

Congress of the United States

Washington, D.C. 20515

June 27, 2022

Delivered via Email

The Honorable Jennifer Abruzzo
General Counsel
National Labor Relations Board
1015 Half Street, SE
Washington, D.C. 20570-0001

Dear Ms. Abruzzo:

On April 7, 2022, you issued Memorandum 22-04, “The Right to Refrain from Captive Audience and other Mandatory Meetings.” The memorandum discards decades of case law and National Labor Relations Board (NLRB or Board) precedent that supports an employer’s First Amendment right to educate its employees about unionization. Instead, your memo characterizes such constitutional rights as “at odds with fundamental labor law principles, [the Board’s] statutory language and our congressional mandate.” We write once again to object to your flagrant disregard of applicable case law and precedent and to express our grave concern with your unconscionable efforts to further a partisan objective.

The memo is replete with inaccurate, unsupported claims and glaring omissions. For example, it inaccurately claims that mandatory meetings in which an employer expresses anti-union views “inherently involve an unlawful threat that employees will be disciplined or suffer other reprisals if they exercise their protected right not to listen to such speech.”¹ Without specific evidence of coercion or threats, you generally assert that the Board was “incorrect” in allowing employers to communicate anti-union views in mandatory meetings. The memo claims such meetings are contrary to “basic principles of labor law.” Most ominous is your general characterization of mandatory employer sponsored information meetings as a “license to coerce.”

Such assertions and characterizations run contrary to Board precedent and Congress’s statutory command. The ability of an employer to communicate its views on unionization via mandatory meetings is a long-standing right that has been upheld by the Board for decades and is embodied within the statutory language of the *National Labor Relations Act* (NLRA). Section 8(c) of the

¹ General Counsel Memorandum 22-04, “[The Right to Refrain from Captive Audience and Other Mandatory Meetings](#),” April 7, 2022.

NLRA explicitly states that “the expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of [this Act], if such expression contains no *threat of reprisal or force or promise of benefit*.”² Section 8(c) was codified as an amendment to the NLRA following passage of the *Taft-Hartley Act of 1947*, which aimed to eliminate the disproportionate influence unions imposed on the workplace.³ Embodying as it did the reforms of the *Taft-Hartley Act*, the Board has held that an employer has a long-standing right to communicate its views on unionization under both the legislative history and statutory language of Section 8(c).⁴ For nearly a century, Board and circuit court precedent have held that an employer does not commit an unfair labor practice simply by expressing antipathy toward unions in compelled meetings absent threats of reprisal, acts of intimidation, or promises of benefit.⁵ These decisions were in accordance with the *Taft-Hartley Act*’s legislative purpose of “guarantee[ing] to employers as well as unions the right of free speech,”⁶ and of prohibiting the Board from “constru[ing] utterances containing neither threats nor promises of benefit an unfair labor practice standing alone or as making some act which would otherwise be legal an unfair labor practice.”⁷

The memo cites the Supreme Court’s decision in *NLRB v. Gissel Packaging Co.*⁸ as standing for the proposition that mandatory employer-sponsored meetings unlawfully impair employee choice due to an inherent “inequality of bargaining power” between an employer and employee. As with much of the memo, this citation lacks context and contains convenient omissions. The portion of *Gissel* cited within the memo concerned an employer’s right to resist unionization. In its opinion, the Court clearly held that “an employer’s free speech right to communicate his views to his employees is firmly established and cannot be infringed by a union or a Board.”⁹ While noting the obvious—“that an employer’s rights cannot outweigh the equal rights of the employees to associate freely”—the Court held that “an employer is free to communicate to his

² 29 U.S.C. § 158(c) (emphasis added).

³ See H.R. Rep. No. 510, 80th Cong. 1st Sess., at 45, reprinted in Legislative History at 549, 1947 U.S. Code Cong. Serv. 1135, 1151 (in which the House–Senate conference on H.R. 3020, later enacted as Section 8(c) of the Taft-Hartley Act specifically noted that “[t]he practice which the Board has had in the past of using speeches and publications of employers concerning labor organizations and collective bargaining arrangement *as evidence*, no matter how irrelevant or immaterial, that some later act of the employer had an illegal purpose gave rise to the necessity for this change in the law.”) (emphasis added).

⁴ *Babcock and Wilcox*, 77 NLRB 577, 578 (1948).

⁵ See *NLRB v. Prescott Indus. Prod. Co.*, 500 F.2d 6, 8, 10-11 (8th Cir. 1974) (holding that a discharge of an employee was lawful when employee’s pro-union activity interfered with management’s “right to deliver an anti-union speech”); *Litton Sys. Inc.*, 173 NLRB 1024, 1030 (1968) (holding that “[a]n employee has no statutorily protected right to leave a meeting which the employees were required by management to attend on company time and property to listen to management’s noncoercive antiunion speech”); *Hicks Ponder Co.*, 168 NLRB 806, 811-12, 815 (1967).

⁶ *NLRB v. FW Woolworth Co.*, 214 F.2d 78, 79-80 (6th Cir. 1954).

⁷ Supplemental Analysis of Labor Bill as passed by Conference Committee, submitted by Senator Robert Taft, June 12, 1947, 93 Congressional Record 7002.

⁸ 395 U.S. 575, 617 (1969).

⁹ *Id.*

employees any of his *general* views about unionism or any of his specific views about a particular union, so long as the communications do not contain ‘a threat of reprisal or force or promise of benefit.’”¹⁰

In other words, the Court in *Gissel*, far from asserting that mandatory meetings are presumptively coercive, upheld an employer’s First Amendment rights to speak against unionization, so long as the employer imparts only general views and confines any economic predictions to those based on objective fact to avoid the appearance of impropriety or coercion. We also note the irony of citing *Gissel* to upend decades of Board precedent to suit your personal preferences on employer speech, while also, in a signed brief, seeking to discard *Gissel*’s standard for issuing bargaining orders.¹¹ Such selective and inaccurate invocation of precedent only further undermines public confidence in the Office of the General Counsel.

In previous correspondence, Senator Burr impressed upon you the impropriety of using memoranda to impose policy preferences beyond the Board’s statutory authority. Senator Burr cautioned you that replacing decades of case law and legislative text with one’s own personal views and preferences undermines the Board’s reputation, risks the prospect of frivolous litigation, and distracts the Board from its fundamental mission. During your tenure as general counsel, you have attempted to issue through memoranda what Congress has most purposefully refrained from implementing via statute. Your office has asserted that the Board is endowed with unlimited remedial powers neither contemplated nor envisioned by Congress, and in Memorandum 22-04, you propose to eviscerate 75 years of Board precedent upholding an employer’s First Amendment rights.

Granting the Board nearly unlimited remedial make-whole measures and classifying mandatory employer-sponsored meetings as unfair labor practices were both proposals in the *Protecting the Right to Organize Act* (PRO Act), which Congress has conspicuously chosen not to pass. We do not believe it mere coincidence that you are now attempting to implement these policies via memoranda. Memorandum 22-04 bizarrely refers to 75 years of precedent upholding mandatory employer meetings as an “anomaly in labor law,” yet it fails to acknowledge that such precedent was implemented in response to Congress’s passage of the *Taft-Hartley Act*, a statute enacted by the people’s representatives for the specific purpose of remedying the arbitrary power unions had in the workplace.¹² We do not believe such an omission to be a mere oversight.

While you may prefer passage of the PRO Act along with repeal of the *Taft-Hartley Act*, neither has occurred. It is a violation of separation of powers constitutional principles for any Senate-

¹⁰ Id.

¹¹ [Brief in Support of General Counsel’s Exception to the Administrative Law Judge’s Decision In Support of Respondents](#), Cemex Construction Materials Pacific and International Brotherhood of Teamsters. April 11, 2022.

¹² See Holo-Krome Co. v. NLRB, 907 F.2d 1343, 1347 (2nd Cir. 1990) (holding it improper for NLRB to refer to employer’s lawful expressions of opinion during representation election as a basis for finding antiunion animus as “the 1947 amendments to the NLRA reflect a . . . shift in favor of employer rights.”); Pittsburgh Steamship Co. v. NLRB, 180 F.2d 731, 735 (6th Cir. 1950)(“[Section] 8(c) of the Taft-Hartley Act was specifically intended to prevent the Board from using unrelated non-coercive expressions of opinion on union matters as evidence of a general course of unfair labor conduct “), *aff’d* 340 U.S. 498, 71 S.Ct. 453, 95 L.Ed. 479 (1951).

confirmed executive branch official to implement policy Congress has refused to enact or to ignore existing law simply based on policy preferences. Congress, through carefully crafted legislation, has granted the Board sufficient tools to preserve an employee's right of free association. It is not for the General Counsel to expand or limit its authority as the current occupant personally sees fit.

Therefore, commensurate with our oversight responsibilities and with the assurances you gave the Senate during your confirmation, we request answers to the following inquiries by July 12, 2022. When responding, please include a response below each question rather than in a narrative format.

1. What is the process for drafting published memoranda, and does the Office of the General Counsel consult any outside groups before the issuance of a memorandum? If so, please provide a list of all outside groups consulted.
 - a. Does any official from the White House or other federal agencies, or any other figures aligned with the administration, provide input or advice on the contents of these memos?
 - b. If so, furnish their names as well as any correspondence the Board or Office of the General Counsel has had with administration officials, political appointees, or others.
 - c. Has any member of the Board discussed with you or your staff that your published memos may be pushing the limits of statutory authority? If so, please explain and provide all documents and communications related to such discussions.
2. Please furnish a summary of how these memoranda are crafted, formulated, and issued, from beginning to end.
 - a. Are NLRB career attorneys consulted?
 - b. Do they inform you of applicable precedent?
 - c. All your memos urge implementation of the policy preferences of a variety of liberal interest groups. When drafting them, did you consult with officials, subordinates, or other representative from Harvard University's Labor and Worklife Program, the National Employment Law Project, or any other liberal interest group?
3. In Memorandum 22-04, you characterize the right of employers to hold mandatory meetings against unions—a right that has been enshrined in law for 75 years—as an “anomaly.” Yet you neglected to mention that such a right was enshrined in Board precedent and federal law following passage of the *Taft-Hartley Act* in order to remedy the disproportionate, often intimidating influence unions imposed on the workplace.
 - a. Did your office consult primary and secondary sources concerning the *Taft-Hartley Act* or any court decisions interpreting Section 8(c) before issuing the memo?

- b. How does such a wholesale refusal to recognize and analyze the *Taft-Hartley Act*, passage of which was the impetus for the Board to recognize a right to mandatory employer meetings, not undermine the Board's reputation for impartial legal analysis?
 - c. How is such a refusal not a dereliction of duty on your part as General Counsel who is responsible for interpreting the Board's statutory authority?
 4. As General Counsel, do you not consider circuit court opinions to be binding?
 - a. Does advising the Board to adopt a position directly contrary to circuit court opinion risk further litigation and the waste of taxpayer dollars?
 - b. Were the Board to adopt your position of holding mandatory employer meetings to be an unfair labor practice in violation of Section 7 of the NLRA, would numerous circuit courts of appeal, including the 8th Circuit, disagree with this position?
 - c. Would circuit courts of appeal overturn their binding precedent simply based on the recommendation of an administrative agency?
 5. Memorandum 22-04 cites *Gissel* to support the assertion of fundamental "unequal bargaining power in the workplace" that should prohibit mandatory employer meetings.
 - a. Why did the memo omit *Gissel's* upholding of free speech?
 - b. Why was the Supreme Court's holding not addressed further?
 - c. Was your invocation and inaccurate reliance on *Gissel* to curtail employer speech self-serving when contrasted with your Office's stated position of abandoning adherence to *Gissel's* holding on bargaining orders?
 - d. Taken cumulatively, how does the memo's misuse of *Gissel* not further erode confidence in the General Counsel's Office?
 6. Please provide all documents and communications, including but not limited to draft versions, related to Memorandum 22-04 "The Right to Refrain from Captive Audience and other Mandatory Meetings."

Thank you for your attention to this matter.

Sincerely,



Richard Burr
Ranking Member
Senate Committee on Health, Education,
Labor and Pensions



Virginia Foxx
Ranking Member
House Committee on Education and Labor

The Honorable Jennifer Abruzzo

June 27, 2022

Page 6



Mike Braun
Ranking Member
Subcommittee on Employment
and Workplace Safety



Rick Allen
Ranking Member
Subcommittee on Health, Employment,
Labor and Pensions