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NOTE

Are Union-Financed Legal Services Provided Prior to a Representation Election an Impermissible Grant of Benefit?: An Analysis of *Nestle*, *Novotel*, and *Freund*

Employees commonly decide whether to be represented by labor unions through elections conducted by the National Labor Relations Board (NLRB or the “Board”).¹ Campaigns leading up to the elections usually involve attempts to influence employees to vote for or against the union, and in many campaigns, unions and employers each spend considerable resources in an attempt to achieve favorable election results.² In reviewing the validity of an election, the Board and reviewing courts³ closely examine the conduct of the employer, employees, and unions that occurred during the “critical period”—the

1. 29 U.S.C. § 159(c) (1994); THEODORE J. ST. ANTOINE ET AL., LABOR RELATIONS LAW: CASES AND MATERIALS 285–95 (10th ed. 1999). The National Labor Relations Act requires employees, a union, or an employer to submit a petition to the Board requesting an election. See 29 U.S.C. § 159(c). The employer may submit a petition for a Board representation election only upon notification that employees or a union desire to unionize. See 29 U.S.C. § 159(c)(1)(B). Employees may choose among one or more competing labor organizations or decide to forgo union representation. If a majority of voting employees chooses a union, and if the Board upholds the election result against appeals, then the Board will certify the union as the exclusive bargaining representative of the employees. See *id.* Conversely, if a majority of voters opts for no union representation, and if the Board upholds the election, then the employees will remain unrepresented. See 29 U.S.C. §§ 159(a) (1994), 159(c)(1)(B). If two or more unions compete in the election, and if no option (including the choice of no representation) garners a majority, then the Board will conduct a runoff election between the two options that received the most votes. 29 U.S.C. § 159(c)(3).

2. See, e.g., *Novotel N.Y.*, 321 N.L.R.B. 624, 624–25 (1996) (noting the statement by a union official that “an organizing campaign required significant union resources, and that the [union] would probably be reluctant to engage in another organizing drive” at the employer’s workplace). In a nonunionized workplace, much is at stake because the outcome of an election might determine the future course of labor-management relations not only at that specific site but also at other work sites in the region or in other locations where companies in the same industry operate. While an employer who has a number of unorganized workplaces might fear that a successful union campaign at one workplace might spread to others, a labor union organizing in a largely nonunionized industry might place special emphasis on a few particularly vulnerable work sites within that industry. Charles B. Craver, *Why Labor Unions Must (and Can) Survive*, 1 U. PA. J. LAB. & EMP. L. 15, 38–39 (1998).

3. Parties receiving adverse Board rulings may appeal to federal appeals courts. 29 U.S.C. § 160(f) (1994); see also *infra* notes 139–43 and accompanying text (discussing the procedural implications of choosing a particular federal appeals court).

time between the election request and the vote itself—to determine whether any acts improperly influenced employees in the exercise of their freedom to vote.⁴

The Board and the courts have drawn a line between permissible and impermissible goods and services that an employer or labor organization may provide to employees during the critical period.⁵ This distinction ensures that employee votes are “governed only by consideration of the advantages and disadvantages of unionization . . . and not by any extraneous inducements of pecuniary value.”⁶ The legitimacy of one type of pre-election activity, however, divides the Board and reviewing courts: union funding of legal services for employees who file work-related lawsuits during the pre-election period.⁷

This Note reviews the case law on pre-election grants of benefits⁸ and employees’ constitutional and statutory rights to receive union advice and support.⁹ The Note then discusses Board and court decisions on the validity of union-supported pre-election suits, focusing on arguments for and against their use.¹⁰ The Note also describes a procedural maneuver—forum choice—that will frustrate judicial review of the issue unless the Supreme Court issues a ruling that ends the disagreement.¹¹ Finally, the Note explores three alternatives to the filing of a union-financed lawsuit during the critical period before an election.¹²

4. Goodyear Tire & Rubber Co., 138 N.L.R.B. 453, 453–54 (1962) (citing the Board’s definition of the critical period in *Ideal Elec. & Mfg. Co.*, 134 N.L.R.B. 1275, 1278 (1961)). If the validity of the vote is questioned, the critical period extends through the resolution of the question of representation, which often includes a subsequent election. See *Novotel*, 321 N.L.R.B. at 639 (noting that the critical period ends when a *valid* election is held). For a discussion of the critical period, see *infra* notes 149–54 and accompanying text.

5. For a discussion of rulings on critical period activities, see *infra* notes 13–25 and accompanying text.

6. NLRB v. L & J Equip. Co., 745 F.2d 224, 231 (3d Cir. 1984).

7. Compare *Freund Baking Co. v. NLRB*, 165 F.3d 928, 935 (D.C. Cir. 1999) (holding that the union benefit tainted the representation election), and *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 586 (6th Cir. 1995) (same), with *Freund Baking Co.*, 324 N.L.R.B. No. 175, 1997 WL 715828, at *2 (Nov. 7, 1997), *enforcement denied*, 165 F.3d 928 (D.C. Cir. 1999) (holding that the pre-election suit was permissible), *BHY Concrete Finishing, Inc.*, 323 N.L.R.B. 505, 505 (1997) (same), *Novotel*, 321 N.L.R.B. at 640–41 (same), and *Nestle Dairy Sys., Inc.*, 311 N.L.R.B. 987, 987 (1993), *enforcement denied*, 46 F.3d 578 (6th Cir. 1995) (same).

8. See *infra* notes 13–19 and accompanying text.

9. See *infra* notes 20–25 and accompanying text.

10. See *infra* notes 26–136 and accompanying text.

11. See *infra* notes 137–42 and accompanying text.

12. See *infra* notes 143–55 and accompanying text.

A brief survey of cases addressing conduct during the critical period, as well as cases delineating the rights of employees to confer with labor organizations, will provide an appropriate context in which to analyze union funding of lawsuits filed before representation elections. Through a series of cases, the Board and reviewing courts have generally held that unions or employers bestowing goods or services worth more than a few dollars that are unrelated to employment impermissibly taint the representation election.¹³ The Board and the courts also agree that distribution of campaign propaganda of negligible monetary value, such as buttons, bumper stickers, and T-shirts, does not impermissibly influence elections so long as the manner in which the items are given is not objectionable.¹⁴

An employer, however, must not distribute any campaign items, even those of negligible value, in a manner that tends either to identify employees who receive or reject them or to pressure employees to accept the items.¹⁵ The Board and reviewing courts

13. Examples of invalid union benefits that led the Board and the courts to set aside election results include the following: a waiver of initiation fees to workers who signed a pre-election document of support, *NLRB v. Savair*, 414 U.S. 270, 277-78 (1973); payment of an employee's traffic ticket and court costs, *NLRB v. Madisonville Concrete Co.*, 552 F.2d 168, 170 (6th Cir. 1977); free medical screenings, *Mailing Servs., Inc.*, 293 N.L.R.B. 565, 566 (1989); gifts of sixteen-dollar jackets, *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235, 1235-36 (1984); five-dollar gift certificates, *Gen. Cable Corp.*, 170 N.L.R.B. 1682, 1682-83 (1968); and free life insurance, *Wagner Elec. Corp.*, 167 N.L.R.B. 532, 533 (1967). Similarly, the Board and the courts have invalidated elections after determining that employers' pre-election actions impermissibly tainted the results. Examples include an employer's conferral of enhanced vacation benefits, *NLRB v. Exch. Parts Co.*, 375 U.S. 405, 409 (1964) (noting that "[e]mployees are not likely to miss the inference that the source of benefits now conferred is also the source from which future benefits must flow and which may dry up if it is not obliged"); an offer to pay a few hours' wages to off-duty employees who came to work to vote, *Perdue Farms, Inc.*, 320 N.L.R.B. 805, 805 (1996); *Broward Co. Health Corp.*, 320 N.L.R.B. 212, 212-13 (1995); and a company-sponsored cookout featuring anti-union remarks, *B & D Plastics*, 302 N.L.R.B. 245, 245 (1991).

14. *E.g.*, *NLRB v. Dickinson Press, Inc.*, 153 F.3d 282, 286-87 (6th Cir. 1998) (holding that a union's distribution of inexpensive T-shirts to employee voters shortly before a representation election did not impermissibly taint the vote); *NLRB v. Coca-Cola Bottling Co. Consol.*, 132 F.3d 1001, 1006 (4th Cir. 1997) (ruling that a union's pre-election distribution of low-priced T-shirts did not unduly influence results); *NLRB v. Wintz Distrib. Co.*, No. 95-6033, 1996 WL 694150, at *6 (6th Cir. Dec. 3, 1996) (approving the Board's policy of permitting distribution of low-cost campaign propaganda and affirming the Board's ruling that distribution of baseball caps to employees did not taint the election); *Nu Skin Int'l, Inc.*, 307 N.L.R.B. 223, 223-24 (1992) (permitting union distribution of T-shirts before representation election); *Lott's Elec. Co.*, 293 N.L.R.B. 297, 304 (1989) (holding that employer's distribution of "vote no" buttons was permitted); *Black Dot, Inc.*, 239 N.L.R.B. 929, 929 (1978) (upholding election after employer provided anti-union buttons).

15. *E.g.*, *Circuit City Stores, Inc.*, 324 N.L.R.B. 147, 147-48 (1997) (setting aside an election after the employer individually distributed mugs inscribed with employees' names

recognize that the employer controls the workplace regardless of the election results and can penalize employees believed to be union supporters. On the other hand, the Board and the courts do not generally set aside elections based on the manner in which unions distribute propaganda, reasoning that a union cannot exert power over employees if it loses an election.¹⁶

Similarly, because of the power disparity between employers and unions, labor organizations may make pre-election promises to employees, provided they do not confer a tangible material benefit before the vote,¹⁷ while employers are forbidden from making promises during the critical period.¹⁸ The rationale for this treatment is similar to that governing the distribution of propaganda: employees understand that the realization of union promises depends on the ability of union negotiators to strike a bargain with the

and "Just Vote No"); *Barton Nelson, Inc.*, 318 N.L.R.B. 712, 712 (1995) (invalidating a vote result after supervisors personally distributed anti-union caps to employees); *House of Raeford Farms, Inc.*, 308 N.L.R.B. 568, 570 (1992) (voiding an election after the employer, who offered "Vote No" T-shirts, asked receiving employees to sign a list and refused to give the shirts to employees wearing pro-union apparel).

16. See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 569-77 (1993) (discussing the different treatment of unions and employers and the rationale behind the practice).

Unions encounter disapproval from the Board and reviewing courts, however, if they distribute campaign materials within twenty-four hours before the election. *NLRB v. Shrader's, Inc.*, 928 F.2d 194, 196-98 (6th Cir. 1991) (reversing Board order upholding election results and remanding for a hearing on the issue of whether a union's distribution of T-shirts and caps impermissibly influenced voters because the items were distributed on election day); *Owens-Illinois, Inc.*, 271 N.L.R.B. 1235, 1235 (1984) (setting aside an election after the union handed out jackets on election day to employees, some of whom had not yet voted).

17. *NLRB v. Allen's I.G.A. Foodliner*, 652 F.2d 594, 596 (6th Cir. 1980) (noting that unions do not taint representation elections when they promise benefits if elected); *Smith Co.*, 192 N.L.R.B. 1098, 1101 (1971) (upholding an election after a union promised various benefits and noting that the promises "are easily recognized by employees to be dependent on contingencies beyond the [u]nion's control and do not carry with them the same degree of finality as if uttered by an employer who has it within his power to implement promises"); *Higgins, Inc.*, 106 N.L.R.B. 845, 846 n.2 (1953) (refusing to set aside a vote after the union made pre-election promises of increased wages, improved working conditions, and decreased union dues).

18. For an elaboration of this doctrine, see *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969) (noting that "[a]n employer in an unorganized plant, with his almost absolute control over employment, wages, and working conditions, occupies a totally different position in a representation contest than a union, which is merely an outsider seeking entrance to the plant"). For examples of cases in which employer promises resulted in invalidated elections, see *NLRB v. Savair Manufacturing Co.*, 414 U.S. 270, 277-78 (1973); *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964); *HarperCollins San Francisco v. NLRB*, 79 F.3d 1324, 1329-31 (2d Cir. 1996); *Amboy Care Center*, 322 N.L.R.B. 207, 208 (1996); *Great Plains Coca-Cola Bottling Co.*, 311 N.L.R.B. 509, 513 (1993).

employer, while employers exert near total control over the promises they make.¹⁹

In addition to dividing critical-period conduct into permitted and proscribed activities, the Board and reviewing courts have considered First Amendment and statutory rights of employees when determining the validity of pre-election practices.²⁰ Both the Board

19. See *Golden Age Beverage*, 415 F.2d at 30. The most common examples of union statements that do not invalidate election results are promises to negotiate wage increases, which undeniably depend upon a union's ability to strike a bargain with the employer. See *Kendall Co.*, 115 N.L.R.B. 1401, 1402 (1956) (upholding election results after the union promised increased wages to employees if elected); *Shirlington Supermarket, Inc.*, 106 N.L.R.B. 666, 667 (1953) (upholding an election after the union promised wage increases, calling them "customary and legally unobjectionable pre-election propaganda"); *Blue Banner Laundry & Cleaners*, 100 N.L.R.B. 2, 3 (1952) (upholding an election result after the union distributed leaflets promising wage and insurance benefits and noting that the Board "will not undertake to censor or police union campaigns, or consider the truth or falsity of official union utterances"); *Trinity Steel Co.*, 97 N.L.R.B. 1486, 1487 (1952) (refusing to void an election after the union promised a wage increase).

Other union promises seem to depend less upon a union's ability to negotiate with the employer. The Board and courts, however, have upheld elections after unions promised, for example, to reduce union fees, provide strike benefits, waive initiation fees to all bargaining unit members, and provide legal services to employees. *NLRB v. VSA, Inc.*, 24 F.3d 588, 594 (4th Cir. 1994) (distinguishing *Savair* in upholding an election after the union promised a waiver of initiation fees to *all* employees, regardless of employees' pre-election allegiances); *Colquest Energy, Inc. v. NLRB*, 965 F.2d 116, 122-23 (6th Cir. 1992) (same); *Molded Acoustical Prod., Inc. v. NLRB*, 815 F.2d 934, 937-39 (3d Cir. 1987) (same); *Primco Casting Corp.*, 174 N.L.R.B. 244, 245 (1969) (upholding the validity of an election after the union promised to refund strike fund money to employees if elected); *FDIC*, 38 F.L.R.A. 952, 962-63 (1990) (refusing to set aside an election after the union promised, if elected, to file a lawsuit against the employer challenging employees' temporary status); *Dart Container*, 277 N.L.R.B. 1369, 1369 (1985) (upholding an election result after a pre-election union flier promised "free legal help from the Teamsters attorneys," noting that the union merely promised to extend a standard union benefit to new members).

In contrast, the Board has set aside elections after employers promised wage increases, benefits, or remedies to employees' complaints during the critical period. *Dow Chem. Co. v. NLRB*, 660 F.2d 637, 644 (5th Cir. 1980) (noting that an employer's "statements from which promises may reasonably be inferred" are sufficient to show a violation of the NLRA); *Johnson Architectural Metal Co.*, 294 N.L.R.B. 896, 900 (1989) (noting that "[t]he promise of benefits by an employer during an election campaign may constitute a subtle but nevertheless unlawful inducement if its purpose is to impinge of the employees freedom of choice in selecting union representation"); *Am. Freightways, Inc.*, 327 N.L.R.B. No. 154, 1999-2000 NLRB Dec. (CCH) ¶ 15,092 (Mar. 12, 1999) (noting that the employer representative told employees that the company "would look into the problems and . . . fix them"); *Chef's Pantry, Inc.*, 247 N.L.R.B. 77, 83 (1980) (setting aside an election after the employer "impliedly promised" benefits to employees to encourage anti-union support).

20. *E.g.*, *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 741 (1983) (noting that courts "should be sensitive to these First Amendment values in construing the NLRA"); *Cent. Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972) (approving the Board's recognition of the right of unions to communicate freely with employees).

and the courts have recognized not only the rights of employees to organize under the National Labor Relations Act (NLRA),²¹ but also the rights of non-unionized employees to hear the messages of labor organizations.²² The Supreme Court has similarly acknowledged the need for unions to communicate freely with workers in protecting unions' and employees' First Amendment rights of speech, assembly, and access to courts,²³ as well as the First Amendment rights of labor and other organizations to provide free legal assistance to vindicate the legal rights of both members and non-members.²⁴ The Court has

21. 29 U.S.C. §§ 151-169 (1994). In *Eastex, Inc. v. NLRB*, the Court recognized that the NLRA allows concerted activity among employees who do not all work for the same employer (that is, unions of employees) and "protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums." 437 U.S. 556, 556 (1978). The Fourth Circuit had acknowledged earlier that "[t]he giving of aid by a labor union to an employee in prosecution of a claim for back wages is clearly a concerted activity on the part of employees protected by the [NLRA]." *NLRB v. Moss Planing Mill Co.*, 206 F.2d 557, 559 (4th Cir. 1953). The Board had recognized the right more than a decade earlier. *M.F.A. Milling Co.*, 26 N.L.R.B. 614, 624-26 (1940) (noting that the NLRA protected as concerted activity the filing of four suits by nonunionized employees, with union assistance, against the employer).

22. *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956) (stating that employees' rights to self-organization depend in part "on the ability of employees to learn the advantages of self-organization from others"); *Cent. Hardware*, 407 U.S. at 542 (noting that unorganized employees' "organization rights are not viable in a vacuum" and holding that the NLRA, which grants employees the right to "self-organization, to form, join, or assist labor organizations," includes the right of union organizers to discuss labor organizing with employees (quoting 29 U.S.C. § 157 (1970))).

23. In *Thomas v. Collins*, the Supreme Court recognized that "[t]he right . . . to discuss, and inform people concerning, the advantages and disadvantages of unions and joining them is protected not only as part of free speech, but as part of free assembly." 323 U.S. 516, 532 (1945). The Court further stated that union organizers have a First Amendment right to "persuade [workers] to action, not merely to describe facts." *Id.* at 537. The Court in *United Transportation Union v. State Bar of Michigan* reaffirmed that "collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment." 401 U.S. 576, 585 (1971).

24. The Supreme Court has established these organizational rights both within and outside the employment context. For labor-related cases, see *United Mine Workers v. Illinois State Bar Ass'n*, 389 U.S. 217, 221-22 (1967) (ruling that the First Amendment rights to assemble and petition permitted the union to pay attorneys to assist members in vindicating their legal rights); *Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar*, 377 U.S. 1, 5-6, 8 (1964) (noting that First Amendment protections of assembly, petition, and free speech give employees the right to advise each other in asserting statutory labor rights, and holding that the union may recommend attorneys to advocate for employee claims). For cases not involving labor issues, see *In re Primus*, 436 U.S. 412, 432, 439 (1978) (holding that South Carolina's imposition of public censure on an attorney affiliated with the ACLU for offering free legal assistance to a woman who had been involuntarily sterilized violated the attorney's and the ACLU's First Amendment freedoms of association and political expression); *NAACP v. Button*, 371 U.S. 415, 419, 428-29 (1963) (striking down a Virginia statute that prevented the NAACP from exercising First Amendment rights of expression and association by assisting persons who

not specifically addressed, however, whether such legal aid impermissibly influences a union representation election.²⁵

Although the Supreme Court has not heard a case on the issue, the Board and two federal circuit courts of appeals have addressed union financing of legal services for non-unionized employees during the critical period. The question at issue in these cases was whether the financing of such services impermissibly influenced the employees' free choice in a subsequent election. Each time, the Board upheld the representation election after the union had funded legal services.²⁶ In contrast, the Sixth and District of Columbia Circuits declined to enforce representation elections occurring shortly after the filing of union-financed lawsuits against employers.²⁷ Without the Supreme Court's attention to this issue, the conflict between the Board and the two circuit courts will persist,²⁸ and unions and employers will continue to face uncertainty surrounding the validity of the practice.²⁹

Union economic support of employment-related suits against employers during a campaign gives the union an opportunity to demonstrate to employees that the union would effectively represent

sought vindication of constitutional and other rights).

25. The Supreme Court and lower courts have upheld, in the limited context of the Federal Mine Safety and Health Act (FMSHA), 30 U.S.C.A. §§ 801-926 (1986 & West Supp. 2000), union provision of work-related legal help to non-unionized workers that the union was attempting to organize. Individuals affiliated with the United Mine Workers' union regularly act as designated non-employee safety representatives for non-unionized mine workers, even when the union is campaigning for a representation election at those mines. *See* *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 217 (1994) (upholding, under the FMSHA, the right of nonunionized mine workers to choose a person to represent them in safety issues); *Thunder Basin Coal Co. v. Fed. Mine Safety & Health Review Comm'n*, 56 F.3d 1275, 1280 (10th Cir. 1995) (ruling that the FMSHA allows a union agent to represent non-unionized miners in vindicating safety rights); *Kerr-McGee Coal Corp. v. Fed. Mine Safety & Health Review Comm'n*, 40 F.3d 1257, 1259 (D.C. Cir. 1994) (holding that the FMSHA allows a non-elected union to represent miners on safety issues at a non-unionized mine); *Utah Power & Light Co. v. Sec'y of Labor*, 897 F.2d 447, 452 (10th Cir. 1990) (ruling that the FMSHA allows miners to authorize non-employees to represent them on work safety issues).

26. *See infra* notes 30-42, 50-116 and accompanying text.

27. *See infra* notes 43-49, 117-26 and accompanying text.

28. *See infra* notes 137-42 and accompanying text.

29. In recent years, unions have filed suits during campaigns in increasing numbers. For example, in addition to the four cases heard by the Board, the American Federation of State, County, and Municipal Employees has pursued litigation under the Fair Labor Standards Act (FLSA) on behalf of employees whom it has attempted to organize, *see* *Novotel N.Y.*, 321 N.L.R.B. 624, 629 (1996), and the United Food and Commercial Workers funded a class action lawsuit on behalf of employees during an organizing campaign, alleging wage payment violations of the FLSA. *See* *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142, 144 (4th Cir. 1992).

workers. Employers who wish to keep unions out of their workplaces naturally prefer that the Board and reviewing courts deny labor organizations the opportunity to show their effectiveness before a representation election. The permissibility of union-supported suits during the critical period is thus particularly important to both unions and employers. A review of the decisions of the Board and reviewing courts makes clear the arguments advanced for and against allowing the practice.

In *Nestle Dairy Systems, Inc.*,³⁰ the Board ordered the employer to bargain with a newly elected Teamsters union local after holding that a class action lawsuit, filed by the union three days before an election on behalf of employees and against the employer, did not taint the vote.³¹ The union and three employees brought a union-financed suit against the employer and three former officers of the union local under the Federal Racketeer Influenced and Corrupt Organizations Act (RICO).³² The lawsuit alleged that the defendants had negotiated a collective bargaining agreement when the union local had not established the support of a majority of employees in the bargaining unit.³³ In addition, the plaintiffs alleged that the agreement stipulated lower wages than employees would have earned had the defendants bargained in good faith.³⁴ The Teamsters convened a meeting of interested employees the night before the

30. 311 N.L.R.B. 987 (1993), *rev'd and enforcement denied sub nom.* Nestle Ice Cream Co. v. NLRB, 46 F.3d 578 (6th Cir. 1995). *Nestle Dairy* was decided by a three-member panel of the Board. Members Devaney and Oviatt maintained the majority position, *see id.* at 987, while Chairman Stephens dissented in part, *see id.* at 989 (Stephens, Chairman, dissenting in part).

31. *Id.* at 987. In dissent, Chairman Stephens posited that he would have invalidated the election result because he believed that the lawsuit unduly influenced the workers' choice. *Id.* at 989 (Stephens, Chairman, dissenting in part). To arrive at this conclusion, he applied a balancing test that Member Cohen later applied in his dissenting opinion in *Novotel N.Y.*, 321 N.L.R.B. 624, 643 (1996) (Cohen, Member, dissenting in part). *Nestle Dairy*, 311 N.L.R.B. at 989-90 (Stephens, Chairman, dissenting in part).

32. 18 U.S.C. §§ 1961-1968 (1994 & Supp. IV 1998).

33. If proven, this alleged action would have constituted a violation of the NLRA. *See Bernhard-Altmann Tex. Corp.*, 122 N.L.R.B. 1289, 1290-93 (1959) (finding that the employer's acknowledgment of the union as the exclusive bargaining representative, when in fact the union did not enjoy majority support from employees, violated 29 U.S.C. §§ 158(a)(2) and 158(b)(1)(A) (1994)), *aff'd sub nom.* Int'l Ladies Garment Workers' Union v. NLRB, 366 U.S. 731 (1961).

34. *Nestle Dairy*, 311 N.L.R.B. at 987. The trial court dismissed the complaint for failure to state a claim but allowed the union to submit an amended complaint. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 580 (6th Cir. 1995). The employer moved for dismissal and sanctions, and the union agreed to a dismissal with prejudice, in return for the employer's withdrawal of its sanctions motion. *Id.*

representation election.³⁵ At that meeting, then-Teamsters President Ron Carey and other union officials and attorneys announced the filing of the lawsuit and stated that each employee could win as much as \$35,000 in lost wages and punitive damages based on calculations that the employer had underpaid workers five dollars per hour.³⁶ The officials requested the employees' votes the following day, and the workers elected the union as their bargaining representative.³⁷

Assuming that the union's costs in filing the suit were minimal, the Board held that the employer had not met its burden of proving that the union provided employees with a "substantial and direct benefit."³⁸ The Board further reasoned that, because of the uncertain outcome of the litigation, the union had conferred no tangible benefit upon employees; the possible \$35,000 per employee was analogous to a union's permissible promises to workers to increase wages or benefits.³⁹ The Board analogized the RICO suit to a complaint under the Occupational Safety and Health Act,⁴⁰ a state labor law claim, or a charge of unfair labor practices prior to a representation election, none of which the Board would consider a benefit to employees.⁴¹ Finally, the Board maintained that, even if the lawsuit conferred a benefit to employees, unions have a First Amendment right to seek redress to vindicate workers' rights.⁴²

The Sixth Circuit refused to enforce the Board's order.⁴³ In contrast to the Board's analogy of the union-financed lawsuit to legitimate claims linked to employees' work conditions, the court in *Nestle Ice Cream Co. v. NLRB* viewed the RICO suit as an impermissible conferral of benefits that improperly influenced employees in the election.⁴⁴ After concluding that the lawsuit constituted a conferral of a pre-election benefit, the court then posited a two-prong test to determine the permissibility of a benefit in light of an ensuing election. First, the court asked whether the lawsuit

35. *Nestle Dairy*, 311 N.L.R.B. at 987. About 100 of the 334 employees in the unit attended this meeting. *Id.*

36. *Id.*

37. *Id.*

38. *Id.* at 987-88.

39. *Id.* at 988; see also *supra* notes 17-19 and accompanying text (discussing union pre-election promises).

40. 29 U.S.C.A. §§ 651-678 (1999 & West Supp. 2000).

41. *Nestle Dairy*, 311 N.L.R.B. at 988.

42. See *id.*; see also *supra* notes 20-25 and accompanying text (discussing employees' and unions' rights under the First Amendment and the NLRA).

43. See *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 586 (6th Cir. 1995), *rev'g and denying enforcement to Nestle Dairy Systems, Inc.*, 311 N.L.R.B. 987 (1993).

44. See *Nestle Ice Cream*, 46 F.3d at 582-84.

was "sufficiently valuable and desirable" to employees to influence their vote.⁴⁵ Answering in the affirmative, the court then asked whether the influence rose to a level where it served to "purchase" or "unduly influence" employee votes in a manner "without relation to the merits of the election."⁴⁶ The court determined that the lawsuit "smacked of a 'purchase' of votes" because the Teamsters owed the employees no duty to provide legal services.⁴⁷ The court further concluded that the suit risked engendering in employees a sense of obligation to vote for the union based on a desire to continue the legal claim.⁴⁸ Finally, the court rejected the union's claim of a First Amendment right to seek redress of grievances, reasoning that the Teamsters could not be class representatives of employees who were not members of the union.⁴⁹

One year later, in *Novotel New York*,⁵⁰ the Board upheld a representation election after a private law firm filed a union-financed lawsuit eight days before the vote.⁵¹ The suit involved forty-eight employees who claimed that the employer failed to pay overtime

45. *Nestle Ice Cream*, 46 F.3d at 583 (quoting *NLRB v. Shrader's, Inc.*, 928 F.2d 194, 198 (6th Cir. 1991)).

46. *Id.* (quoting *Shrader's*, 928 F.2d at 198).

47. *Id.* at 584.

48. *See id.* at 584-85.

49. *See id.* at 585-86. The court noted that, because the employees, not the union, were injured by the alleged indiscretions of the employer and previous union leaders, the Teamsters had no grievance of its own for which to seek redress. *See id.* at 586.

50. 321 N.L.R.B. 624 (1996). *Novotel* was decided by a three-member panel of the Board. Chairman Gould and Member Browning maintained the majority position, *see id.* at 624, while Member Cohen dissented in part, *see id.* at 641 (Cohen, Member, dissenting in part).

51. *Id.* at 625-26. After upholding the election results, the Board certified the union as the exclusive bargaining representative of the employees qualified in the bargaining unit. *Id.* at 641. In order to contest the Board's election ruling, Novotel subsequently refused to bargain, which prompted the union to file a charge with the Board alleging that the employer had violated its duty to bargain under the NLRA, 29 U.S.C. § 158(a)(5) (1994). *See Novotel N.Y.*, 322 N.L.R.B. No. 121, 1996 WL 730801, at *1 (Dec. 16, 1996). The General Counsel of the Board issued a complaint based on the charge and sought summary judgment, which the Board granted. *See id.* Novotel appealed the Board's order to the United States Court of Appeals for the District of Columbia, which heard oral arguments on October 3, 1997. Joint Motion of the Parties for Dismissal of Causes at 1-2, 52nd St. Hotel Assoc. v. NLRB, No. 96-1488, 1997 WL 811778 (D.C. Cir. 1997) (*per curiam*). On October 28, 1997, the parties jointly moved for dismissal of the appeal, which the court granted. *See 52nd Street Hotel Assoc.*, 1997 WL 811778, at *1; Joint Motion of the Parties for Dismissal of Causes at 1-2; *see also infra* note 154 (discussing factors that might persuade an employer not to contest election results). On September 4, 1998, Novotel recognized the union as the exclusive representative of bargaining unit employees, and on September 25, 1998, both parties agreed to an employment contract, which is still in effect. Telephone Interview with Jim Donovan, Director of Organizing, New York Hotel and Motel Trades Council, AFL-CIO (Oct. 12, 2000).

wages in violation of the Fair Labor Standards Act (FLSA).⁵² The attorney did not file the employees' consent forms with the court until a few weeks after filing the suit, however, because the employees feared that the employer would identify them as plaintiffs.⁵³ At some time after the complaint was filed, but before the vote, the union distributed three fliers that it maintained were unrelated to the FLSA lawsuit.⁵⁴ One flier publicized a purported failure by Novotel to honor a promise of premium pay to employees, another announced the union's success in obtaining pay owed to unionized employees at another hotel, and a third invited employees to meet with unionized workers.⁵⁵ Employees at Novotel voted in favor of the union.⁵⁶ The law firm that handled the lawsuit billed the union for approximately \$11,000 in legal fees.⁵⁷

In contrast to its finding in *Nestle Dairy*, the Board in *Novotel* determined that the union had conferred a pre-election benefit on the unorganized employees.⁵⁸ The Board held, however, that the union-supported lawsuit was sheltered by the Constitution and the NLRA.⁵⁹ The Board stated that the Supreme Court's case law "strongly suggest[ed]" that the First Amendment protected the union's participation in the lawsuit, even though the union did not officially represent the employee plaintiffs at the time of filing.⁶⁰ The Board analogized the lawsuit to the Court's holding in *NAACP v. Button*,⁶¹ which extended First Amendment protection to the NAACP's litigation on behalf of people who were not members of that group.⁶² The Board then linked the *Button* holding to cases in which the Court held that unions have a constitutional right to speak with unorganized

52. *Novotel*, 321 N.L.R.B. at 624-25; 29 U.S.C.A. §§ 201-219 (1998 & West Supp. 2000).

53. *Novotel*, 321 N.L.R.B. at 626.

54. *Id.*

55. *Id.* at 626 & n.10.

56. *Id.* at 624. Election results showed seventy votes for the union and fifty-six against, with the validity of ten ballots in question. *Id.* The Board did not rule on the challenged ballots because they were insufficient to change the outcome. *Id.*

57. *Id.* at 626. The Board stated that a law firm billed the union for \$10,653 in legal fees and \$437.80 in disbursements for the lawsuit. *Id.* The bill covered services rendered during a six-month period that began two months before the election. *Id.*

58. *Id.* at 636.

59. *See id.* at 633-34.

60. *See id.* at 631; *see also supra* notes 20-25 and accompanying text (discussing employees' and unions' rights under the First Amendment and the NLRA).

61. 371 U.S. 415 (1963).

62. *See id.* at 420, 443. In subsequent cases, the Court reiterated that *Button* protected "solicitation of prospective litigants, many of whom were not members of the NAACP." *E.g., In re Primus*, 436 U.S. 412, 423-24 (1978) (footnote omitted).

employees about work-related issues.⁶³ In the Board's view, at the intersection of these cases lies the right of unions to finance legal aid for non-members during an election campaign.⁶⁴ In addition to establishing the union's First Amendment right to assist in the suit, the Board noted that employees' rights to organize under the NLRA extend to union officials who attempt to persuade those employees to join the union.⁶⁵ According to the Board, legal precedent established that, by assisting employees in their work-related lawsuit, the union "did precisely what the [NLRA] intended labor organizations to do: it aided employees engaged in concerted activity."⁶⁶

After establishing the validity of the union-supported suit under the First Amendment and the NLRA, the Board distinguished the union's legal assistance from impermissible grants of benefits during the critical period before an election.⁶⁷ In contrast to a conferral of goods or services wholly unrelated to employees' labor concerns,⁶⁸ the union's financial support for employees' FLSA claims in *Novotel* was linked directly to a vindication of workers' rights under the NLRA.⁶⁹ The issue of wages had been central to the employees' communications with the union since the organizing campaign began.⁷⁰ Labor union funding of legal services over matters against employers that directly relates to terms and conditions of employment "cannot be characterized as a pecuniary inducement extraneous to efforts to vindicate employment-related concerns."⁷¹

The Board then addressed the Sixth Circuit's decision in *Nestle Ice Cream*.⁷² Although the Board disagreed with the court's conclusion in *Nestle* that the union's lawsuit had conferred an

63. See *Novotel*, 321 N.L.R.B. at 631-32; see also *supra* notes 24-25 and accompanying text (discussing unions' rights to provide legal aid to employees).

64. See *Novotel*, 321 N.L.R.B. at 631-32.

65. The Board stated that "labor union organizers possess [NLRA] rights derivative from employees they are seeking to organize, but do not currently represent." *Id.* at 633 (citing *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992)); see also *supra* notes 20-25 and accompanying text (discussing employees' and unions' rights under the First Amendment and the NLRA).

66. *Novotel*, 321 N.L.R.B. at 633.

67. See *id.* at 636.

68. See *supra* note 13 and accompanying text (discussing impermissible union benefits).

69. See *Novotel*, 321 N.L.R.B. at 635; see also *supra* note 21 and accompanying text.

70. *Novotel*, 321 N.L.R.B. at 635.

71. *Id.*

72. 46 F.3d 578 (6th Cir. 1995), *rev'g and denying enforcement to Nestle Dairy Sys., Inc.*, 311 N.L.R.B. 987 (1993); see also *supra* notes 43-49 and accompanying text (discussing *Nestle Ice Cream*).

impermissible pre-election benefit,⁷³ the Board concluded that *Novotel* and future cases with similar facts would pass *Nestle's* two-part test.⁷⁴ While a union-financed lawsuit related to the employer's work conditions could influence an employee's vote, thus satisfying the first prong of the test, the benefit would fail the second prong because the suit directly pertained to the "merits of the election."⁷⁵ The Board reasoned that the suit "demonstrates the kind and quality of services the [u]nion might be expected to provide if it is elected bargaining representative and thus bears directly on the question facing every employee in the voting booth."⁷⁶

According to the Board, the Sixth Circuit's two reasons under the second prong in *Nestle* for determining that the union-financed lawsuit was impermissible did not apply in *Novotel*.⁷⁷ First, although the union in *Novotel* had no legal duty to support the employees' lawsuit, the labor organization had a right to do so under the First Amendment and the NLRA.⁷⁸ The suit, therefore, "was not an impermissible attempt to purchase votes, but rather a protected effort to improve employee terms and conditions of employment."⁷⁹ Second, the parties presented no evidence that the labor organization would end its support of the suit if employees did not elect the union; in fact, the evidence showed that union funding would continue regardless of the vote result.⁸⁰

The Board also addressed the Sixth Circuit's concerns related to associational standing.⁸¹ The Board distinguished the question of standing in the two cases, noting that in *Nestle* the union was a party to the lawsuit it supported while the union in *Novotel* was not.⁸² The Board held that, although the *Novotel* union was not seeking standing, it nevertheless had a First Amendment interest in aiding

73. See *Novotel*, 321 N.L.R.B. at 636.

74. *Id.*; see also *supra* notes 45–48 and accompanying text (discussing the test: first, whether the benefit could influence employees' votes, and second, whether the benefit was related to the merits of the election).

75. *Novotel*, 321 N.L.R.B. at 636 (quoting *Nestle Ice Cream*, 46 F.3d at 583).

76. *Id.* at 637.

77. See *id.*; see also *supra* notes 47–48 and accompanying text.

78. See *Novotel*, 321 N.L.R.B. at 637; see also *supra* notes 20–25 and accompanying text (discussing employees' and unions' rights under the First Amendment and the NLRA).

79. *Novotel*, 321 N.L.R.B. at 637.

80. *Id.*

81. See *Nestle Ice Cream*, 46 F.3d at 585–86; see also *supra* note 49 and accompanying text (discussing associational standing in *Nestle Ice Cream*).

82. See *Nestle Ice Cream*, 46 F.3d at 637 n.61.

Novotel employees in exercising their rights under the NLRA.⁸³ The Board also determined that the union presented legitimate explanations for the filing of the suit eight days before the representation election: the law firm had completed its research on the plaintiffs' wage claims and had received a sufficient number of consent forms from employees wishing to participate.⁸⁴ Moreover, union officials stated that they wanted the law firm to file the suit before the vote to avoid the appearance that the suit was conditioned on the election result.⁸⁵

Finally, the Board rejected the adoption of a bright-line rule that would ban lawsuit filings during the critical period.⁸⁶ The Board reasoned that if a union-supported suit were filed prior to requesting a representation election, then any activities related to the suit that occur during the critical period could be challenged as impermissible.⁸⁷ Waiting to file a suit until after a valid election would raise the possibility of an impermissible grant of benefits during the critical period in the form of preparations for filing, such as investigating and discussing the suit with employees.⁸⁸ Moreover, waiting to file a suit until the Board has declared an election to be valid might extinguish employees' claims altogether under the relevant statutes of limitations.⁸⁹ Because unsatisfied parties automatically extend the critical period by contesting the validity of a representation vote, an absolute ban on filings during the critical period would encourage employers to protract litigation surrounding elections, thus prohibiting lawsuits under the FLSA.⁹⁰ Proscribing all lawsuit filings during the critical period could thus force employees to choose between their NLRA right to seek representation by a union and their NLRA right to request legal assistance from that union.⁹¹

Dissenting in *Novotel*, Member Cohen would have set aside the vote and ordered a new election on the grounds that the union's assistance in the employees' lawsuit during the critical period tainted

83. *Id.*; see also *supra* notes 22-24, 59-66 and accompanying text (discussing employees' and unions' rights under the First Amendment and the NLRA).

84. *Novotel*, 321 N.L.R.B. at 637.

85. *Id.* at 626 n.11.

86. *Id.* at 638-39. For a discussion of the critical period, see *supra* note 4 and *infra* notes 149-54.

87. *Novotel*, 321 N.L.R.B. at 638.

88. *Id.* at 639.

89. *Id.*; see also 29 U.S.C. § 255(a) (1994) (stating that the statute of limitations under the FLSA is two years from accrual of the cause of action, unless the violation was willful, in which case the statute of limitations is three years).

90. *Novotel*, 321 N.L.R.B. at 639.

91. *Id.*

the workers' free choice in balloting.⁹² To reach this conclusion, Member Cohen followed what he asserted was the Board's customary approach in cases involving pre-election benefits: a four-part test to determine whether a grant of benefits during an election impermissibly influences the election outcome.⁹³ The test examines (1) the size of the grant as compared to the stated purpose in providing it, (2) the number of employees receiving the benefit, (3) the reasonable employee's view of the purpose of the grant, and (4) the timing of the benefit.⁹⁴

Applying the test, Member Cohen first calculated the union's expenditure in legal fees to equal \$163 per plaintiff,⁹⁵ an amount which he stated was far greater than the value of pre-election union benefits that the Board had found impermissible.⁹⁶ Moreover, Member Cohen maintained that the grant was large considering the stated purpose of helping workers exercise their FLSA rights. He asserted that the union could have either advised the employees to file a complaint with state labor authorities or simply filed the lawsuit after the election.⁹⁷ Second, Member Cohen maintained that the number of benefit recipients was substantial: forty-three employee-plaintiffs received free legal services out of a total of 136 workers who cast ballots, with a victory margin of fourteen and ten contested ballots.⁹⁸ Third, the grant of legal aid would instill in workers a sense of obligation to vote for the union.⁹⁹ Fourth, the union timed the filing in order to influence the vote and not to allay statute-of-limitations concerns, according to Member Cohen.¹⁰⁰ Although the law firm filed the suit before the vote, the statute of limitations was

92. *Id.* at 648 (Cohen, Member, dissenting in part).

93. *Id.* at 643 (Cohen, Member, dissenting in part) (citing *B & D Plastics*, 302 N.L.R.B. 245, 245 (1991)).

94. *Id.* (Cohen, Member, dissenting in part) (citing *B & D Plastics*, 302 N.L.R.B. 245, 245 (1991)).

95. *Id.* (Cohen, Member, dissenting in part). Member Cohen stated that the union spent "over \$8,000" but did not explain how he arrived at that figure. *See id.* (Cohen, Member, dissenting in part). The Board's opinion stated that a law firm had billed the union for fees and expenses totaling \$11,090.80. *See id.* at 626; *see also supra* note 57 and accompanying text (describing the union's costs).

96. *Novotel*, 321 N.L.R.B. at 643 (Cohen, Member, dissenting in part); *see also supra* note 13 and accompanying text (discussing union benefits that tainted elections).

97. *Novotel*, 321 N.L.R.B. at 643 (Cohen, Member, dissenting in part). In its opinion, the Board raised concerns related to the option of filing after an election. *Id.* at 638-39. For a discussion of this option, *see infra* notes 144-47 and accompanying text.

98. *Novotel*, 321 N.L.R.B. at 643 (Cohen, Member, dissenting in part); *see also supra* note 56 (listing election results).

99. *Novotel*, 321 N.L.R.B. at 644 (Cohen, Member, dissenting in part).

100. *Id.* at 645-46 (Cohen, Member, dissenting in part).

not tolled until the firm submitted the plaintiffs' consent forms after the election.¹⁰¹

Member Cohen also criticized the Board's rationale for concluding that the First Amendment and the NLRA protected the pre-election filing.¹⁰² According to Member Cohen, the NLRA neither gave employees a right to receive free legal aid nor granted unions a right to provide it, especially considering that the union did not represent the employees.¹⁰³ Member Cohen also criticized what he called the Board's "leaps of logic" in its First Amendment analysis.¹⁰⁴ Although he agreed that unions may confer with non-member employees and that unions may hire attorneys to represent its own members, Member Cohen asserted that it does not follow that unions have a First Amendment right to pay legal costs of non-members before an election.¹⁰⁵

One year after *Novotel*, the Board reaffirmed its position on union-financed suits filed during the critical period in two brief opinions. In *BHY Concrete Finishing, Inc.*,¹⁰⁶ a union financed a lawsuit against the employer on behalf of employees who made claims under the FLSA.¹⁰⁷ The employer, citing the Sixth Circuit's *Nestle Ice Cream* decision,¹⁰⁸ argued that the election results should be set aside, but the Board affirmed the hearing officer's conclusion, distinguishing *BHY* from *Nestle*, and found the lawsuit permissible.¹⁰⁹ Member Higgins dissented, relying on *Nestle* and on the dissent in *Novotel* to argue that the suit compromised the employees' free choice in the vote.¹¹⁰

In its most recent ruling on union financing of pre-election suits, *Freund Baking Co.*,¹¹¹ the Board found that an employer violated the NLRA by refusing to bargain with a union that had won a

101. *See id.* (Cohen, Member, dissenting in part).

102. *Id.* at 646-47 (Cohen, Member, dissenting in part); *see also supra* notes 58-66 and accompanying text (discussing the Board's reasoning).

103. *Novotel*, 321 N.L.R.B. at 646 (Cohen, Member, dissenting in part).

104. *See id.* (Cohen, Member, dissenting in part).

105. *Id.* at 646-47 (Cohen, Member, dissenting in part).

106. 323 N.L.R.B. 505 (1997).

107. *Id.*

108. 46 F.3d 578 (6th Cir. 1995); *see also supra* notes 43-49 and accompanying text (discussing the *Nestle Ice Cream* decision).

109. *BHY*, 323 N.L.R.B. at 505. The hearing officer also determined that the lawsuit was permitted under the *B & D Plastics* four-factor test that the dissent urged in *Novotel*. *Id.*; *see also supra* notes 93-101 and accompanying text (discussing the test).

110. *BHY*, 323 N.L.R.B. at 506 & n.1 (Higgins, Member, dissenting).

111. 324 N.L.R.B. No. 175, 1997 WL 715828, at *1-2 (Nov. 7, 1997). A three-member panel of the Board issued the decision. *Id.* at *1.

representation election.¹¹² Referring to his dissent in *BHY*, Member Higgins noted that he had dissented in the representation proceeding in *Freund* on the grounds that the union improperly influenced the vote through filing and publicizing a class action lawsuit during the critical period.¹¹³ One week before the election, four workers brought a class-action lawsuit on behalf of all eligible employees alleging that the employer violated California labor laws by failing to pay overtime wages.¹¹⁴ The day before the election, the union distributed fliers informing employees of the lawsuit and requesting their votes.¹¹⁵ Employees voted in favor of the union.¹¹⁶

The company appealed the *Freund* ruling to the District of Columbia Circuit, which denied enforcement of the Board's order.¹¹⁷ The Board relied largely on arguments developed in its *Novotel* opinion, but the court found those arguments unconvincing.¹¹⁸ The court first rejected the Board's argument that a union-supported lawsuit is distinguishable from impermissible benefits, such as free medical screenings or life insurance for employees.¹¹⁹ Although the court agreed that a union's demonstration of its ability to litigate successfully on behalf of employees is a relevant election issue, the court emphasized that the filing of a suit "which may be meritless [or] even frivolous" does not prove the union's ability to represent workers.¹²⁰

112. The Board concluded that the employer violated 29 U.S.C. §§ 158(a)(1), 158(a)(5) (1994). *Id.* at *1. The Board stated that the employer "is in fact refusing to bargain with the [u]nion in order to test the certification." *Id.*

The election involved workers at the company's plant in Hayward, California. *Id.* at *2. The NLRB had certified the Bakery, Confectionery and Tobacco Workers International Union, Local 119, as the exclusive bargaining representative of the employees. *Id.*

113. *Id.* at *2 n.1.

114. *Freund Baking Co. v. NLRB*, 165 F.3d 928, 930 (D.C. Cir. 1999), *denying enforcement of Freund Baking Co.*, 1997 WL 715828.

The workers were represented by the private attorney who had represented the plaintiffs in *Nestle*. *Id.*; see also *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 580 (6th Cir. 1995) (referring to the lawyer, David Rosenfeld, as an attorney representing the Teamsters). In its opinion, the District of Columbia Circuit stated that Mr. Rosenfeld "has several times before represented employees filing lawsuits against their employers just before a representation election." *Freund*, 165 F.3d at 930.

115. *Freund*, 165 F.3d at 930.

116. *Id.* at 930-31.

117. *Id.* at 930.

118. *Id.* at 933-35; see also *supra* notes 50-91 and accompanying text (discussing the Board's *Novotel* ruling).

119. *Freund*, 165 F.3d at 933; see also *supra* note 13 and accompanying text (describing union benefits that invalidated election results).

120. *Freund*, 165 F.3d at 933.

Next, the court found unconvincing the argument that the lawsuit was a protected activity that improved workers' employment conditions under the NLRA. In reaching this conclusion, the court countered that, although a union may permissibly file pre-election charges with the Board alleging that an employer is impermissibly influencing the election, the union may not support a lawsuit that is unrelated to an alleged election infraction.¹²¹ According to the court, a union's suit must be the cure and not the cause of an unfair election influence.¹²² Moreover, the court reasoned that, during the critical period, certain employee rights under the NLRA may be suspended out of deference to a greater countervailing interest in conducting an untainted representation election.¹²³

Finally, the court disposed of the Board's contention that a union-financed suit is protected by the First Amendment, applying the same reasoning as in the NLRA argument that "the parties to a representation election do not retain their full panoply of rights during the critical period."¹²⁴ The court noted as an example that, although an employer has a First Amendment right to make controversial statements on racial issues, expressing those views before an election runs the risk of unfairly influencing the vote, which could lead to setting the election aside.¹²⁵ The court concluded that the Board's rule allowing for union support of lawsuits during the critical period "is not based upon any reasonably defensible interpretation of the [NLRA]."¹²⁶

121. *Id.* at 933-34.

122. *Id.* at 934.

123. *Id.*

124. *Id.* at 935.

125. *Id.*

126. *Id.* The Board did not seek certiorari to the Supreme Court. *Freund Baking Co.*, 330 N.L.R.B., No. 13, 1999-2000 NLRB Dec. (CCH) ¶ 15,335 (Nov. 16, 1999). The Board reopened the case, invalidated the election, revoked the certification of the union as exclusive bargaining representative, and ordered a second election. *Id.* The Board rejected the employer's assertion that its employees must renew their vote petition before the NLRB may order a second election. *Id.* at *2; *see also* *Provincial House, Inc.*, 236 N.L.R.B. 926, 926 (1978) (explaining that Board policy does not require a renewed showing of interest in an election when a previous vote has been set aside due to a valid objection); *Interlake Steamship Co.*, 178 N.L.R.B. 128, 129 (1969) (same).

In response to the Board's decision to order a second election, the employer petitioned the District of Columbia Circuit for a writ of mandamus and a stay of the Board's order pending review. The court denied both motions, noting that the employer did not satisfy the requirements of either remedy. *In re Freund Baking Co.*, No. 00-1008, 2000 WL 274217, at *1 (D.C. Cir. Mar. 6, 2000) (*per curiam*).

In a second election conducted on March 9, 2000, a majority of employees voted against union representation. After the union challenged the validity of the election, the Board determined that the employer unlawfully tainted the vote and ordered a third

The District of Columbia Circuit's opinion in *Freund* failed to address a number of arguments that the Board had presented in *Novotel*¹²⁷ and in its brief before the *Freund* court.¹²⁸ First, the court did not refute the Board's assertion that union support of workers' statutory claims is different from a union benefit that is arguably related to wages or working conditions.¹²⁹ The court's treatment merely linked the union-financed lawsuit to union grants of medical and insurance benefits and stated that "[t]he Board's attempt to distinguish free legal services therefore fails" without explaining why it fails.¹³⁰ Yet a critical difference between the two union activities appears to exist. Union provision of medical or insurance benefits is akin to a cash benefit that flows directly from the union to the employees, without the employer's involvement. On the other hand, a union-supported suit against the employer over wages or working conditions is an attempt to force the employer to give employees what the law requires. Any improvement in the work situation will flow from the employer to the workers, not from the union to the workers.

The District of Columbia Circuit also ignored the possible extinction of employees' statutory claims against the employer through the running of the statute of limitations.¹³¹ As the Board had explained in *Novotel*, a prohibition of union-financed suits against employers during the critical period will, in some cases, deny employees the right to sue for alleged workplace violations.¹³² Moreover, litigation surrounding representation elections can drag on for months or even years, extending the critical period and increasing the likelihood that employees will have to decide between exercising their right to decide whether to unionize and exercising their right to seek union assistance in their legal claim.¹³³

Finally, the court did not explore the extent to which employees' and unions' First Amendment and statutory rights may be suspended

election, which is scheduled for early 2001. Telephone Interview with Michael Fouch, Secretary-Treasurer, Bakery, Confectionery, Tobacco Workers and Grain Millers International Union (BCTGM), Local 119 (Nov. 1, 2000).

127. See *Novotel* N.Y., 321 N.L.R.B. 624, 629-39 (1996).

128. Brief for the National Labor Relations Board at 27-47, *Freund Baking Co. v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999) (No. 97-1694).

129. *Freund*, 165 F.3d at 933.

130. *Id.*

131. See *supra* notes 88-91 and accompanying text (discussing the Board's reasoning in *Novotel* regarding statute of limitations concerns).

132. *Novotel*, 321 N.L.R.B. at 639.

133. *Id.*

during the critical period.¹³⁴ The District of Columbia Circuit's analogy of a union-supported pre-election suit to an employer's pre-vote expression of racial hate speech fails to address the possibility that a union might have a more compelling argument for aiding workers who are attempting to collect overtime wages denied them than an employer has for making racially inflammatory pre-election statements.¹³⁵ Similarly, the court's skepticism of the validity of some union-supported claims did not include justify applying a blanket ban on filing suits during the critical period.¹³⁶

Unless the Supreme Court grants certiorari in a future case, the District of Columbia Circuit's rebuff of the NLRB's rule allowing unions to finance worker's suits during the critical period¹³⁷ effectively ends judicial examination of the issue. In subsequent controversies with similar facts, the Board will likely uphold the results of representation elections, as it did in the two post-*Novotel* cases.¹³⁸ A Board decision in favor of the practice precludes the prevailing party from appealing the ruling and "allows only the employer the opportunity" to choose a federal appeals court for review.¹³⁹ Because the District of Columbia Circuit in *Freund* refused to enforce the Board's ruling that the representation election was valid, in similar cases employers will naturally appeal Board decisions to the District of Columbia Circuit, regardless of the locations of either the company's businesses or the challenged union activity.¹⁴⁰ This scenario makes it unlikely that appeals courts other than the District of Columbia and Sixth Circuits will hear cases on this issue and therefore rests a question of national scope upon only two appeals courts. Moreover, because this procedural pattern allows little

134. *Freund*, 165 F.3d at 935.

135. *Id.*

136. *Id.* at 933-34. A judicial alternative to prohibiting outright the filing of all suits during the critical period is examining the merits of the claim. The Supreme Court has held that the Board may not enjoin a state court suit unless it "lacks a reasonable basis in fact or law." *Bill Johnson's Rests., Inc. v. NLRB*, 461 U.S. 731, 748 (1983). Although the employer in *Freund* was not seeking an injunction of the lawsuit, the court could instead set aside the election if the suit failed the reasonable basis test.

137. For a discussion of the Board's decision to support the rule, see *supra* notes 50-91 and accompanying text.

138. For a discussion of these cases, which relied on the Board's reasoning in *Novotel N.Y.*, 321 N.L.R.B. 624 (1996), see *supra* notes 106-16 and accompanying text.

139. The NLRA allows only parties "aggrieved by a final order of the Board" to appeal. 29 U.S.C. § 160(f) (1994).

140. The party appealing a Board decision may choose among various courts of appeals: the circuit in which the case's alleged events occurred, the circuit in which the party resides or conducts business, or the District of Columbia Circuit. 29 U.S.C. §§ 160(e)-(f) (1994) (describing the appeals process).

possibility of disagreement among the circuits on the issue,¹⁴¹ the Supreme Court might be disinclined to grant certiorari to cases appealed from the District of Columbia or Sixth Circuits.¹⁴²

In the wake of *Nestle* and *Freund*, unions will be forced to change their approach to handling work-related claims of employees during the critical period. Considering that the District of Columbia Circuit

141. There are three possible scenarios, none of them likely to occur, through which this issue could be heard by courts other than the District of Columbia or Sixth Circuits. First, if the employer neither appeals the Board's ruling nor obeys the Board's order, the Board could seek enforcement of its order in a circuit other than the District of Columbia or Sixth Circuits, so long as the event at issue and the adverse party's residence or business location are not exclusively in the District of Columbia or Sixth Circuits. See 29 U.S.C. § 160(e). Most employers would seek review in the District of Columbia Circuit rather than wait for the NLRB to seek enforcement of its order in a circuit in which the outcome is uncertain.

Second, the employer could appeal to a court other than the District of Columbia or Sixth Circuits. 29 U.S.C. § 160(f). This alternative seems unlikely in light of the employer's ability to choose the District of Columbia Circuit, which ruled favorably to employers in *Freund Baking Co. v. NLRB*. See *supra* notes 117-36 and accompanying text (discussing the *Freund* decision).

Finally, if the event at issue and the adverse party's residence or business location are not exclusively in the District of Columbia or Sixth Circuits, and if the Board makes a ruling favorable to the union concerning the provision of legal services before an election, and if, in the same case, the Board makes a ruling adverse to the union on another matter, then the union could appeal the case to an appeals court other than the District of Columbia or Sixth Circuits. See 29 U.S.C. § 160(f). In this scenario, however, the employer, who also has the right to appeal, would probably seek relief from the District of Columbia Circuit. See *id.* When both parties seek review from different appeals courts within ten days of the Board's ruling, a judicial panel randomly selects one of the courts to hear the matter. 28 U.S.C. § 2112(a)(1)-(3) (1994).

This scenario occurred when both parties sought review of the decision in *Southwest Gas Corp.*, 330 N.L.R.B. No. 171, 2000 WL 389448 (Apr. 11, 2000). The employer, petitioning for review in the District of Columbia Circuit, objected to the Board's certification of the union, which had won a representation election. The employer argued that, under *Freund* and *Nestle Ice Cream*, the union had impermissibly intervened in the pending merger between the employer and another corporation. The union, seeking review in the Ninth Circuit, objected to the Board's ruling that denied the union reimbursement of its attorneys' fees. A judicial panel randomly selected the Ninth Circuit pursuant to 28 U.S.C. § 2112(a)(1)-(3). The parties later settled the matter, and the court dismissed the case pursuant to Rule 42(b) of the Federal Rules of Appellate Procedure on August 9, 2000. Stipulation of Dismissal at 1-2, Int'l Bhd. of Elec. Workers v. NLRB (9th Cir. 2000) (Nos. 00-70433, 00-70645) (on file with the North Carolina Law Review); Order Filed Granting Joint Motion to Dismiss, August 9, 2000 (Public Access to Court Electronic Records document) (on file with the North Carolina Law Review).

If appeals are filed after the ten-day period, then the first party to appeal decides the forum. Samuel Estreicher & Richard L. Revesz, *Nonacquiescence by Federal Administrative Agencies*, 98 YALE L.J. 679, 706 & n.146 (1989).

142. The Board maintains its right to continue to disagree with appeals court decisions that contradict the Board's policy on labor issues of national scope, even when the Board decides not to seek Supreme Court review of a case. Estreicher & Revesz, *supra* note 141, at 706.

has a virtual lock on the issue, unions will probably avoid financing any employees' suits until after a valid election has taken place. Private attorneys who wish to represent employees during the critical period will have to work out payment arrangements with the employees, or work on a contingency-fee basis. *Nestle* and *Freund* effectively prohibit those lawsuits that private attorneys are unwilling to litigate without union financial backing.¹⁴³

Because unions will need to formulate alternative strategies to filing lawsuits during the critical period, three possibilities are offered here. One method is to make a campaign promise¹⁴⁴ to file a post-election lawsuit if employees elect the union.¹⁴⁵ At least two problems confront this strategy, however. First, an employer might argue that the union's preparation of the lawsuit during the critical period constitutes an impermissible grant of benefits.¹⁴⁶ Second, unions might be unable to counter the argument that they possess total or near-total control over the promise to file a suit and that therefore the representation election should be set aside.¹⁴⁷

A second alternative, untested in court proceedings, is to file a lawsuit against the employer *before* a petition for a representation election has been submitted.¹⁴⁸ Under the Board's "critical period" doctrine,¹⁴⁹ in its determination of whether to set aside the results of an election, the Board will consider only those allegedly improper acts that occur during the critical period.¹⁵⁰ The theory underlying the

143. Telephone Interview with David M. Prouty, Southern Regional Counsel, Union of Needletrades, Industrial and Textile Employees (UNITE) (Mar. 20, 2000).

144. For a discussion of the rationale behind permissible and impermissible promises, see *supra* notes 17–19 and accompanying text.

145. This practice was upheld by the Federal Labor Relations Authority, the NLRB analogue that governs federal employees. See FDIC, 38 F.L.R.A. 952, 962–63 (1990) (refusing to set aside an election after the union promised, if elected, to file a lawsuit against the employer challenging employees' temporary status).

146. The Board noted this problem in *Novotel N.Y.*, 321 N.L.R.B. 624, 638–39 (1996). See *supra* note 88 and accompanying text.

147. In at least one case, the Board determined that a union's promises during the critical period impermissibly influenced voters. *Alyeska Pipeline Serv. Co.*, 261 N.L.R.B. 125, 126–27 (1982) (setting aside an election after a union flier stated that union membership was a "definite advantage [in] . . . securing a job if unemployed" because the union maintained significant control over union hiring hall practices).

148. In *Novotel*, the employer asserted at oral argument before the Board that filing a suit before the critical period might constitute impermissible conduct. 321 N.L.R.B. at 638.

149. For a definition of the critical period, see *supra* note 4 and accompanying text.

150. *Goodyear Tire & Rubber Co.*, 138 N.L.R.B. 453, 453–54 (1962) (citing the Board's definition of this period in *Ideal Elec. & Mfg. Co.*, 134 N.L.R.B. 1275, 1278 (1961)). The Board and courts regularly have invoked the *Ideal Electric* rule. *E.g.*, *Torbitt & Castleman, Inc. v. NLRB*, 123 F.3d 899, 907–08 (6th Cir. 1997) (holding that an employer's

doctrine is that "the possibility of improper coercion or influence on employee choice is then at its highest, thus justifying special scrutiny of employer actions."¹⁵¹ The critical period doctrine does not apply, however, in cases in which the court determines that the effects of actions that occurred before an election petition have not sufficiently dissipated by the election date.¹⁵² The Tenth Circuit has interpreted

program of soliciting employee grievances did not taint the representation election because the program began before the critical period and was implemented to increase work productivity); *Taber Partners I v. NLRB*, Nos. 95-4166, 95-4202, 1996 WL 285784, at *1 (2d Cir. May 29, 1996) (noting that alleged incidents of impermissible union coercion cannot be considered in determining the validity of an election because the incidents occurred before the critical period); *NLRB v. Browning-Ferris Indus.*, 803 F.2d 345, 347-48 (7th Cir. 1986) (stating that purported union threats did not create a "fearful climate which the Board or the courts have found to be grounds for setting aside an election" because the threats occurred before the critical period); *Crown Cork & Seal Co.*, 308 N.L.R.B. 445, 456 (1992) (ruling that allegedly improper anti-union speeches made by employer before the critical period could not be the basis of voiding election results), *vacated on other grounds*, 36 F.3d 1130 (D.C. Cir. 1994); *Kellwood Co.*, 299 N.L.R.B. 1026, 1036 (1990) (holding that, because the employer's alleged threat to close the plant if the union won the election occurred before the critical period, the union could not use that event as a basis for invalidating the election).

151. *NLRB v. Wis-Pak Foods, Inc.*, 125 F.3d 518, 521 (7th Cir. 1997); *see also NLRB v. Lawrence Typographical Union No. 570*, 376 F.2d 643, 652 (10th Cir. 1967) (noting that "conduct too remote to have prevented [employees] the free choice guaranteed by [the NLRA]" should be excluded from consideration).

152. *E.g., Wis-Pak Foods*, 125 F.3d at 521, 525-26 (observing that the Board considers the effects of actions that occur outside the critical period when they "add meaning or context to the days and weeks leading up to the election" and holding that the employer's steep wage increase after an election lost and contested by the union could impermissibly influence a possible follow-up election); *NLRB v. Anchorage Times Publ'g Co.*, 637 F.2d 1359, 1364-65 (9th Cir. 1980) (enforcing a Board order adverse to the employer after the employer committed unfair labor practices before the critical period that had substantial effects up to the moment of the election); *NLRB v. R. Dakin & Co.*, 477 F.2d 492, 494 (9th Cir. 1973) (refusing to enforce a Board order on the ground that the Board had erred in "mechanically" applying the critical period doctrine, when the alleged pre-critical period misconduct raised a material issue that affected the validity of a representation election); *Lawrence Typographical*, 376 F.2d at 652-53 (denying enforcement of a Board order that the union cease picketing after the employer had granted super-seniority to strike replacement workers before a petition for a decertification election, reasoning that the grant's effect of encouraging non-strikers to decertify the union did not dissipate by the time of the vote); *Am. Freightways, Inc.*, 327 N.L.R.B. No. 154, 1999-2000 NLRB Dec. (CCH) ¶ 15,092 (Mar. 12, 1999) (setting aside an election after the employer initiated, before the critical period, a series of employee meetings that continued into the critical period); *Classic Coach*, 319 N.L.R.B. 701, 706 (1995) (invalidating an election because of the employer's pre-critical period threat to close the business, combined with other acts of intimidation during the critical period); *Advo Sys., Inc.*, 297 N.L.R.B. 926, 930 n.3 (1990) (voiding an election on the ground that the employer's "attendance policy review committee," although formed before the critical period, "continually existed as an instrument to defeat the union drive into and beyond the critical period when the new attendance policy was actually adopted"); *Fruehauf Corp.*, 274 N.L.R.B. 403, 412 (1985) (invalidating an election after a union agent's threat before the critical period that

the doctrine not as a statute of limitations on unfair labor practices, but rather as a rule of evidence that allows the Board and courts to “render irrelevant” conduct before the critical period that is too attenuated to have affected employees’ free choice in the representation election.¹⁵³ The validity of filing a suit before the critical period, therefore, might turn on the length of time that elapses between the initiation of the suit and the request for a representation election. Accordingly, courts might adopt a case-by-case approach in lieu of declaring a bright-line rule of temporality.¹⁵⁴

employees who crossed the picket line might be shot generated rumors and fears that interfered with employees’ freedom of choice); *Baker Mach. & Gear, Inc.*, 220 N.L.R.B. 194, 207–08 (1975) (ordering the employer to bargain with the union notwithstanding the union’s loss in the representation election because the employer’s acts before the critical period, including the firing of four pro-union employees, were so egregious as to make a free election impossible); *Weather Seal Inc.*, 161 N.L.R.B. 1226, 1228–29 (1966) (setting aside an election after the employer coercively interrogated employees, assisted a rival union, and laid off pro-union employees—all before the critical period).

153. *Anchorage Times*, 637 F.2d at 1364–65 (citing *NLRB v. R. Dakin & Co.*, 477 F.2d 492, 494 (9th Cir. 1973)).

154. A number of factors might lead an employer not to contest the validity of an election won by a union that financed a lawsuit filed before (or even during) the critical period. An employer who prevails in such an appeal would be left with a majority of employees who voted for the union and who might be disenchanted with the employer’s efforts to overturn the election. Moreover, upon a determination that an election is invalid, the Board typically orders a second election. If a majority of workers continue to support the union, the employer might face both less cordial relations with its employees and a more determined union leadership than if the employer had accepted the results of the first election. Telephone Interview with Nicholas W. Clark, Assistant General Counsel, United Food and Commercial Workers International Union (Oct. 13, 2000); see also *Freund Baking Co.*, 330 N.L.R.B. No. 13, 1999–2000 NLRB Dec. (CCH) ¶ 15,335 (Nov. 16, 1999) (ordering a second election after determining that the first election was invalid). For a discussion of litigation subsequent to the Board’s order of a second election in this case, see *supra* note 126.

A strategy of filing union-supported suits prior to the certification period is compatible with a long-term approach to organizing employees. This approach might focus on organizing around the needs of employees at a particular workplace and encouraging worker empowerment and a sense of ownership of the union. Typically, under this strategy, a substantial amount of time elapses between the filing of a lawsuit and a petition for an election. For discussions of this approach, see Christopher David Ruiz Cameron, *The Labyrinth of Solidarity: Why the Future of the American Labor Movement Depends on Latino Workers*, 53 U. MIAMI L. REV. 1089, 1104–15 (1999); Jennifer Gordon, *We Make the Road by Walking: Immigrant Workers, the Workplace Project, and the Struggle for Social Change*, 30 HARV. C.R.-C.L. L. REV. 407, 428–37 (1995). In contrast, under the traditional model of employee organizing, in which the goal is to certify the union as representative in a relatively short time period, filing lawsuits before the critical period might be difficult because the length of time between filing suit and petitioning for an election tends to be shorter. For a discussion of the traditional model, see Marion Crain, *Feminism, Labor, and Power*, 65 S. CAL. L. REV. 1819, 1837–43 (1992).

Finally, the establishment of a legal foundation, unaffiliated with unions, that advocates on behalf of employees could provide legal advocacy to workers with job-related claims during the critical period.¹⁵⁵ Because the organization would have no legal ties to the union seeking to represent employees in the workplace, no party would have a valid claim of impermissible influence over the election. This alternative would provide the surest and safest avenue for vindication of workers' rights during the critical period.

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155. Such a foundation would be the union equivalent of such organizations as the Right To Work Legal Defense Foundation and the Council on Labor Law Equality, two groups that take anti-union positions on issues of employment and labor law. For examples of cases in which these organizations represented or filed amicus briefs on behalf of parties, see *Prescott v. County of El Dorado*, 204 F.3d 984, 984 (9th Cir. 2000); *Production Workers Union of Chicago and Vicinity, Local 707 v. NLRB*, 161 F.3d 1047, 1048 (7th Cir. 1998); *International Ass'n of Machinists & Aerospace Workers v. NLRB*, 133 F.3d 1012, 1014 (7th Cir. 1998); *Conair Corp. v. NLRB*, 721 F.2d 1355, 1359 (D.C. Cir. 1983); *M.B. Sturgis, Inc.*, 331 N.L.R.B. No. 173, 2000 WL 1274024, at *6 (Aug. 25, 2000); *Local 74, Service Employees International Union*, 323 N.L.R.B. 289, 291 (1997); *Novotel N.Y.*, 321 N.L.R.B. 624, 628-29 (1996).

