



Timothy L. Watson
Regional Director
Region 16
National Labor Relations Board



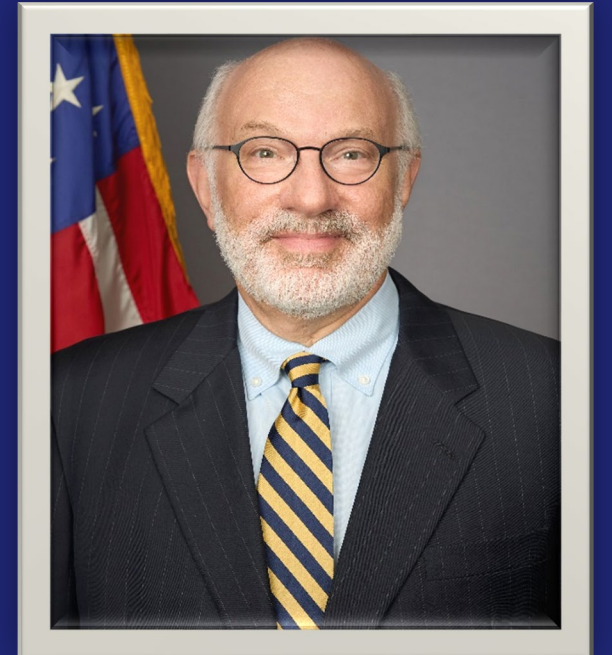
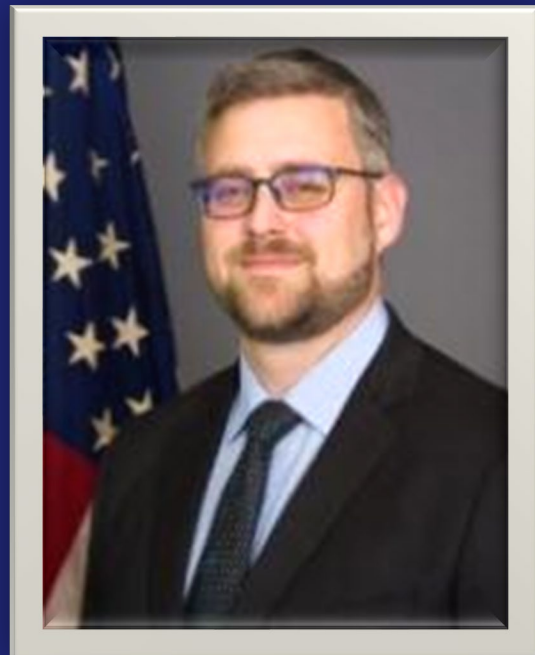
REGION
16





We're an independent federal agency that protects the rights of private-sector employees to join together, with or without a union, to improve their working conditions.

The Board



General Counsel Jennifer Abruzzo





We protect employees' rights to:

- engage in group efforts to improve their wages and working conditions with or without a union
- determine whether they want to be represented by a union and
- engage in collective -bargaining
- refrain from any of these activities

Right to Engage in Union Activity



Employees have the right to attempt to form a union where none currently exists, or to get rid of a union that has lost the support of employees.

Right to Engage in Concerted Activity

- Two or more employees act together to improve their working conditions
- A single employee brings group complaints to an employer or tries to convince co-workers to act together as a group



Protected Concerted Activity involves

- Two or more employees
- Acting together or on behalf of another
- For mutual aid or protection
- Concerning working conditions



San Juan, Puerto Rico, Construction Contractor

Thirteen workers building the foundation of a luxury hotel retreated to a trailer to wait out a downpour. Supervisors ordered them back to work. Workers refused, citing health and safety concerns, and were fired on the spot.

Were the employees engaged in protected concerted activity?



Does this constitute protected concerted activity?



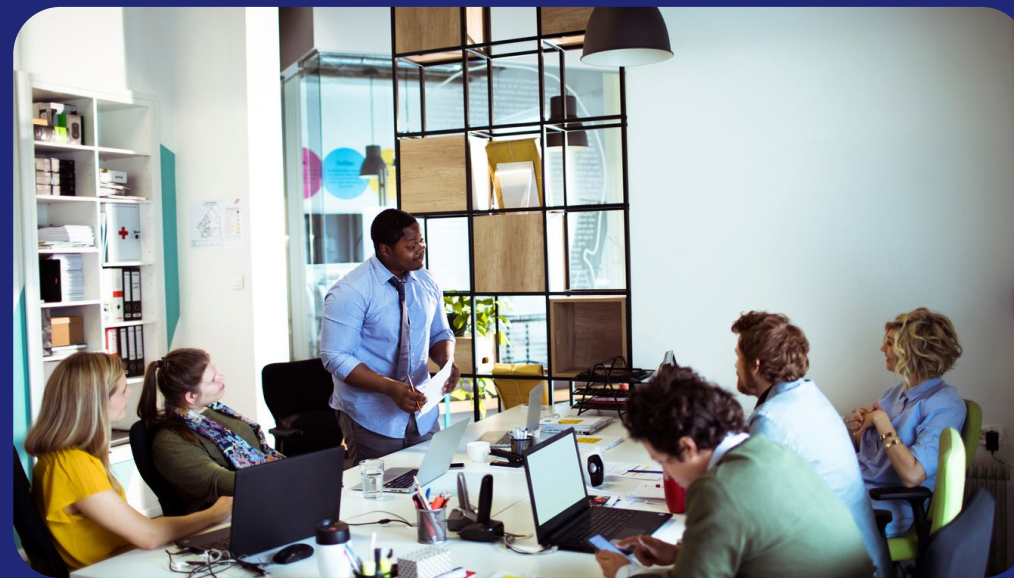
Employees contacted a state administrative agency regarding concerns over patient care, i.e., the effect of hot water on patients.

Who we protect

The National Labor Relations Act covers employees of most businesses in the United States, including:



Workers at small
businesses



Workers at nonprofits



Workers in states with
"Right-to-Work" laws

Immigrants and Undocumented Workers Are Protected



Student Athletes
Graduate Assistants
Memorandum GC 21-08 (9/29/21)



Coverage exceptions

Some groups are excluded from protections, including:



Agricultural workers



Independent contractors



Domestic workers

Who is a Supervisor?

- hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly direct them, or adjust their grievances, or effectively recommend such action.



INDEPENDENT CONTRACTORS



SUPERSHUTTLE DFW, INC., 367 NLRB #75 (2019)



"Calling the SuperShuttle drivers 'entrepreneurs' or 'small business owners' does not make them any less employees entitled to the protection of the National Labor Relations Act."

—*SuperShuttle DFW, Inc.*, 367 NLRB No. 75 (2019) (Member McFerran Dissenting)



***The Atlanta Opera,
371 NLRB #45 (2021)***



"Although the Board must apply the common-law agency test...Supreme Court precedent permit[s] the Board to apply the test in a narrow manner and thereby avoid unjustly depriving workers of statutory rights."

—Counsel for the General Counsel, Amicus Brief,
Atlanta Opera, Filed Feb. 11, 2022



"By definition, [when workers are classified as independent contractors,] they forfeit most of the Act's protections; they have no right to union representation, and employers may generally discharge them with impunity for engaging in union activity or other concerted activity for mutual aid or protection."

—Counsel for the General Counsel, Amicus Brief, *Atlanta Opera*, Filed Feb. 11, 2022.

MISCLASSIFICATION AS A STAND-ALONE UNFAIR LABOR PRACTICE

- ▶ *Velox Express, Inc.*, 368
NLRB #61 (2019)
- ▶ Memorandum GC 21-04
(Aug. 12, 2021)



ULP INVESTIGATIONS

▶The Board agent assigned to the case may be a Field Attorney or Field Examiner. That agent will investigate the case by:

- ▶Taking affidavits from witnesses
- ▶Gathering and reviewing evidence from both the charging party and charged party
- ▶Reviewing position statements from the parties
- ▶Researching related cases, as well as Board and Court decisions
- ▶Memorandum GC 22-05 (May 27, 2022) – *Goals for Initial Unfair Labor Practice Investigations*

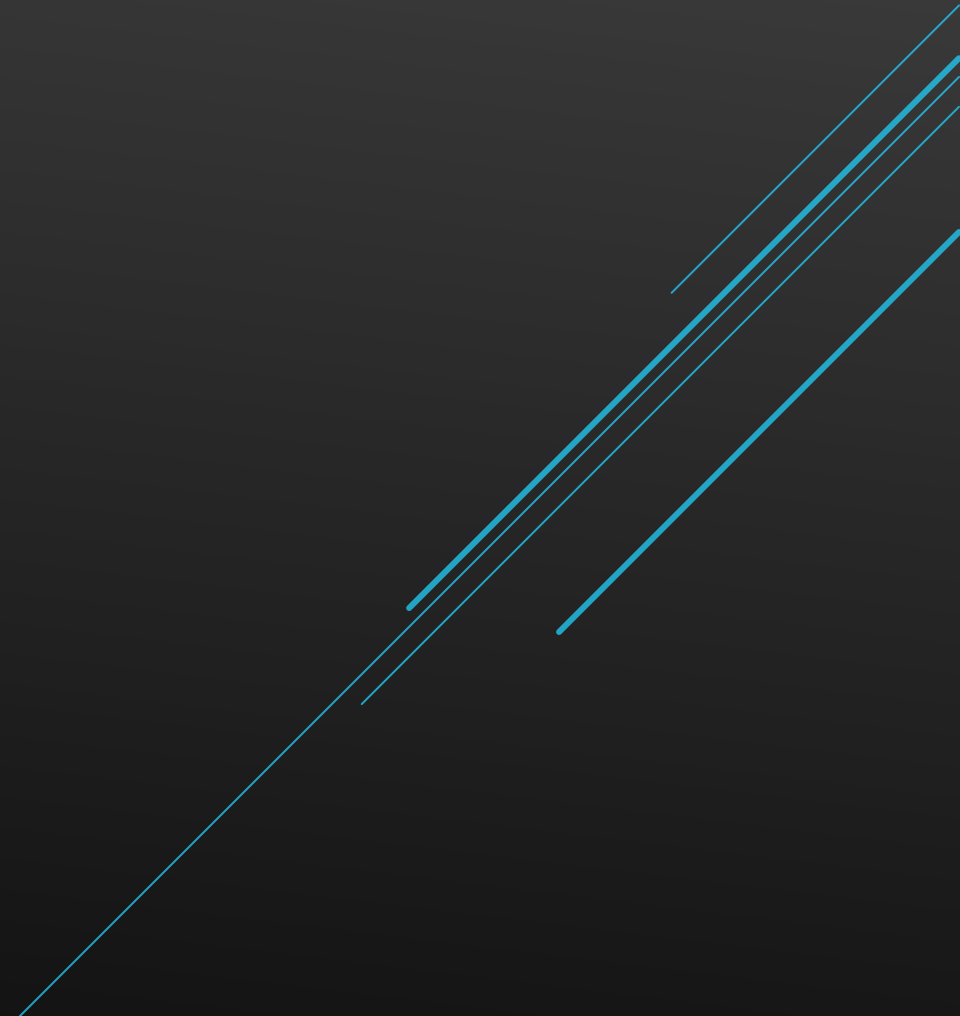
DETERMINATION & DISPOSITION



Upon completion of the investigation, a **regional determination** is made on the merits of the case. Then one or more of the following occurs:

- Case is **dismissed** and may be appealed to Office of Appeals.
- Charging Party **withdraws** charge.
- If merit is found, absent settlement, **complaint** will issue.
- Case is **deferred** to the grievance procedure in the parties' collective bargaining agreement.
- Electronic issuance of disposition documents (GC 20-05).

DISPOSITION, CONT.

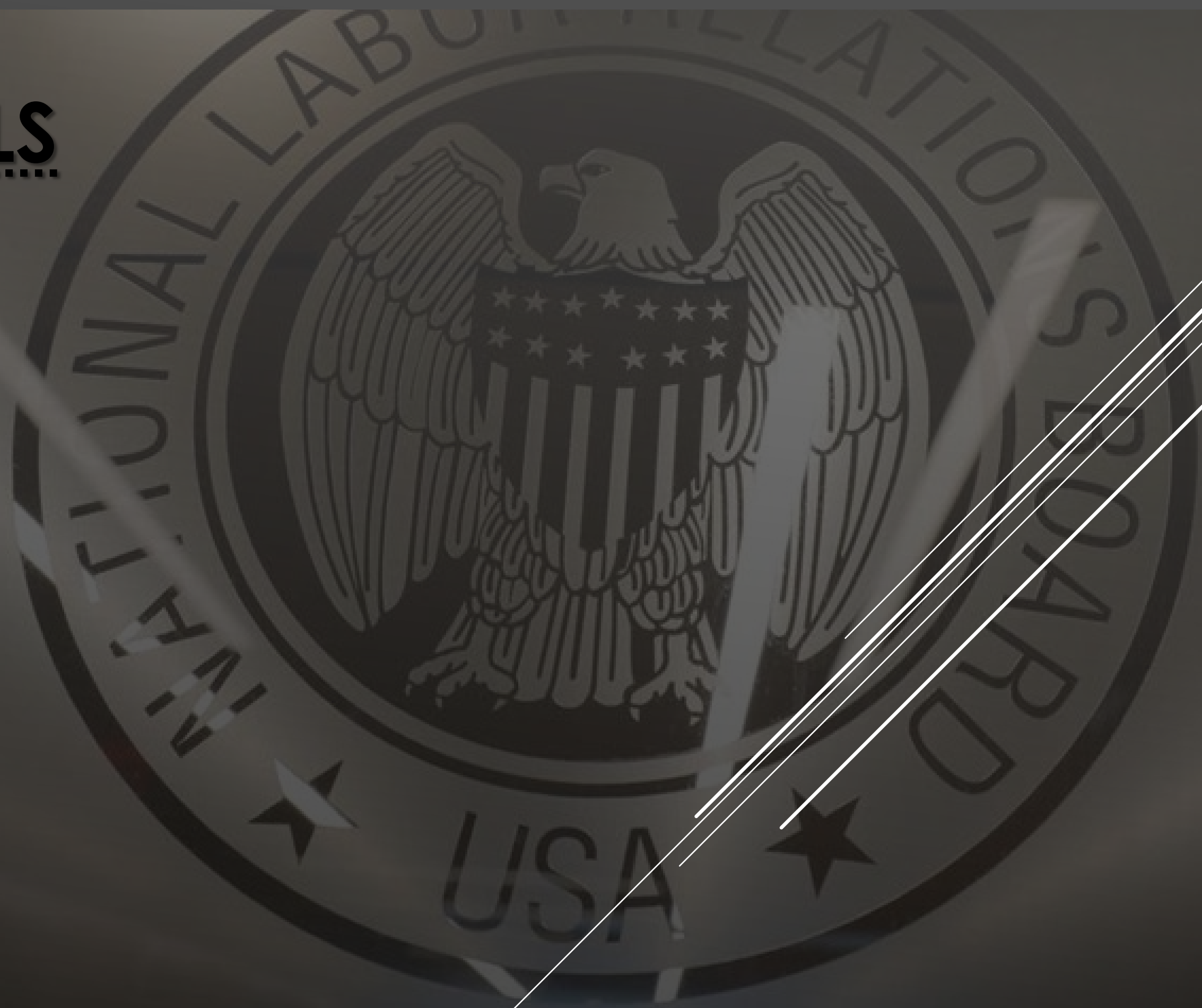
- ▶ Parties may determine they desire to settle a case. Settlement may be reached either prior to or after complaint issues.
 - ▶ The Act is a make-whole statute – typical remedy for discharge would be reinstatement, backpay, and posting a Notice.
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GC REMEDIAL INITIATIVES

- ▶ *Thryv, Inc.*, Cases 20-CA-250250, et al.
- ▶ Memorandum GC 21-05 Utilization of 10(j) Proceedings
- ▶ Memorandum GC 21-06 Seeking Full Remedies
- ▶ Memorandum GC 21-07 Full Remedies in Settlement Agreements
- ▶ Memorandum GC 22-01 Ensuring Rights and Remedies for Immigrant Workers Under the NLRA
- ▶ Memorandum GC 22-02 Seeking 10(j) Injunctions in Response to Unlawful Threats or Other Coercion During Union Organizing Campaigns
- ▶ Memorandum GC 22-06 Update on Efforts to Secure Full Remedies in Settlements
- ▶ *Pathway Vet Alliance*, 03-CA-291267



JOY SILK MILLS





"After the Board replaced *Joy Silk*, the commission of unfair labor practices during election campaigns, including unlawful discharges, increased dramatically."

—Counsel for the General Counsel,
Amicus Brief, *Cemex*, Filed April 11, 2022.



"The *Joy Silk* doctrine's deterrent effect will contribute to the Board's policy of preserving 'laboratory conditions' to ensure elections represent the uninhibited desires of employees."

—Counsel for the General Counsel, Amicus Brief, *Cemex*, Filed April 11, 2022.

"[T]he *Joy Silk* doctrine furthers the policies set forth in Section 1 of the Act to "eliminate the causes of certain substantial obstructions to the free flow of commerce . . . by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representative of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."

—Counsel for the General Counsel, Amicus Brief, *Cemex*, Filed April 11, 2022.

"*Joy Silk* is clearly a permissible construction consistent with the Act given its many years of prior implementation by the Board and its firm rooting in Section 8(a)(5)'s prohibition on failing to bargain in good faith..."

—Counsel for the General Counsel, Amicus Brief, *Cemex*, Filed April 11, 2022.

General Motors LLC

369 NLRB No. 127 (2020)



- Cases involving outbursts to management in the workplace should be analyzed under *Wright Line* standard, rather than *Atlantic Steel*.
- Abusive conduct that occurs in the context of Section 7 activity is not analytically inseparable from the Section 7 activity itself.
- Board overruled *Clear Pine Mouldings, Inc.*, 268 NLRB 1044 (1984), *enforced mem.*, 765 F.2d 148 (9th Cir. 1985), and *Pier Sixty, LLC*, 362 NLRB 505 (2015), *enforced*, 855 F.3d 115 (2d Cir. 2017). *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), *enfd. in part* 664 F.3d 286 (9th Cir. 2011), *decision on remand* 360 NLRB 972 (2014).

Future of *General Motors*



Lion Elastomers , 369 NLRB #88
(May 29, 2020), remanded (5th Cir.
June 15, 2021)

General Counsel requests that Board overrule *General Motors* and return to its previous, well-established standards for determining whether an employer has unlawfully disciplined or discharged an employee for protected conduct or has acted lawfully in response to unprotected misconduct.

OLD UNLAWFUL RULES TEST:

Lutheran Heritage Village – Livonia, 343 NLRB 646
(2004)

- 1) If the rule explicitly restricts Section 7 protected activities;
- 2) If the rule doesn't explicitly restrict Section 7 activities, then it will be unlawful if:
 - A) employees would reasonably construe the language to prohibit Section 7 activity;
 - B) the rule was promulgated in response to union activity; or
 - C) the rule has been applied to restrict the exercise of Section 7 rights.



NEW TEST

- *The Boeing Company*, 365 NLRB No. 154 (2017)
 - When evaluating handbook rule, the Board will evaluate two things:
 - The nature and extent of the potential impact on employee NLRA rights; and
 - Legitimate justifications associated with the rule



Boeing (cont.)

- *The Board* will conduct this evaluation, consistent with the Board's "duty to strike the *proper balance* between ... asserted business justifications and the invasion of employee rights in light of the Act and its policy."
- As a result of this balancing ... The Board will delineate 3 categories of rules:



Boeing (cont.)

- Category I-Lawful rule because when reasonably interpreted rule does not interfere with Section 7 rights.
- Category II-Rules that warrant individualized scrutiny in each case as to whether rule interferes with Section 7 rights, and if so, whether impact is outweighed by legitimate justifications.
- Category III—Unlawful rule because of prohibition of Section 7 right and not outweighed by legitimate justifications.



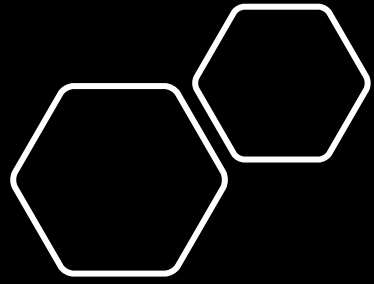


Future of *Boeing*?

Stericycle, Inc. 371 NLRB No. 48 (2022)

- 1. Should Board continue to adhere to the standard adopted in *Boeing* and revised in *LA Specialty Produce Co.*?
- 2. In what respects, if any, should the Board modify existing law addressing the maintenance of employer work rules to better ensure that:
 - (a) Board interprets work rules in a way that accounts for the economic dependence of employees on their employers and the related potential for a work rule to chill the exercise of Section 7 rights by employees;
 - (b) Board properly allocates the burden of proof in cases challenging an employer's maintenance of a work rule under Section 8(a)(1); and
 - (c) Board appropriately balances employees' rights under Section 7 and employers' legitimate business interests?
- 3. Should Board continue to hold that certain categories of work rules—such as investigative-confidentiality rules, non-disparagement rules, and rules prohibiting outside employment—are always lawful to maintain?





Captive Audience Meetings - Memorandum GC 22-04 (4/7/22)

***Cemex Construction
Materials Pacific, LLC,
28-CA-230115, et al.***



“The license to coerce [when employees are forced to listen to speech concerning the exercise of their statutory labor rights in mandatory meetings] is an anomaly in labor law, inconsistent with the Act’s protection of employees’ free choice and based on a fundamental misunderstanding of employers’ speech rights.”

—NLRB General Counsel Jennifer Abruzzo

Resources

- NLRB website: nlrb.gov
 - En Español: nlrb.gov/es
- NLRB Hotline 1-844-762-NLRB
 - (Spanish language option available)
- NLRB Mobile App for IOS and Android
- Visit your NLRB local office
 - nlrb.gov/about-nlrb/who-we-are/regional-offices
- General information on federal workplace protections: worker.gov
- Follow us on Facebook, Twitter, and Instagram.

