of grievances under Federal or State law is not accurately characterized as the provision of "gratuitous benefits." While the Board, with judicial approval, has held that speech that would be protected at other times may, during the critical period, be found objectionable, we nevertheless have an obligation to draw clear lines in so holding. Cf. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 871–872 (1997) ("The vagueness of such a regulation raises special First Amendment concerns because of its obvious chilling effect on free speech.").

[20] Our concurring colleague finds it unnecessary to "specify the scope of *unobjectionable* conduct in this area." But, as we explain above, application of the Board's objections jurisprudence in this area involves a balance of important interests, not only under our statute but other important Federal and State statutes as well as the First Amendment. That balance cannot be struck without specifying what falls on both sides of the tipping point. Thus, the description of what is unobjectionable conduct in this area is an essential part of our holding that the conduct at issue here was objectionable.

When lawyers make an independent judgment to initiate litigation on behalf of clients to whom they owe an exclusive duty of loyalty, either pursuant to a fee agreement with the clients or on a contingency basis, they act as third parties, even if in other contexts they represent the union, and the application of our traditional standards for judging whether the actions of third parties are grounds for objection do not suggest they would be under these circumstances. See *Hollingsworth Management Service*, 342 NLRB 556, 558 (2004); *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984).[21]

V.

A key remaining question is whether a union may file and fund employment-related litigation on behalf of employees prior to the filing of an election petition. The Board frequently is faced, in both the representation and unfair labor practice context, with determining whether conduct is permissible that occurs during an organizing campaign, but prior to the filing of a representation petition and the onset of the critical period. The Board's long-settled rule is that, with rare exception, only conduct occurring during the critical period between the filing of the petition and the date of the election may serve as a basis for the setting aside of an election. See *Wyandanch Day Care Center*, 323 NLRB 339 fn. 2 (1997); *Ideal Electric & Mfg. Co.*, 134 NLRB 1275, 1278 (1961). In *Ideal Electric*, the Board stated, "when the Board's processes have been invoked [by the filing of a petition] and a prompt election may be anticipated pursuant to present procedures, we believe that conduct thereafter which tends to prevent a free election should appropriately be considered as a postelection objection." Id. at 1278. The Board focuses on this time period because the probability that coercion or other improper influence will affect employees' choice is then at its highest, thus, justifying special scrutiny of employer and union actions, while at the same time avoiding litigation over matters remote in time from the election. See *NLRB v. Wis-Pak Foods*, 125 F.3d 518, 521 (7th Cir. 1997*); National League of Professional Baseball Clubs*, 330 NLRB 670, 676 (2000).

Consistent with these settled principles, a union does not engage in objectionable conduct by funding employment-related litigation on behalf of employees so long as the litigation is commenced prior to the filing of an election petition.[22] Unions typically learn about employees' workplace concerns in the earliest stages of organizing, prior to the filing of an election petition, as we observed above. Based on the voicing of these concerns, the union may investigate and discover during this prepetition period colorable claims of violation of the FLSA or other employment laws. These circumstances constitute a legitimate justification for seeking legal redress prepetition akin to an employer's legitimate business justification for the grant of a wage increase during that time period. This is particularly so when the passage of time will bar or reduce the employees' claim. For example, under the FLSA, an employee can recover backpay only 2 or, in the case of willful violations, 3 years back from when they file their claim.[23] Thus, if a union discovers employees are being paid less than the minimum wage early in an organizing drive, but must wait until after the election to initiate litigation on their behalf, the employees may lose months of backpay they would otherwise have recovered under the FLSA.

A contrary approach would leave open the troubling question of just how long prior to the filing of a petition assisting employees in this manner would constitute grounds for objection, and may be tantamount to precluding all such action until after the election has taken place. The vindication of the important employee rights and public policies at stake precludes such an approach.[24] While those interests may be required to yield during the critical period to ensure a fair election process, as we have indicated above, they are not required to yield before that period even begins.[25]

[21] Contrary to our concurring colleague, in *Freund Baking*, the District of Columbia Circuit made clear that,

> in the post-election proceeding upon Freund's objections, the Regional Director referred to the Union itself as having filed the lawsuit. The record does not indicate that the Union ever disputed that characterization before the Regional Director or filed a conditional cross-exception to it before the Board. Therefore, we treat the Union's responsibility for the suit as having been conclusively established.

165 F.3d at 932. In other words, counsel in that case was not acting as a third party for purposes of determining whether his conduct was objectionable, but as an agent of the union. In a case alleging an objectionable grant of benefits, we do not read the court's opinion as rendering irrelevant the question of whether it was a party that actually granted the benefits.

[22] Consequently, if a lawsuit is filed prepetition, then maintenance of the lawsuit, including the union's continued financial support of the litigation, during the critical period is not objectionable, just as a wage increase or improvement of benefits properly granted prepetition can continue during the critical period.

[23] 29 U.S.C. § 255.

[24] For example, the Employer's medical waste business, handling blood, needles, pharmaceuticals, and the like, is heavily regulated by public health authorities including the Occupational Health and Safety Administration. We do not intend our decision today to restrict, deter, or delay prepetition union assistance to employees seeking legal or administrative redress for violations of safety rules intended to protect employees, the public, or both.

[25] To be sure, the Board's obligation to ensure a fair election process has resulted in the consideration of prepetition conduct in limited circumstances, resulting in a few narrow exceptions to the rule of *Ideal Electric,* supra. These instances have involved direct promises of benefits to employees in exchange for signing an authorization card. See

The union, of course, controls the timing of its filing of a petition for an election. Thus, on the one hand, the rule we announce today imposes, under most circumstances, a modest burden on the statutorily and constitutionally protected activity at issue by requiring that, if it wishes to assist employees in vindicating their employment rights by funding litigation, a union must delay filing a petition for an election until after litigation is initiated or delay initiation of litigation or funding of its pursuit until after the election. On the other hand, because a union may control the timing of both events, it may be argued that funding a lawsuit filed 1 day before the filing of a petition has no less impact on employee free choice than funding a lawsuit filed 1 day after the filing of a petition. Here, as in many other areas of labor policy, "[t]he ultimate problem is the balancing of the conflicting legitimate interests." *NLRB v. Teamsters Local 449,* 353 U.S. 87, 96 (1957). Such balancing often requires the drawing of clear, temporal lines even under circumstances where, at the margins, differences in the impact of the conduct at issue may be small. See, e.g., *Bruckner Nursing Home*, 262 NLRB 955 (1982) (employer can lawfully recognize a union without an election while a rival union is organizing but such recognition becomes unlawful once the rival has filed a petition). As the District of Columbia Circuit observed in *Freund Baking*, "Under the Act contestants in a representation election are routinely prevented from exercising certain rights during the brief time when their exercise might interfere with the voters' free choice." 165 F.3d at 934. Our holding today is consistent with that principle.

DIRECTION OF SECOND ELECTION

A second election by secret ballot shall be held among the employees in the unit found appropriate, whenever the Regional Director deems appropriate. The Regional Director shall direct and supervise the election, subject to the Board's Rules and Regulations. Eligible to vote are those employed during the payroll period ending immediately before the date of the Notice of Second Election, including employees who did not work during that period because they were ill, on vacation, or temporarily laid off. Also eligible are employees engaged in an economic strike that began less than 12 months before the date of the election directed herein and who retained their employee status during the eligibility period and their replacements. Those in the military services may vote if they appear in person at the polls. Ineligible to vote are employees who have quit or been discharged for cause since the payroll period, striking employees who have been discharged for cause since the strike began and who have not been rehired or reinstated before the date of the election directed herein, and employees engaged in an economic strike that began more than 12 months before the date of the election directed herein and who have been permanently replaced. Those eligible shall vote whether they desire to be represented for collective bargaining by International Brotherhood of Teamsters, Auto Truck Drivers, Line Drivers, Car Haulers, and Helpers, Local No. 70, of Alameda County, California, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

To ensure that all eligible voters have the opportunity to be informed of the issues in the exercise of their statutory right to vote, all parties to the election shall have access to a list of voters and their addresses that may be used to communicate with them. *Excelsior Underwear*, 156 NLRB 1236 (1966); *NLRB v. Wyman-Gordon*, 394 U.S. 759 (1969). Accordingly, it is directed that an eligibility list containing the full names and addresses of all the eligible voters must be filed by the Employer with the Regional Director within 7 days from the date of the Notice of Second Election. *North Macon Health Care Facility*, 315 NLRB 359 (1994). The Regional Director shall make the list available to all parties to the election. No extension of time to file the list shall be granted by the Regional Director except in extraordinary circumstances. Failure to comply with this requirement shall be grounds for setting aside the election whenever proper objections are filed.

Dated, Washington, D.C. August 23, 2011

Craig Becker, Member

Mark Gaston Pearce, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER HAYES, concurring in part and dissenting in part.

Consistent with circuit court precedent, I join Members Becker and Pearce in overruling *Novotel New York*,

Royal Packaging Corp., 284 NLRB 317 (1987) (prepetition offer to obtain reinstatement of employee's daughter); *Gibson's Discount Center*, 214 NLRB 221 (1974) (prepetition offer to waive union initiation fees); *Lyon's Restaurants*, 234 NLRB 178 (1978) (prepetition statement to employees that they had to join the union or they would not work was instrumental in obtaining signed authorization cards). Such circumstances are not presented in this case. Moreover, in creating these exceptions, the Board has emphasized that it did "not otherwise intend any broad departure from the *Ideal Electric* rule." *Gibsons*, supra at 222 fn. 3. Thus, contrary to our concurring colleague, *NLRB v. Savair Mfg. Co*., 414 U.S. 270 (1973), is consistent with the rule we announce here.

321 NLRB 624 (1996), to the extent of holding that the Union's involvement with and support for the lawsuit at issue during the critical period constitutes objectionable conduct sufficient to warrant setting aside the election. I disagree, however, with their decision, endorsed by Chairman Liebman, to go beyond the facts of this case to create what is essentially a road map for how unions can provide gratuitous benefits, in the form of legal services, to voting employees without running afoul of the Act. In my view, issues concerning the objectionable nature of a union's support for, or involvement with, legal action undertaken on behalf of voting employees are best resolved on a case-by-case basis. Accordingly, although I agree that the Union's conduct here warrants setting aside the election, I dissent from the remainder of the majority opinion.

As the majority acknowledges, both the District of Columbia and Sixth Circuit courts of appeals have addressed the objectionable nature of union conduct like that before the Board here. In those cases, the courts invoked the Board's prohibition against parties to an election providing gratuities to voters and found that the unions engaged in objectionable conduct sufficient to set aside the election by filing a lawsuit, or sponsoring a lawsuit filed, on behalf of voting employees against their employer during the critical period. See *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999); and *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995). The courts did so after reviewing the facts and arguments presented in each case to determine whether the union conduct "improperly influenced the impending election." *Freund Baking Co.*, supra, 165 F.3d at 934; see also *Nestle Ice Cream Co.*, supra, 46 F.3d at 583 (court looked to whether the union's conduct with respect to the lawsuit had the "potential to influence" voters).

Guided by the above precedent, it is clear that the Union's conduct here was bound to improperly influence voters in the election. In this regard, prior to the filing of the representation petition, the Union's attorneys discussed with the employees a potential Federal Fair Labor Standards Act (FLSA) lawsuit against the Employer and how they could recover money from the Employer. At this time, the attorneys provided the employees with attorney-client representation agreements. The agreements stated that the Union would pay all litigation expenses on behalf of the employees, thereby conveying to the employees that the opportunity to recover money from the Employer would be at no cost to them. Based on the information provided by the Union's attorneys, 16 unit employees signed the representation agreements and returned them to the Union. The Union then filed the representation petition on November 4, 2008, and its attorneys filed the FLSA lawsuit shortly thereafter. The Union went on to win the election by an 11 vote margin. On these facts, I would find that the Union's involvement with and support for the FLSA lawsuit improperly influenced the impending election and warrants setting aside the election.

Unlike my colleagues, however, I would not go beyond the facts of this case to "further specify the scope of *unobjectionable* conduct in this area." (Emphasis added.) While I do not dispute the Board's authority to provide legal guidance to parties practicing before it, I question the appropriateness of such guidance when it reads like a manual to unions on how they can provide gratuitous benefits to voters before and during the critical period without engaging in objectionable conduct.[1] Moreover, I have genuine concerns that the "clear guidance" provided by the majority here may lead parties astray as to the "scope of unobjectionable conduct in this area" and ultimately put them on questionable ground should the issue make its way to the appellate courts. In this regard, although the majority's decision indicates that unions are essentially unbridled in their prepetition involvement in lawsuits on behalf of voting employees and that a union's critical period objectionable conduct is limited to the financing of a wage and hour lawsuit on behalf of employees, circuit courts may well read relevant precedent to reach a contrary conclusion. See *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973) (Court found prepetition promise of monetary benefit, in the form of union's promise to waive initiation fees, to be objectionable); *Freund Baking*, supra (court found union to have engaged in objectionable conduct where it merely supported the filing of a lawsuit, absent any definitive evidence that the union actually financed the lawsuit);[2] and

[1] In seeking to further specify the scope of unobjectionable conduct, my colleagues assert that they address "petitions to the Government for the redress of grievances under Federal or State law," not gratuitous benefits. Assuming the lawsuit-related conduct addressed in this portion of the majority's decision is properly characterized as such a petition, this characterization, alone, may not protect the conduct from being found to be objectionable. As the *Freund* court indicated, the lawsuit itself is not objectionable. It is the potential for the filing of the suit to interfere with the employees' right to a free and fair vote by tainting "an atmosphere amenable to rationale decisionmaking" that is objectionable. Thus, while unions may have First Amendment and Sec. 7 rights to file lawsuits against employers, they "do not retain their full panoply of rights" to do so in the period before the election. *Freund Baking*, supra, 165 F.3d at 935.

[2] The majority advises that a union is not responsible, for purposes of the Board's objections jurisprudence, for a lawsuit filed by an attorney on behalf of a group of employee-voters, so long as the union does not fund the litigation and the attorney is not acting as the union's agent in filing the suit. My colleagues appear to view *Freund* as consistent with this guidance because, in their view, the court found that the attor-

NLRB v. Madisonville Concrete Co., 552 F.2d 168 (6th Cir. 1977) (court found union's provision of general legal services to a voting employee to be objectionable). Indeed, I think it should remain an open question whether the Union's prepetition conduct in this case, without more, had the potential to improperly influence the election.

Based on the foregoing, I would review a union's support for or involvement with legal actions undertaken on behalf of voting employees on a case-by-case basis to determine if the union's conduct may have improperly influenced the election under the principles set forth in the cited judicial precedent. Finding that the Union's conduct here clearly did so, I agree with my colleagues to set aside the election. But I would go no further, and I dissent from their decision to do so.

Dated, Washington, D.C. August 23, 2011

Brian E. Hayes, Member

NATIONAL LABOR RELATIONS BOARD

CHAIRMAN LIEBMAN, dissenting.

Today's decision is prudent, given the court of appeals decisions rejecting the Board's treatment of union-sponsored employment lawsuits as a potential basis for setting aside a representation election.[1] I agree with Members Pearce and Becker, for the reasons reflected in their opinion, that such lawsuits are unobjectionable if filed outside the so-called critical period, i.e., before the union petitions for a Board election or after the election is over, or if filed by lawyers owing an exclusive duty of loyalty to the plaintiff and not acting as agents of the union. But because I would adhere to the Board's established law, which permits a lawsuit to be filed even during the critical period,[2] I dissent. Even the modified approach adopted today burdens activity protected by the National Labor Relations Act and by the First Amendment more than is necessary to preserve the integrity of Board elections.[3]

In the Supreme Court's words, "collective activity to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment."[4] No one can seriously dispute that union-sponsored lawsuits, like the one at issue here, are integral to unions' efforts to improve working conditions, that they further the goals of the underlying workplace statutes, and that they implicate the protections of the Act and the Constitution. As the Board has observed in the past, "[t]o hold that [such lawsuits] nevertheless constitute[] grounds for setting aside a Board election would be, to say the least, highly anomalous."[5] Two Federal appellate courts have done so, however. Their reasoning has not persuaded distinguished scholars,[6] and I would prefer that the Board stand its ground.

Making a union-sponsored lawsuit grounds for setting aside a Board election forces a choice on employees who want both the union's representation in the workplace and the union's aid in the courts. Employees may have to forego one option or the other. Either choice, of course, means sacrificing protected rights. The price for seeking workplace representation under the Act is giving up meaningful and timely access to the courts to enforce other workplace laws. The price for going to court with the union's help is giving up the union's representation on the job.

Under today's decision, this dilemma exists during the critical period only, but the length of that period cannot be known in advance, and it may be substantial, especially if, for example, there is an extended preelection hearing.[7] It is only a partial answer to say that in some

ney involved in *Freund* acted as an agent of the union in filing the lawsuit. I disagree.

In *Freund*, the court engaged in no discussion of agency principles and in no way indicated that agency between the attorney filing the suit and the union was a predicate to holding the union responsible for the suit for objectionable conduct purposes. Instead, the court found that by publicizing the previously filed lawsuit in a campaign flyer to employees, the union demonstrated its support for the lawsuit and thereby encouraged employees to believe it was responsible for the suit. The court concluded that the lack of evidence linking the union to the filing or financing of the suit was "immaterial" because it was the "appearance of [the union's] support, not the support itself, that may have interfered with the voters' decisionmaking." *Freund Baking*, supra, 165 F.3d at 145. Thus, *Freund* establishes that even without evidence of a union's financing of a lawsuit or the existence of an agency relationship between the union and the attorney filing the suit, the mere appearance of union support for such a lawsuit is sufficient to hold the union responsible for it for objectionable conduct purposes.

[1] *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995).

[2] *Novotel New York*, 321 NLRB 624 (1996).

[3] Today's decision divides the Board into two separate majorities: one that overrules prior Board law (Members Becker, Pearce, and Hayes) governing union-sponsored lawsuits filed during a critical period and one that reaffirms precedent (Members Becker and Pearce and myself) for lawsuits filed outside of that period or by counsel not acting as agents of the union.

[4] *Transportation Workers v. Michigan Bar*, 401 U.S. 576, 585 (1971).

[5] *Novotel*, supra, 321 NLRB at 634.

[6] Robert A. Gorman & Matthew W. Finkin, *Basic Text on Labor Law* § 7.15 at 212 (2d ed. 2004); Catherine L. Fisk, *Union Lawyers and Employment Law*, 23 Berkeley J. Emp. & Lab. L. 57 (2002).

[7] Moreover, if a second election is required (because the first election was set aside for irregularities), the critical period continues from

cases, it will be possible to initiate a lawsuit before the union files a representation petition, allowing both to proceed. The underlying dilemma remains, constraining employees' freedom to pursue their rights in both the workplace and the courts, as they wish and when they wish.

The Board does not need to prohibit union-sponsored employment litigation in order to preserve the integrity of representation elections. Board law prohibits employers and unions from granting benefits to employees in order to influence their votes. But as the Board has explained in the past, lawsuits like the one at issue here, which addressed workers' terms of employment, are fundamentally different from the sort of "extraneous inducements of pecuniary value" that the Board finds objectionable.[8]

The Supreme Court has made clear that the Board must avoid, if it can, construing the Act in a way that significantly burdens the First Amendment right to petition.[9] That case involved the Board's view that it could sanction concluded, meritless litigation that was aimed at activity protected by the Act. Here, we are dealing with something that approaches a prior restraint against litigation that is not a reprisal against Section 7 activity, but is itself such activity—as well as the exercise of the right to petition and the freedom of association. Nothing in the language of the National Labor Relations Act compels the Board to find union-sponsored lawsuits objectionable in the election context, whether broadly or narrowly. Consistent with the principle of constitutional avoidance, then, I would not do so.

Dated, Washington, D.C. August 23, 2011

Wilma B. Liebman, Chairman

NATIONAL LABOR RELATIONS BOARD

the date of the first election. *Star Kist Caribe, Inc.*, 325 NLRB 304 (1998).

[8] *Novotel*, supra, 321 NLRB at 625.

[9] *BE & K Construction Co. v. NLRB*, 536 U.S. 56 (2002). Both *Nestle* and *Freund Baking*, supra, were decided before the Supreme Court's decision. Neither case reflects the level of analysis that *BE & K* would now seem to require.