

**Board Memorandum Describing the Authority and Assigned
Responsibilities of the General Counsel of the Agricultural Labor
Relations Board with respect to
Labor Code Section 1160.4**

The Board announces a revised delegation of its authority to seek injunctive relief under Section 1160.4 of the Act. Under the revised delegation, the General Counsel is required to provide 24 hours' notice to the Board before s/he seeks injunctive relief and to obtain Board approval before filing any action for section 1160.4 relief. The Board will respond to the General Counsel's request for approval within 24 hours of receiving it. Upon receiving Board approval for the filing of any such 1160.4 action, the General Counsel shall affirmatively allege that such approval has been maintained. The General Counsel is further required to obtain Board approval for all appeals or defenses to appeals of the Superior Court action upon the Board's application and to forward copies of all papers filed by the other parties to the action to the Board within 24 hours of their receipt. The change in the delegation does not otherwise alter the terms of the delegation previously entered into between the Board and the General Counsel in 2010 and under which the agency has been functioning since then. The entire delegation with the appropriate changes announced today is attached hereto along with Chairman Gould's Memorandum.

The Board hereby adopts the following internal management Memorandum delegating the authority to apply for 1160.4 relief:

The General Counsel may initiate and prosecute injunction proceedings as provided in Section 1160.4 only upon approval of the Board. In accordance with this requirement, the General Counsel shall provide copies of the proposed complaint for such relief and the papers in support thereof at least 24 hours prior to filing the application and shall further provide copies of any and all papers filed in the case by any person, and any orders of the court within 24 hours of their receipt. The requirement of Board approval shall extend to the pursuance of any appeals or defenses to appeals that may follow the initial filing in the superior court and Board approval must be sought at least 24 hours before the date of filing. All complaints, appeals, or defenses to such appeals shall include the representation that Board approval has been obtained. The General Counsel shall report to the Board on the outcome of all court proceedings. The Board shall act upon such requests for injunctive relief and all other related requests within 24 hours of their receipt. The obligations under this paragraph shall not include the

provision to the Board of any facts or other information which would constitute prohibited communications under sections 20700 and 20740 of the Board's regulations. (Title 8, Cal. Code Regs., sec 20700, 20740.)



William B. Gould IV, Board Chairman

3/6/15
Date



Cathryn Rivera-Hernandez, Board Member

3/6/15
Date



Genevieve Shiroma, Board Member

3/6/15
Date

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MEMORANDUM

To: Sylvia Torres-Guillén
General Counsel

William B. Gould IV
3/6/15

From: William B. Gould IV
Board Chairman

Date: March 6, 2015

Re: Delegation of Authority: Injunctive Relief

I am writing to clarify matters with respect to the authority of the General Counsel to seek injunctive relief pursuant to Labor Code Section 1160.4, which provides that “[t]he board may, upon finding reasonable cause to believe that any person has engaged in or is engaging in an unfair labor practice, petition the superior court . . . for appropriate temporary relief or restraining order.” As I will describe in more detail below, the Board has found it necessary to revise its 2010 delegation of authority to the Office of the General Counsel concerning 1160.4 relief to return to what has been the historic practice of the Board and the National Labor Relations Board by requiring the General Counsel to obtain case specific authorization to seek 1160.4 relief before initiating any proceedings.

As originally enacted, section 1160.4 was taken directly from the National Labor Relations Act and then read, as the national Act has read since the power to seek injunctive relief was added to it, that this “board shall have power, upon issuance of a complaint . . . to petition” for injunctive relief.¹ Although section 1160.4 no longer perfectly mirrors Section 10(j) linguistically, we discern no substantive difference between what this Board may do under 1160.4 and what the national Board has “the

¹ 29 USCA 160(j); hereafter section 10(j).

power” to do that would affect the conclusion that cases arising under section 10(j) of the national Act² are applicable precedent.³

The national Board’s power to seek injunctive relief was added to the NLRA by the Taft-Hartley amendments of 1947. Prior to these amendments, the General Counsel was an appointee of the Board, which led to complaints about the fairness of a process in which the appointee of a tribunal brought cases before it. Taft-Hartley put an end to such complaints 1) by creating the office of an independent General Counsel with final authority to investigate charges and to issue and prosecute complaints before the Board and 2) by giving the General Counsel “general supervision” over all attorneys of the Board (except those engaged in immediately adjudicative functions) and the officers and employees of the regional offices. Except for these two responsibilities explicitly assigned to the General Counsel, Taft Hartley was, and the national Act remains, silent with regard to any other duties possessed by the General Counsel. Our Act maintains a similar silence.

There is no doubt that the office of the General Counsel under the NLRA and your office under the ALRA regularly perform many more functions than the ones specifically delineated in either statute. It is on the question of the *source* of the authority to seek injunctive relief that I objected to the position taken by you in the *Gerawan* matter for you clearly imply that your authority to seek injunctive relief is of statutory provenance. Thus, in your Supplemental Brief you state that “[c]onsistent with the General Counsel’s independent and final authority over unfair labor practices, she also has full and final authority to seek temporary relief in the Superior Court to put an end to ongoing unfair labor practices.”⁴

² Labor Code Section 1148 requires the Board to follow applicable precedent of the NLRA.

³ *Agricultural Labor Relations Board v Tex-Cal Land Management* (1985) 165 Cal App 3d 429

⁴ In her argument before the court on the application for an injunction, the Regional Director argued that the “ALRA is different from the national Act in regard to whether or not the General Counsel is required to seek permission to – to request injunctive relief. Our rules and regs say nothing about us needing to go to the Board to ask for injunctive relief before we do.” RT: pp. 41-42, Case No. 1:14-cv-00236-LJO-GSA. It is true that “our rules and regs say nothing about [the General Counsel’s] needing to go to Board to seek injunctive relief”, but it is not the case that our Act is different from the national Act in this regard since there is nothing in the national Board’s Rules and Regulations Manual that requires the General Counsel of the national Board to obtain case-specific approval from the Board before seeking 10(j) relief either. Rather, whether or not the General Counsel of the national Board must obtain case specific approval to seek 10(j) relief depends entirely upon the delegation from the Board to the General Counsel that is in effect at the time such relief is sought. I should add that in the same hearing, the Regional Director said both: “that the *legislature* allowed for and *empowered* the General Counsel with

I did not object to this, as your Memorandum of May 15, 2014 to me implies, because I believe that section 1160.4 “requires” the General Counsel seek permission for injunctive action from the Board, but because your authority to seek 1160.4 relief must come from a delegation of the Board’s authority: if there is no delegation, the General Counsel has no authority to seek 1160.4 relief. We cannot, therefore, ever put aside the question “whether,” as you put it, section 1160.4 requires that “such authority *must be delegated to the General Counsel by the Board.*” [Emphasis added.] Any consideration of the scope of your authority to seek 1160.4 relief – that is, whether you have blanket authority to do so or whether you must seek case-specific approval from the Board before doing so – requires inquiry into *what* we have delegated.

When you do take up this question in your Memorandum, you maintain that the Board has, in fact, delegated such authority to you in *Ace Tomato Company, Inc.* (2012) 38 ALRB No. 8.

In the Board’s decision in *Ace Tomato Company, Inc.*, it wrote:

The Board has taken administrative notice of the unfair labor practice charge No. 2012-CE-024-VIS, in which the UFW has alleged, inter alia, that Ace “has failed and refused to implement and abide by the parties’ collective bargaining agreement.” The General Counsel . . . has final authority with respect to the investigation of unfair labor practice charges and issuance of complaints. [Cite] *In addition, the General Counsel has been delegated full and final authority, with approval of the Board, to seek injunctive relief.* We note that pursuant to section 1160.4, subdivision (c), temporary relief or restraining orders under that section, unlike injunctions generally, are not stayed pending appeal. [Emphasis added.]

The language emphasized above was not *the* delegation of the authority to seek injunctive relief as of the date of our decision, but a description of authority that had already been delegated to the Office of the General Counsel, which was why the act of delegation was described in the past tense. It is true, as you point out in your Memorandum, that the 2010 delegation was between the Board and your predecessor as General Counsel, but the suggestion that any delegation to a general counsel does not survive his or her term of

these injunctive relief proceedings” and “[b]ecause the Board said it is incapable of enforcing [its MMC order before the time for a respondent to seek review has elapsed] *we made this agreement. . .*” RT: p. 14. I take it that, despite her argument that the Legislature “empowered the General Counsel” to seek injunctive relief, the agreement she is here referring to is the delegation.

office entails the conclusion that the Board must re-execute a delegation with every General Counsel upon his or her assuming office as well as the conclusion that the General Counsel must re-execute a delegation with every change in a majority of the Board. Besides the mischief and turmoil such an interpretation of the statute would cause, with the prospect of disagreement over the scope of every delegation upon the appointment of every General Counsel or the formation of a new Board majority, the conclusion that, unless properly revoked, delegations of authority survive the terms of individual Board members or the appointment of a new General Counsel is supported by applicable precedent. See, *Overstreet v Santa Fe Tortilla Company* (2013) 943 Fed. Supp 2nd 1296.

Nevertheless, in light of this unfortunate confusion, the Board has determined to withdraw the current delegation respecting your plenary authority to seek injunctive relief in favor of a new delegation that returns to what has been the national Board's practice for most of its history, excepting the immediate post Taft-Hartley period as well as those periods during which it operated without a quorum. We do so because we believe that the litigation positions taken by your office do not comport with settled law and are not only erroneous, but even prejudicial to this Board's role as the primary interpreter of the rights and responsibilities arising under the ALRA.⁵ I am referring here to your argument in your Supplemental Brief in the *Gerawan* matter that if the Board were to retain authority with respect to seeking injunctive relief, it would be improperly participating in the prosecutorial phase of the case. In the first place, the Board took care not to do so in the 2010 delegation. Although it did grant plenary authority to the General Counsel to seek 1160.4 relief and required the General Counsel to provide it with the pleadings, it specifically excluded from that obligation anything that might constitute prohibited communications under our regulations.

Moreover, we think the argument proves too much for it implies that this Board must delegate plenary power to seek injunctive relief. Even though some cases have characterized the national Board's power to seek 10(j) relief as "prosecutive" in nature, no case holds that the national Board *must* delegate plenary power to the General Counsel for this reason.⁶ Indeed, although the national Board has, from time to time delegated its

⁵ This Board, like the national Board, provides "centralized administration of specially designed procedures . . . to obtain uniform application of substantive rules" on the basis of its "specialized knowledge and cumulative experience," *San Diego Building Trades Council v Garmon* (1959) 359 US 236, 242-243.

⁶ As the Court of Appeals put it in *Frankl v HTH Corporation* (USCA 9th Cir. 2011) 650 Fed 3d 1334, 1347:

power to seek injunctive relief to the General Counsel, for most of the 60 year history since 10(j) has been a part of the NLRA, the NLRB has required the General Counsel to obtain case-specific approval from it before seeking relief under 10(j) without “the shadow of partiality” ever having been held to require a delegation. Closer to home, the Public Employment Relations Board has a procedure that has passed judicial muster that requires its General Counsel to submit a request to it for permission to seek injunctive relief. Title 8 Code of California Regulations Section 32465; *San Diego Teachers Union v Superior Court* (1979) 24 Cal 3d 1 (Board policy to decide appeals of General Counsel’s denials of requests for injunctive relief upheld.) I should add here that, as a former Chairman of the National Labor Relations Board, during whose tenure the national Board was more active in using 10(j) than during any other previous or subsequent Chairman’s tenure, the NLRB never delegated plenary authority to the General Counsel to seek 10(j) relief. Notwithstanding the concerns stated above, I applaud the vigor with which your office has pursued 1160.4 relief. The action the Board is taking with respect to the delegation should by no means be interpreted as a rejection of the robust use of 1160.4 as a tool to remedy violations of the ALRA.

To the extent that any position you have taken depended upon your good faith understanding of any of our orders or actions, I have sought to explain why the Board believes it is necessary to take the step of modifying the Board’s 2010 delegation in order to require case-specific approval of every request for injunctive relief. We hereby substitute for the third paragraph on page 2 of the previous delegation the following:

The General Counsel may initiate and prosecute injunction proceedings as provided in Section 1160.4 only upon approval of the Board. In accordance with this requirement, the General Counsel shall provide copies of the proposed complaint for such relief and the papers in support thereof at least 24 hours prior to filing the application and shall further provide copies of any and all papers filed in the case by any person, and any orders of the court within 24 hours of their receipt. The requirement of Board approval shall extend to the pursuance of any appeals or defenses to appeals that may follow the initial filing in the superior court and Board approval must be sought at least 24 hours before the date of filing.

As we explain 10(j) gives the Board the power to petition a court for relief, which the Board necessarily does through counsel, but does not specify the level of involvement the Board must have with each individual petition. * * * “. . . [W]e hold that, although the Board may reserve to itself the ultimate decision whether to petition for 10(j) relief in individual cases, it may exercise its power to petition for 10(j) relief by authorizing the General Counsel to seek relief on the Board’s behalf.

All complaints, appeals, or defenses to such appeals shall include the representation that Board approval has been obtained. The General Counsel shall report to the Board on the outcome of all court proceedings. The Board shall act upon such requests for injunctive relief and all other related requests within 24 hours of their receipt. The obligations under this paragraph shall not include the provision to the Board of any facts or other information which would constitute prohibited communications under sections 20700 and 20740 of the Board's regulations. (Title 8, Cal. Code Regs., sec 20700, 20740.)

In all other respects the delegation remains the same except where it is inconsistent with the Board's regulations on compliance and with the transfer of Administrative Duties required by the Labor and Workforce Development Agency. I appreciate that this Board's previous delegations have taken the form of agreements between the Board and the General Counsel but that does not mean that, with respect to any delegation of our 1160.4 authority, they must take such a form. Although the NLRB in the immediate aftermath of the Taft-Hartley amendments delegated 10(j) authority to the General Counsel pursuant to a "Memorandum of Understanding" (See, *Evans v International Typographic Union* (E.D. Ind. 1948, 76 Fed. Supp 881,) since that time the NLRB has effectuated its delegations by issuing Memoranda "Describing the Authority and Assigned Responsibilities" of the General Counsel by action of the national Board.⁷

As noted, complaints about the Wagner Act's meshing of the prosecutorial and adjudicative components of the agency led Congress to separate the two functions in the

⁷ Some examples:

- 1) In 1950, the Board published a Memorandum in the Federal Register withdrawing the unilateral authority to seek 10(j) relief from the General Counsel and requiring him to obtain case-by-case approval from the Board for each application for such relief, Nat'l Lab. Rel. Bd., General Counsel, Description of Authority and Assignment of Responsibilities, 15 Fed. Register 6924, 6924 (October 14, 1950);
- 2) In 1954, the Board revoked the 1950 Memorandum, and assigned general litigation authority, including applications for injunctive relief, to the Associate General Counsel, See, Nat'l Lab. Rel. Bd., Revocation of Statement of Description of Authority and Assignment of Responsibilities to the General Counsel, 19 Fed. Register 8830, 88390 (December 21, 1954);
- 3) In 1955, the Board withdrew the delegation of litigation authority to the Associate General Counsel and issued a new Memorandum in which it assigned litigation authority (including applications for 10(j) relief) to the General Counsel, See, Nat'l Lab. Rel. Bd., Authority and Assigned Responsibilities of General Counsel of National Labor Relations Board, 20 Fed. Register 2175, 2176 (April 1, 1955).

Taft-Hartley amendments. In these amendments, the investigative and prosecutorial functions with respect to unfair labor practices were given to a General Counsel who was also given “general supervision” over all attorneys not engaged in the adjudicative process. The statute also specifically provided for the Board to prescribe other duties.

Congress left it to the Board and the General Counsel to work out how the newly independent office of the General Counsel was to be integrated into the ongoing functions of the agency, which the Board and the new General Counsel set out to do.

Allocation of functions between the Board and the Office of the General Counsel was one of the most important matters concluded before the effective date of the amendments. The law itself did not divide the agency into two separate organizations. On the contrary, Congress had rejected legislation that would have had that effect. However, the amendments clearly intended to separate prosecuting functions from decision-making functions. The Board and the new General Counsel set out to accomplish this purpose, in a manner which would satisfy the letter and the spirit of the legislation without destroying the identity of the agency as an integrated whole. It was readily apparent that while the amendments to the Act gave the General Counsel final authority over the investigation of unfair labor practice under section 8 of the act, Congress did not clothe him with any statutory authority to take any action in connection with representation cases or union-shop authorization elections under section 9 of the act. On the other hand, while Congress assigned responsibility for the investigation of representation cases to the Board members, Congress gave the General Counsel general supervision over the officers and employees of the very regional offices that had in the past performed important functions in handling representation cases. The statute contained no provisions that resolved this administrative problem or many similar questions. After exploring them with the General Counsel, however, the Board delegated to him various functions concerning which the law was silent.

Thirteenth Annual Report of the National Labor Relations Board, pp. 2-3

Among the functions as to which the law was silent was how the agency was to use its new power to obtain 10(j) relief. However it was worked out, the result was that the Board issued a Statement of Procedure in the Federal Register which, inter alia, granted unilateral authority to its Regional Directors to seek injunctive relief:

Whenever the *Regional Director* deems it advisable to seek temporary injunctive relief under Section 10(j) . . . the officer or Regional Attorney to whom the matter has been referred will make application for appropriate temporary relief or

restraining order in the District Court of the United States within which the unfair labor practice is alleged to have occurred or within which the party sought to be enjoined resides or transacts business. [National Labor Relations Board Procedures (Issued and effective August 23, 1947) Section 202.35; 20 Labor Relations Reference Manual, pp. 3117-3118].⁸

In reliance on the explicit statutory language in section 10(j), a party against whom an injunction was sought by a Regional Director of the NLRB argued that *only the Board* could properly petition for 10(j) relief and that it could not delegate its authority to do so. For his part, the Regional Director contended that there was no delegation because “the whole scheme of the statute for the separation of functions require[d] a construction of 10(j) which permit[ted] the General Counsel, rather than the Board, to invoke the procedure laid down by that section.” In support of this argument, the Regional Director revealed to the court that Board and General Counsel had reached an ‘understanding’ among themselves, incorporated in an internal memorandum, that it was the General Counsel who had “full and final authority and responsibility on behalf of the Board for initiating and prosecuting injunction proceedings”

The Court rejected the argument that the “understanding” between the Board and the General Counsel accurately interpreted the statute and held, instead, that the power to seek injunctive relief lay in the Board. It then turned to the question whether the Board could properly delegate this power. In considering this question, the court noted that the Board appeared to have delegated it twice: once, to its Regional Directors in Section 202.35 and, second, to the General Counsel in the “Memorandum of Understanding.”

Before reaching the question [of the Board’s authority to delegate], it should be pointed out that the Board has acted not once, but twice, with reference to a sub-delegation of its functions under Section 10(j). In the first place, it has adopted the aforementioned Rule 202.35, which directs the regional director to make application to the district court for appropriate interlocutory relief whenever he

⁸ The Board’s statement was *not* a regulation subject to the notice and comment procedure of the Federal Administrative Procedure Act. It was explicitly issued pursuant to Section 3(a)(2) of the APA, which required “[e]very agency [to] separately state and . . . publish in the Federal Register * * * (2) statements of the general course and method by which its functions are channeled and determined. . . .” See, 79th Cong. Ch. 234, 60 Stat. 237. Such Statements were required to be published for informational purposes only (Section 3 was specifically denominated “Public Information.”) Rules promulgated pursuant to it did not have to be noticed and submitted for comment under Section 4, which exempted “rules of agency . . . procedure” (unless such notice and comment were specifically required by agency statute.) See, Attorney General’s Manual on the Administrative Procedure Act, Department of Justice, 1947, p. 194.

“deems it advisable.” Secondly, during argument by counsel for the petitioner it was disclosed that the members of the Board and the General Counsel have entered into a “memorandum of understanding” which in pertinent part states: “General Counsel shall exercise full and final authority and responsibility on behalf of the Board for initiating and prosecuting injunction proceedings as provided for in Sections 10(j) and 10(l).” It would seem that as a result of these actions by the Board there co-exist two delegations of the same function; one by a rule adopted in accordance with Section 6 of the Act, which gives the Board the authority to make rules and regulations ‘as may be necessary to carry out the provisions’ of the Act, and the other contained in an unpublished intra-agency agreement between the General Counsel and the Board.⁹

Observing that even though the Board was given the authority to appoint regional directors under Section 4 of the Act, the fact the Section 3(d) vested supervision over all officers and employees of the regional offices in the General Counsel also meant that the perceived conflict between Section 202.35’s delegation of 10(j) authority to the regional directors and the Memorandum of Understanding’s delegation of that authority to the General Counsel was only apparent: the delegation to the regional directors was, in effect, a delegation to the General Counsel. The court thus upheld the delegation.

Since *Evans*, the national Board has withdrawn and announced delegations to its General Counsels, and since *Evans*, there has been no discussion of any internal understanding being necessary for a complete and effective delegation: they are effective upon appropriate announcement by the Board.

As I advised Senator de León and the Rules Committee during my confirmation hearing, it is this Board “on which [the Legislature] conferred the authority to develop and apply fundamental [state] labor policy”, to balance the legitimate competing interests recognized by the ALRA, *Beth Israel Hospital v National Labor Relations Board* (1978) 437 US 500, 501, and it is this Board which is supreme within the agency on all interpretations of our labor law. That is why we must be forever vigilant about speaking for the Agency with one voice whenever there is contact with the judiciary. This is the role which Congress gave to the NLRB and which the Legislature has given this Board in the ALRA. In no arena is this more vital than that of temporary injunctive relief.

⁹ *Evans*, supra, at p. 888