

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

In the Matter of:

CEMEX CONSTRUCTION MATERIALS
PACIFIC, LLC

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Cases 28-CA-230115
28-CA-235666
31-CA-237882
31-CA-237894
31-CA-238094
31-CA-238239
31-CA-238240
28-CA-249413

CEMEX CONSTRUCTION MATERIALS
PACIFIC, LLC

and

INTERNATIONAL BROTHERHOOD OF
TEAMSTERS

Case 28-RC-232059

**MOTION REQUESTING THE BOARD TO SOLICIT *AMICUS* BRIEFS IN RESPONSE
TO THE GENERAL COUNSEL’S REQUEST TO OVERRULE MULTIPLE
LONGSTANDING AND SIGNIFICANT BOARD PRECEDENTS IN THIS CASE**

The Coalition for a Democratic Workplace (“CDW”), Associated Builders and Contractors (“ABC”), the Chamber of Commerce of the United States (the “Chamber”), FMI – The Food Industry Association (“FMI”), the International Franchise Association (“IFA”), the National Association of Manufacturers (“NAM”), the National Association of Wholesaler-Distributors (“NAW”), and the National Retail Federation (“NRF”), hereby request the Board to solicit *amicus*

briefs in response to the General Counsel’s recently filed exceptions and brief in support thereof, to the extent that the Board intends to give serious consideration to the General Counsel’s filings.

As further discussed below, the General Counsel’s exceptions and brief make extraordinary requests of the Board, asking it to overturn multiple longstanding and significant precedents dealing with fundamental aspects of representation elections and unfair labor practice determinations under the National Labor Relations Act. The Board has adopted a practice of inviting *amici* to comment on proposals to overrule significant Board precedents. *See, e.g., Stericycle, Inc.*, 371 NLRB No. 48 (Jan. 6, 2022) (“We believe issuing this notice prior to considering any change in the law is the better course.”).¹ The issues presented by the General Counsel’s requests to overrule longstanding precedent in this case are at least as significant, if not more so, than the issues presented in the cases where the Board has already invited *amici* participation this year.

Interests of the Potential *Amici*

CDW is a broad-based coalition of hundreds of organizations representing hundreds of thousands of employers and millions of employees in various industries across the country. CDW and its members are joined by their mutual concern over regulatory overreach by the Board, which threatens the rights of employees and employers protected by the Act, and jeopardizes economic growth.

ABC is a national construction industry trade association representing more than 21,000 members. ABC’s membership represents all specialties within the U.S. construction industry and is comprised primarily of firms that perform work in the industrial and commercial sectors. ABC

¹ *See also Ralphs Grocery Co.*, 371 NLRB No. 50 (Jan. 18, 2022); *Atlanta Opera, Inc.*, 371 NLRB No. 45 (Dec. 27, 2021); *American Steel*, 371 NLRB No. 41 (2022); *Thryv, Inc.*, 371 NLRB No. 37 (2021). CDW and its member associations filed amicus briefs in response to the Board’s invitation in some or all of these cases.

seeks to protect the rights of its members and their employees under the Act to communicate freely regarding labor relations issues and to preserve the right to secret ballot elections.

The Chamber is the world's largest business federation. The Chamber represents 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. The Chamber regularly files *amicus* briefs with the Board on issues of importance to the regulated business community, such as those presented by the General Counsel in this case.

FMI – The Food Industry Association works with and on behalf of the entire industry to advance a safer, healthier and more efficient consumer food supply chain, including retailers, producers, and the wide variety of companies providing critical services. FMI represents an \$800 billion industry with nearly 6 million employees.

IFA is the world's oldest and largest organization representing franchising worldwide. Founded in 1960, IFA's mission is to protect, enhance, and promote franchising through advocacy, education and networking. IFA members include more than 1,100 franchisors from over 300 different business-format categories, thousands of local franchise owners, as well as the product and service suppliers who support them.

NAM is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12.5 million men and women, contributes \$2.71 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for nearly two-thirds of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States

NAW is an employer and a non-profit trade association that represents the wholesale distribution industry, the link in the supply chain between manufacturers and retailers as well as commercial, institutional, and governmental end users. NAW is comprised of direct member companies and a federation of national, regional, state and local associations which together include approximately 35,000 companies operating at more than 150,000 locations throughout the nation.

NRF is the world's largest retail trade association and the voice of retail worldwide. The NRF's membership includes retailers of all sizes, formats and channels of distribution, as well as restaurants and industry partners from the United States and more than 45 countries abroad. NRF has filed briefs in support of the retail community on dozens of topics including labor relations under the Act.

Upon issuance of an invitation by the Board, CDW and the other associations would intend to file *amicus* briefs in opposition to the General Counsel's requests to overrule any of the cases discussed in the General Counsel's brief, including but not limited to the following:

- ***Babcock & Wilcox, 77 NLRB 577 (1948)*** (GC Br. at 45-66) – In this seminal decision, the Board correctly concluded that an employer does not violate the Act by speaking to its employees on “company time,” thereby exercising the employer’s right of free speech protected by Section 8(c) of the Act. In nevertheless seeking to overturn 75 years of settled law, the General Counsel also calls upon the Board to overrule longstanding applications of *Babcock* in such cases as *Johnnie’s Poultry Co.*, 146 NLRB 770 (1964); *Struksnes Construction Co.*, 165 NLRB 1062 (1967); *Allegheny Ludlum Co.*, 333 NLRB 734 (2001).
- ***Linden Lumber, 190 NLRB 718 (1971)*** (GC Br. at 36-45) – In *Linden Lumber*, enforced by the Supreme Court, the Board abandoned the discredited doctrine of *Joy Silk Mills, Inc.*,

85 NLRB 1263 (1949), under which employers were required to demonstrate good faith doubt as to union majority support in order for the Board to conduct secret ballot elections. The General Counsel now urges the Board to reinstate *Joy Silk*, overturning 50 years of settled labor law, which would greatly narrow the right of employers and employees to insist on secret ballot elections to determine uncoerced union majority status. Such reliance on card checks instead of secret ballots has been twice rejected by Congress, and should not be entertained by the Board.

- ***Tri-Cast, Inc*, 274 NLRB 377 (1985)** (GC Br. at 22-24). – The General Counsel also asks the Board to overrule the 37-year-old decision in *Tri-Cast, Inc.* which found lawful certain truthful statements by employers describing changes in the direct relationship between employers and employees that arise from union certification following an election. The General Counsel wants the Board to declare, in violation of Section 8(c), that such truthful statements constitute unlawful threats or misrepresentations.
- ***Crown Bolt*, 343 NLRB 776 (2004)** (GC Br. 28-36) – *Crown Bolt* stands for the settled proposition that the General Counsel bears the burden of proving that an alleged anti-union message of an employer has been widely disseminated to workers in order to support a bargaining order. The General Counsel asks the Board to overrule this policy and establish a presumption of dissemination, which would be contrary to the burden of proving unfair labor practices under the Act.
- ***Sysco Grand Rapids*, 367 NLRB No. 111 (2019)** (GC Br. at 24-28) – Finally, the General Counsel asks the Board to overrule *Sysco Grand Rapids* by holding that certain “changed circumstances” do not mitigate against the issuance of a *Gissel* bargaining order. Instead, defying numerous court rulings, the General Counsel wants the Board to hold that delays

and changed circumstances do not alleviate the need for bargaining orders forcing employers to recognize and negotiate with a union.

CDW urges the Board not to seriously entertain the General Counsel's inappropriate request to overrule these important precedents in the present proceeding, which would threaten the institutional integrity of the Board and violate the statutory mandate to promote stability in labor relations. If the Board intends to consider the General Counsel's radical proposals in deciding the present case, however, then it should gather input from interested stakeholders by inviting *amicus* briefs, as it did in the recent cases cited above. The NLRB should not move forward with the proposed changes before hearing from the stakeholders who will be directly and significantly impacted by them.

Furthermore, the Board should allow interested parties to fully flesh out their concerns with the General Counsel's arguments. Based on the sheer number of cases the General Counsel is calling on the Board to overturn and the breadth of the issues discussed in the General Counsel's brief, *amici* should be allowed to submit briefs longer than the usual 20 pages. Notably, the General Counsel required 20 pages in her own brief to explain why the Board should overrule *Babcock & Wilcox* alone, and another 10 pages were required for the General Counsel to argue for overruling *Linden Lumber*. The *amici* should therefore be allowed additional pages to respond. The Board should also allow *amici* additional time to file their *amicus* briefs, *i.e.*, 60 days instead of the usual 45 days provided by the Board in recent *amicus* invitations, in order to give the *amici* sufficient time to fully respond and address the complex issues raised by the General Counsel.

Conclusion

For the reasons set forth above, CDW and its member associations ask the Board to invite *amicus* briefs from all interested stakeholders if it intends to consider the General Counsel's

extraordinary requests to overturn multiple significant precedents that would upset settled policies governing labor relations under the Act. Reasonable extensions of page limits and time to file the briefs are further requested in order to allow sufficient space and time to address the General Counsel's arguments.

Respectfully submitted,

Maurice Baskin

Maurice Baskin
Michael J. Lotito
James Paretto
Littler Mendelson, P.C.
815 Connecticut Ave., N.W.
Washington, D.C. 20006
202-772-2526
mbaskin@littler.com

Attorneys for the Movants

CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing motion have been served on the following by electronic mail, this 3rd day of May, 2022:

Fernando Anzaldua
Counsel for the General Counsel, Region 28
fernando.anzaldua@nlrb.com

Alan M. Bayless Feldman
Ross M. Gardner
Jackson Lewis, P.C.
Alan.feldman@jacksonlewis.com
gardnerr@jacksonlewis.com

Caren P. Sencer
Weinberg Roger & Rosenfeld
nlrbnotices@unioncounsel.net

/Maurice Baskin
Maurice Baskin