

52nd Street Hotel Associates d/b/a Novotel New York and Hotel and Motel Trades Council, AFL-CIO, Petitioner. Case 2-RC-21475

July 8, 1996

SUPPLEMENTAL DECISION AND
CERTIFICATION OF REPRESENTATIVE

BY CHAIRMAN GOULD AND MEMBERS BROWNING
AND COHEN

The major issue in this case is the one presented by Objection 1: Did the Petitioner engage in objectionable conduct by providing unit employees legal services to investigate, prepare, and file a lawsuit asserting their wage claims under the Fair Labor Standard Act? Relying on Board precedent in *Nestle Dairy Systems*, 311 NLRB 987 (1993), enf. denied sub nom. *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995), the hearing officer recommended that Objection 1 be overruled and that the Petitioner be certified. We agree with the result reached by the hearing officer, but, in view of the contrary decision of the Sixth Circuit in *Nestle*, supra, we take this opportunity to clarify Board law on this issue.

I. PROCEDURAL BACKGROUND

Pursuant to a Stipulated Election Agreement, an election was held December 9, 1994. The tally of ballots shows 70 for and 56 against the Petitioner, with 10 challenged ballots, a number insufficient to affect the results of the election. The Employer filed four objections.

On May 25, 1995, the Board adopted the Regional Director's report recommending that Objections 2 and 3 be overruled, and recommending that a hearing be held on Objection 4.¹ Contrary to the Regional Director, however, the Board found that Objection 1 raised substantial issues warranting a hearing.

On June 23, 1995, Hearing Officer Terry A. Morgan issued a report recommending that Objection 1 be overruled. The Employer filed exceptions and a supporting brief, and the Petitioner filed a brief in opposition to the Employer's exceptions and in support of the hearing officer's report.

On July 3, 1995, the Board scheduled oral argument concerning Objection 1 because it presented important issues in the administration of the National Labor Relations Act (the Act or NLRA). The Board heard oral argument in this proceeding on August 7, 1995, in Chicago, Illinois, from the Employer, the Petitioner,

¹The issue Objection 4 raises is whether the Petitioner impermissibly promised employees that if the Petitioner won the election, employees would receive credit under the Petitioner's pension plan for the years they had worked for the Employer. As set forth infra, we agree with the hearing officer's recommendation that Objection 4 be overruled.

and the following amici curiae: the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO); the Council on Labor Law Equality (COLLE); the United Mine Workers of America (UMWA); and the Service Employees International Union, AFL-CIO, CLC (SEIU).²

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

II. FACTUAL BACKGROUND

In September 1994,³ the Petitioner commenced an organizing drive among hotel workers employed by the Employer, Novotel New York (the Employer or Novotel). Complaints of alleged irregularities regarding the Employer's payment of overtime wages were received by the Petitioner from employees.⁴ The Petitioner thereafter began an investigation into the wage and overtime payment practices of the Employer. The investigation included interviewing employees, and reviewing pay stubs, work schedules, and written work agreements between the Employer and its employees.

On October 6, the Petitioner filed a representation petition seeking an election in a unit of hotel workers employed by the Employer. On October 25, the Petitioner delivered a letter to the Employer's general manager asserting that the Employer was violating the Fair Labor Standards Act (FLSA)⁵ by failing to pay employees overtime pay for all hours worked in excess of 40 hours per week. The Petitioner distributed copies of the letter to unit employees. The following day, the Employer distributed a flier to its employees stating that its wage policies were in compliance with the law, and urging employees to contact management if they believed a mistake had been made in a paycheck. The Petitioner thereafter began interviewing individual employees who claimed they had not been paid required wages and overtime compensation.

On November 7, the Petitioner conducted an organizing meeting with petitioned-for employees. The hearing officer found that at that meeting, the Petitioner's business manager and chief executive officer,

²Amici curiae briefs were filed by the following organizations: International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, AFL-CIO (UAW); the United Food and Commercial Workers International Union, AFL-CIO (UFCW); the UMWA; the SEIU; the American Federation of State, County and Municipal Employees, AFL-CIO (ASFCME); the International Brotherhood of Teamsters (IBT); and COLLE.

³All dates are in 1994.

⁴The Employer has excepted to the hearing officer's finding that a unit employee provided the Petitioner with a tape recording of the Employer's director of human resources acknowledging the alleged wage irregularities. We need not pass on this exception, however, because we do not rely on the tape recording in finding that employees informed the Petitioner of the Employer's allegedly unlawful wage payments.

⁵29 U.S.C. § 201 et seq.

Peter Ward, told employees that an organizing campaign required significant union resources, and that the Petitioner would probably be reluctant to engage in another organizing drive at the hotel.⁶ The issue of the FLSA lawsuit was not discussed in this organizing meeting.

A. The Petitioner and the Employees Discuss the FLSA Action

On November 10, the Petitioner held a meeting with the organizing committee, which is composed of employees from the petitioned-for unit. Present at the meeting was Eve Klein, an attorney from the law firm of Richards & O'Neil, who serve as Petitioner's counsel. Attorney Klein discussed a potential FLSA lawsuit with the employees. A number of employees at this time signed consent forms to participate in the FLSA lawsuit, as required by the FLSA.⁷ Following Klein's departure from the meeting, other campaign issues were discussed with the organizing committee.

The Petitioner thereafter distributed business cards to unit and nonunit employees of Novotel stating that the law firm of Richards & O'Neil had been hired by the Petitioner to represent Novotel employees in a lawsuit to recover overtime and other wages illegally withheld by Novotel. The business cards invited employees who wished to be part of the lawsuit, or who would like to talk to the lawyers about the lawsuit, to attend meetings scheduled for November 15 and 16.

The sole issue discussed at the November 15 and 16 meetings was the FLSA lawsuit. The Petitioner's counsel, Klein, met with employees one-on-one regarding their potential FLSA claims. Employees who wished to join the lawsuit could execute consent forms available at the Petitioner's office. Some employees signed consent forms at these meetings.

The Petitioner informed employees at these meetings that a lawsuit would not be filed until a substantial number of employees had joined the lawsuit. Peter Ward, the Petitioner's business manager, and Heather Schneider, an organizer employed by the Petitioner, testified that they further told employees that the lawsuit would be funded by the Petitioner whether or not it won the election, that participation in the lawsuit was not dependent on supporting the Petitioner, and that participation in the lawsuit was open to non-bargaining unit and former employees.

⁶Although the Petitioner characterizes this factual finding as "speculation," it did not file exceptions thereto. We note that the record shows that the Petitioner had conducted an unsuccessful organizing campaign at Novotel several years prior to the instant campaign.

⁷Sec. 216(b) of the FLSA provides, in pertinent part:

No employee shall be a party plaintiff to any such [FLSA] action unless he gives his consent in writing to become such a party and such consent is filed in the court in which such action is brought.

The Petitioner additionally distributed to employees attending the November 15 and 16 meetings a memorandum setting forth information about the lawsuit. The memorandum stated, in part:

What type of remedies are you entitled to?—If you win the lawsuit, you will be entitled to receive back pay in the amount of the overtime or cash wages Novotel failed to pay to you for the past two or three years (three years if Novotel's failure to pay you was willful, which it plainly appears to have been). In addition if Novotel's failure to pay you the overtime and cash wages you were entitled to was willful, you will be awarded an amount equivalent to what you are owed as damages. [Emphasis added.]

The memorandum further detailed the procedures to occur following the filing of a complaint, and advised that any inquiries made by the Employer should be directed to Richards & O'Neil. In the time period following these meetings, employees stopped by the Petitioner's office to ask questions about the lawsuit, and to sign consent forms to participate in the lawsuit.

About November 30, the Employer distributed a letter to employees which was addressed from the Employer to the New York State Department of Labor. The letter invited the latter agency to audit the Employer's payroll practices to determine whether it had violated New York State wage and overtime laws. There is no record evidence regarding the status of this request, or whether such an audit was in fact conducted. The Petitioner's business manager, Ward, testified that he did not consider delaying the FLSA lawsuit pending such an audit. The hearing officer found, rather, that the Petitioner determined that the employees would have more control over the recovery of backpay and damages via the filing of an FLSA lawsuit. Indeed, union organizer Schneider testified that a topic of discussion at the November 15 and 16 meetings regarding the proposed FLSA lawsuit was the alternative of proceeding with an investigation by New York State authorities.⁸

B. The FLSA Lawsuit is Filed

On December 1, Richards & O'Neil filed a lawsuit in U.S. District Court for the Southern District of New York on behalf of certain named Novotel employees. Of the 48 employees who signed consent forms and participated in the lawsuit, 16 were members of the Petitioner's organizing committee, and 5 were nonunit

⁸Schneider testified that the Union advised the employees that the FLSA lawsuit was preferable because damages are not available under the administrative proceeding, and "that they would be better represented filing a lawsuit and having an attorney representing them than going down and filing a case on their own with some lengthy government bureaucracy where the case would probably take years to be heard."

or former employees. The Union did not file the consent forms with the court until several weeks after the lawsuit was filed, however, because of the fear expressed by employees that the Employer could discover the identity of the employees participating in the lawsuit by examining the consent forms.⁹

The Employer filed an answer denying the allegations of FLSA violations. The lawsuit was pending in Federal district court at the time of the hearing and the Board's oral argument. The parties stipulated that the Petitioner has been billed by Richards & O'Neil for \$10,653 in legal fees and \$437.80 in disbursements for the FLSA lawsuit for the period of October 1994 to April 1995.

The election was held on December 9, 8 days following the filing of the lawsuit. Sometime prior to the election, the Petitioner distributed campaign literature to employees that included a mock check in the amount of \$3,411.20 payable to "one Novotel Room Attendant," and signed by "Bernie N. Novotel."¹⁰ The Petitioner additionally distributed a flier to employees explaining the overtime claims of Waldorf-Astoria hotel employees represented by the Petitioner, and the Petitioner's success in obtaining backpay for these employees. There was no discussion of the instant FLSA lawsuit in either of these campaign fliers. The Petitioner also distributed a flier inviting Novotel employees to meetings held on December 2 and 6 to "talk freely and openly with real union hotel workers" from the Waldorf-Astoria and other New York City union hotels.

III. THE HEARING OFFICER'S REPORT

The Employer filed timely objections alleging that the Petitioner's conduct impermissibly influenced the outcome of the election. The Employer's Objection 1 asserted that the Petitioner's filing of the FLSA lawsuit and provision of free legal representation constituted the grant of a substantial benefit to employees, and as-

serted further that the Petitioner promised employees monetary recovery from the lawsuit.

The hearing officer recommended that the Employer's Objection 1 be overruled. The hearing officer found that the lawsuit did not constitute an objectionable grant of benefits because the outcome of the lawsuit was uncertain and beyond the Petitioner's control, citing the Board's decision in *Nestle Dairy Systems*, supra, 311 NLRB at 987. The hearing officer likewise found that the Petitioner's campaign literature and pronouncements did not constitute an express or implied promise that the employees would necessarily recover any money as a result of the lawsuit. The hearing officer additionally concluded that the filing of the lawsuit 8 days before the election was not objectionable, citing the testimony of the Petitioner's organizer, Schneider, that the timing of the lawsuit was a function of the completion of the investigation into alleged pay irregularities, receipt of consent forms to participate in the action by a sufficient number of plaintiffs, the preparation of the lawsuit by Richards & O'Neil, and statute of limitations considerations.¹¹

The hearing officer further observed that the Petitioner's maintenance of the lawsuit was permissible under the two-prong test in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 748-749 (1983), in which the Court held that the Board may enjoin the filing of a civil lawsuit as an unfair labor practice only if the lawsuit (1) lacks a reasonable basis in fact or law; and (2) was filed with a retaliatory motive. According to the hearing officer, the lawsuit was brought to compel the Employer to comply with Federal law and has a reasonable basis in fact or law.

Finally, the hearing officer acknowledged that the Board traditionally has found objectionable union grants of substantial and tangible benefits to employees prior to an election, if the benefit granted was one that the employee would not otherwise receive in the course of employment.¹² The hearing officer distinguished that precedent on the ground that here the Union assisted employees in securing benefits already

⁹Union Organizer Schneider testified as follows:

Q. [Did you discuss] whether the consent forms should be filed with the District Court prior to the election.

A. Yes, we had told employees that we wouldn't. Because employees actually had to sign on to this lawsuit individually, some of them were wary of having management find out about it. And so we had told them all along that we wouldn't—first of all, we wouldn't file the lawsuit until enough of them had signed up so that there wouldn't be just a couple, you know, people. And we told them that we wouldn't give management the names of the individuals until after the election.

¹⁰Bernard Rudler is the general manager of Novotel. Peter Ward, the Petitioner's business manager, testified that this flier and "check" concerned the Employer's failure to keep its promise to pay room attendants a flat fee for each extra room they cleaned, and that the amount was calculated based on the assumption that each room attendant cleaned one extra room each work day for the 2-year period during which the Petitioner claimed that the Employer had failed to meet its commitment.

¹¹Schneider testified as follows in response to the question whether the Union had ever considered waiting until after the election to file the lawsuit:

It was discussed . . . were we ready to file for the lawsuit yet, and we wanted to try to get it in before the election, because we were afraid if we waited until after the election, it would look like we were only doing it because we won. And we didn't want to look like the lawsuit was conditioned on the election in any way. And—and we'd already told employees that the lawsuit was completely independent of the election . . . and we had announced it to employees, obviously, in—in early November and mid-November, and so once we had the complaint and everything finalized, we had no reason to hold off on it.

¹²The hearing officer cited *Mailing Services*, 293 NLRB 565 (1989) (medical screenings); *Wagner Electric Corp.*, 167 NLRB 532 (1967) (life insurance coverage); and *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984) (union jackets).

guaranteed them under the Federal law: fair wages and hours as defined by the FLSA. The hearing officer concluded that finding objectionable the Petitioner's aid to employees to secure wage payments required by Federal law would prevent employees from vindicating these rights at the same time they were exercising their Section 7 rights under the Act to have an election to choose whether they would be represented by a union.

IV. CONTENTIONS OF THE PARTIES

A. *The Employer's Exceptions*

The Employer contends that the Petitioner's provision of financial support for the FLSA action violates public policy against a nonparty to a lawsuit funding that lawsuit. The Employer asserts that the Petitioner's conduct violates the common-law doctrine of maintenance, which has been defined as "[m]alicious or officious intermeddling with a suit that does not belong to one, by assisting either party with money or otherwise to prosecute or defend."¹³ The Employer further contends that the Petitioner impermissibly solicited potential plaintiffs to join the lawsuit, in violation of New York State Judiciary Law Section 479.¹⁴

The Employer additionally argues that the free legal representation by a capable law firm provided to employees by the Petitioner constitutes an objectionable preelection grant of benefits. The Employer argues that the employees have been awarded the benefit of having their claims brought and argued by experienced counsel before a judicial body. The Employer submits that these benefits "induce among the voting unit employees a moral sense of duty to vote for the Union as the source of their valuable benefits." The Employer contends that the filing of the lawsuit 8 days before the election plainly would influence the voting of unit employees.

The Employer also asserts that the Petitioner engaged in objectionable conduct by implicitly promising the employees thousands of dollars in monetary awards resulting from the lawsuit. The Employer points to the Petitioner's campaign literature concerning the monetary recovery by other hotel workers represented by the Petitioner, the distribution of the mock paycheck payable to "[o]ne Novotel Room Attendant," and the memorandum distributed at the November 15 and 16

meetings describing the potential monetary recovery from the FLSA lawsuit.

The Employer further contends that finding the FLSA lawsuit to be objectionable would not impair the Petitioner's constitutional right of access to the courts embodied in the First Amendment right to petition the Government for redress of grievances. The Employer asserts that the Petitioner has no First Amendment interest in the FLSA lawsuit because it is not a party to the lawsuit, and further that the Petitioner has no associational standing to assert rights on behalf of Novotel employees because they were not members of the Petitioner at the time the lawsuit was filed.

The Employer lastly argues that this proceeding should be remanded for a de novo hearing before a hearing officer from outside the Board's Region 2, in which jurisdiction this case arose. The Employer asserts that the hearing officer was biased because she was unduly influenced by the prior decision of the Regional Director for Region 2, who supervises and evaluates the hearing officer, recommending that Objection 1 be overruled without a hearing. The Employer accordingly asserts that the Regional Director erred in denying its prehearing request that a hearing officer from another Board Regional Office be assigned to hear the case.

B. *The Petitioner's Response*

The Petitioner argues that its conduct is not objectionable under the rule articulated by the Board in *Nestle Dairy Systems*, supra, 311 NLRB at 987. The Board held in *Nestle* that the union's filing, during the critical period, of a RICO¹⁵ lawsuit against the employer on behalf of petitioned-for employees was not objectionable conduct, and that neither the lawsuit nor the costs attendant to its filing constituted a substantial benefit to employees. The Petitioner asserts that *Nestle* is dispositive of Objection 1, and urges the Board to adhere to that decision. The Petitioner further argues that its conduct here is not objectionable even under the standards articulated by then Chairman Stephens in his dissenting position in *Nestle*.¹⁶

The Petitioner additionally argues that the provision of legal services during the critical period was not a benefit because the legal representation was provided to enforce the existing rights of employees to receive wages as required by the FLSA. Thus, the provision of aid to vindicate these legal rights is distinct from the objectionable provision of benefits such as life insur-

¹³ *Black's Law Dictionary* (revd. 4th ed.)

¹⁴ Sec. 479 of the New York Judiciary Law (McKinney's 1983) provides:

It shall be unlawful for any person or his agent, employee or any person acting on his behalf, to solicit or procure through solicitation either directly or indirectly legal business, or to solicit or procure through solicitation a retainer, written or oral, or any agreement authorizing an attorney to perform or render legal services, or to make it a business so as to solicit or procure such business, retainers or agreement.

¹⁵ The Federal Racketeer Influenced and Corrupt Organizations Act of 1970, 18 U.S.C. § 1961 et seq.

¹⁶ The Petitioner accordingly notes, inter alia, that the instant lawsuit was filed 8 days before the election as compared to 1 day before the election in *Nestle*, and that the Petitioner did not link the lawsuit with exhortations to vote for the Petitioner.

ance¹⁷ or medical screenings,¹⁸ because employees are not entitled to such benefits under Federal law as an incident of their employment. The Petitioner additionally contends that the lawsuit cannot constitute a promise of benefits because the outcome of the lawsuit is remote in time and outside the Petitioner's control.

The Petitioner further maintains that Supreme Court jurisprudence establishes that organizations which bring or financially support lawsuits seeking to vindicate the legal rights of their members or nonmembers are engaged in a constitutionally protected form of free speech safeguarded by the First Amendment, citing *NAACP v. Button*, 371 U.S. 415 (1963); *Railroad Trainmen v. Virginia Bar*, 377 U.S. 1 (1964); *Mine Workers District 12 v. Illinois State Bar Assn.*, 389 U.S. 217 (1967); and *In Re Primus*, 436 U.S. 412 (1978). Based on this precedent, the Petitioner asserts that the common-law doctrine of maintenance is inapposite to this proceeding.¹⁹ The Petitioner argues that its First Amendment right of access to the courts—and that of Novotel's employees—would be infringed by a rule deeming objectionable the filing of a lawsuit during the critical period. The Petitioner likewise asserts that such a rule would restrain the filing of charges with the NLRB, the Department of Labor, or the Occupational Safety and Health Administration. The Petitioner emphasizes that its provision of legal services is constitutionally protected activity that serves not only the interests of Novotel employees in securing compliance with the FLSA, but additionally vindicates the interests of the Petitioner and its membership by ensuring that nonunion companies within the Petitioner's jurisdiction do not gain a competitive advantage over union hotels by operating outside Federal wage laws.²⁰

C. *The Position of the Amici*

1. The AFL–CIO²¹

The AFL–CIO argues that the provision of legal services to employees during the critical period is not objectionable conduct, even if such services are characterized as a substantial benefit. It submits that the reason why it is objectionable to grant a substantial benefit to employees is that such a benefit influences voters without relation to the merits of union representation. This underlying principle is not offended by the

¹⁷ *Wagner Electric Corp.*, supra.

¹⁸ *Mailing Services*, supra.

¹⁹ The Petitioner likewise argues that it did not engage in impermissible solicitation for involvement in the lawsuit, in light of the remedial goals of the FLSA, and the Supreme Court's relaxation of impediments to attorney advertising.

²⁰ The Petitioner additionally argues that its filing and maintenance of the lawsuit is lawful under the Supreme Court's two-prong test in *Bill Johnson's Restaurants*, supra, 461 U.S. 731.

²¹ The brief submitted by the AFL–CIO was also joined by all the labor organizations listed in fn. 2, supra. For ease of reference, this brief will be referred to as the AFL–CIO brief.

Petitioner's provision here of legal services to aid employees in redressing alleged violations of Federal labor law, it is argued, because the "benefit" was directly linked to the merits of the election campaign, and was not an extraneous pecuniary inducement.

The AFL–CIO further maintains that a per se rule against the provision of legal services during an election campaign would be contrary to Federal labor policy. It contends that the rendering of union assistance to employees in bringing a collective action under the FLSA is protected conduct under both Section 7 of the Act and the FLSA, and that an essential purpose of the FLSA is to permit employees to join together to vindicate claims for back wages. According to the AFL–CIO, Congress could not have intended the NLRA to suspend the rights of employees to obtain union assistance during the critical period to enforce their rights under the FLSA.

The AFL–CIO further argues that it is not, and cannot be, objectionable for a union to provide legal assistance to employees in prosecuting unfair labor practice charges during the critical period. The AFL–CIO contends that a union is similarly free during the critical period to investigate employee complaints regarding improper wage payments, advise employees of their rights under the FLSA, and protest the employer's conduct through its campaign literature. The AFL–CIO thus argues that professionals working directly for a union or employed as consultants, such as organizers, economists, auditors, or lawyers, routinely may provide assistance to employees during an election campaign. The AFL–CIO submits that the benefits that attended the Petitioner's provision here of legal assistance are indistinguishable from the benefits arising from services routinely provided to employees by an organizing union during an election campaign.

The AFL–CIO further argues, along with the Petitioner, that the collective activity undertaken by the Petitioner to obtain access to the courts for the FLSA claims of employees is protected by the First Amendment under the *NAACP v. Button*, supra, line of cases.

2. Council on Labor Law Equality (COLLE)

COLLE argues that the conferral of approximately \$11,000 in legal services to the petitioned-for employees must be considered a substantial benefit. It argues that such legal services provided by an experienced law firm are at least as valuable as the conferral of free medical testing²² or \$5-gift certificates,²³ both of which have been found by the Board to be an objectionable grant of benefits. The benefit conferred by having skilled legal representatives pursuing employees' claims is not diminished by the uncertain outcome of litigation because a favorable courtroom result is

²² *Mailing Services*, supra, 293 NLRB 565.

²³ *General Cable Corp.*, 170 NLRB 1682 (1968).

uncertain in all litigation. COLLE accordingly submits that the Petitioner's conduct is objectionable under the Board's traditional standards for evaluating the impact of the conferral of benefits during the critical period,²⁴ and that the Board should not adhere to *Nestle Dairy Systems*, supra.

COLLE further argues along with the Employer that finding objectionable the conferral of free legal representation during the critical period does not infringe the Petitioner's First Amendment right of access to the courts, as the Petitioner was neither suing on its own behalf, nor on behalf of employees it represents under the principle of associational standing. COLLE further argues that neither a union's First Amendment interests, nor the *Button* line of cases, guarantees a union the right to finance a third-party lawsuit during the critical period in a Board election, nor precludes the Board from finding such conduct to be objectionable. COLLE observes that the Board's authority to regulate elections and determine objectionable conduct is not diminished by the Supreme Court's decision in *Bill Johnson's*, supra, which is directed at the Board's authority to condemn a lawsuit as an unfair labor practice. COLLE further emphasizes that the Petitioner remains free during the critical period to file lawsuits or invoke administrative proceedings on its own behalf or on behalf of its members and represented bargaining units, and is also free to do so on behalf of nonmember Novotel employees outside the critical period.²⁵

3. United Mine Workers of America (UMWA) and American Federation of State, County and Municipal Employees (AFSCME)

The UMWA explains that it is committed by its constitution to providing legal assistance to workers for work-related issues, including black lung, mine safety, disability, and pension cases, and that such litigation is undertaken on behalf of both UMWA represented and nonrepresented workers. The UMWA additionally emphasizes that Federal courts have upheld the propriety of its role at nonunion mines as the designated nonemployee safety representative under the Mine Safety and Health Amendments Act,²⁶ even while it is engaging in an organizing campaign at that nonunion mine.²⁷ AFSCME likewise notes that it has initiated FLSA litigation on behalf of employees it is seeking to organize. The UMWA and AFSCME argue, along with the Petitioner and the AFL-CIO, that such

employment-related litigation constitutes Section 7 activity, and that labor unions enjoy a First Amendment right to pursue such litigation on behalf of members, as well as nonmembers and other working people. They argue that this constitutional right of access to the courts cannot be divested because it coincides with the critical period in a Board election.²⁸ They conclude that the public policy underlying both the NLRA and the FLSA require that the Board read these statutes harmoniously in favor of expanding worker rights, so as not to immunize employer illegal activity from challenge during the critical period.

V. DISCUSSION

A. *The Historical Role of Unions in Vindicating the Rights of Workers*

In order to place the issue before us in its proper context, it is important to recognize at the outset that unions have historically undertaken a wide variety of action to protect and advance the rights of workers. Unions have played a central role in efforts to improve workplace safety.²⁹ Unions frequently negotiate collective-bargaining agreements that create programs for identifying and rectifying safety and health issues at the workplace,³⁰ as well as provide safety training and education for their own members.³¹ A union engaged in an organizing campaign may use its expertise in this area to address employees' safety concerns and advise them on methods to improve workplace safety.³²

Unions likewise have a long history of monitoring legislation,³³ lobbying for legislation on a multitude of workplace issues,³⁴ and engaging in a wide variety of litigation on behalf of workers.³⁵ Unions further con-

²⁸ They additionally argue that because the record shows that the instant FLSA action is nonfrivolous, its filing and prosecution is privileged under *Bill Johnson's*, supra.

²⁹ See, e.g., *Protecting Workers' Lives: A Safety and Health Guide for Unions* (1983); Goldsmith & Kerr, *Worker Participation In Job Safety and Health*, *Journal of Public Health Policy*, at 447 (Dec. 1983).

³⁰ Bacow, *Bargaining For Job Safety And Health*, 60-85 (2d ed. 1981).

³¹ *Id.* at 79-81.

³² See, e.g., Perry, *Union Corporate Campaigns*, 10-11 (1987) ("The central issue in that [organizing] campaign [at Consolidated Foods Corporation] was the high reported incidence of tendinitis and related disorders . . . and the adequacy of the corrective actions undertaken to deal with the problem under the terms of a 1981 voluntary agreement between [the company] and the Occupational Safety and Health Administration.").

³³ See, e.g., *AFL-CIO Semi-Annual Status Report on Federal Legislation: Final Summary of the 103rd Congress*, AFL-CIO Department of Legislation (Dec. 1994).

³⁴ Shostak, *Robust Unionism*, 15 (1991) ("Certain unions and locals are guided by the precept that 'only partial solutions are available at the bargaining table. The rest lie . . . in legislative and political action.'") (citation omitted); Ornstein & Elder, *Interest Groups, Lobbying and Policymaking*, 35, 42, 171-173, 180-182 (1978).

³⁵ See, e.g., *Ellis v. Railway Clerks*, 466 U.S. 435, 453 (1984).

²⁴ Citing the four-factor test articulated by the Board in *B & D Plastics*, 302 NLRB 245 (1991).

²⁵ In contrast, the Employer's counsel contended at oral argument that a union's filing of a lawsuit prior to the critical period may constitute objectionable conduct.

²⁶ 30 U.S.C. § 801 et seq.

²⁷ Citing *Kerr-McGee Coal Corp. v. Federal Mine Safety Commission*, 40 F.3d 1257 (D.C. Cir. 1994); and *Utah Power & Light Co. v. Secretary of Labor*, 897 F.2d 447 (10th Cir. 1990).

duct a broad array of worker education and training ranging from craft apprenticeship training and skills upgrading,³⁶ retraining workers to deal with technological change,³⁷ literacy programs,³⁸ training in labor law,³⁹ to assisting workers in efforts to secure employee ownership of plants subject to closure.⁴⁰

Unions engaging in organizational activity likewise focus on educating workers regarding their rights and the ability of unionization to improve their working conditions. Unions thus frequently conduct studies on wage and benefit practices of employers they are organizing in order to demonstrate to employees that unionized workers in the same industry receive greater wages and benefits pursuant to collective-bargaining agreements.⁴¹ Unions additionally study employer financial documents to demonstrate to unrepresented employees that their employer is as profitable as unionized firms in the same industry and thus has the ability to pay union scale.⁴² These economic analyses may include evaluation of the employer's pension, health, and other benefits in order to demonstrate that unionization may improve such benefits for workers.⁴³ Further, during organizing campaigns, unions routinely provide assistance to employees in connection with proceedings before the Board.

Unions engage in this broad range of activity on behalf of both employees they represent, as well as employees they are seeking to organize. Unions engage in this conduct, moreover, to demonstrate to employees their suitability to serve, or continue to serve, as the employees' collective-bargaining representative. As Professor Bok has observed, employees considering unionization seldom possess much direct knowledge concerning the union, its activities, and its potential to bring about better wages and working conditions, while in contrast employees are well aware of the employer's control of wages and working conditions.⁴⁴ Thus, "[t]he decision [of employees] whether or not to support a union depends fundamentally on three questions: Are the conditions within the plant unsatisfac-

tory? To what extent can the union improve on these conditions? Will representation by the union bring countervailing disadvantages."⁴⁵

Accordingly, as an agency with broad administrative experience in conducting representation elections, we recognize that unions engage in a variety of conduct to demonstrate to employees their ability to improve working conditions.⁴⁶ Although it is not the province of the Board to judge the wisdom or effectiveness of conduct undertaken by unions to demonstrate their suitability to represent employees,⁴⁷ we nevertheless acknowledge the historic role that unions play in this effort.

B. Constitutional Protection of Union Conduct to Improve Employee Working Conditions

The Supreme Court has cautioned that the Board should be sensitive to First Amendment values in construing the NLRA. *Bill Johnson's Restaurants*, supra, 461 U.S. at 741. Consistent with *Bill Johnson's*, we find that several Supreme Court decisions addressing the First Amendment rights of free speech, assembly, and access to the courts are relevant to the issue before us.⁴⁸

The Supreme Court has established that unions and their agents enjoy constitutional protection in conferring with employees to discuss unionization and its ability to improve employees' working conditions. "Early in the history of the administration of the Act the Board recognized the importance of freedom of communication to the free exercise of organization rights." *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). The Court accordingly long ago declared that "[t]he right thus 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." *Thomas v. Collins*, 323 U.S. 516, 532 (1945).

⁴⁵ Id. at 49.

³⁶ Shostak, supra at 165-166; Roberts & Wozniak, *Labor's Key Role In Workplace Training: AFL-CIO Report on Training*, 5 (1994) (Joint apprenticeship training committees are formed through collective-bargaining agreements and spend around \$500 million each year to train some 180,000 apprentices and 500,000 journeymen at more than 1000 locations across the United States and Canada).

³⁷ Shostak, supra at 14-15.

³⁸ Id. at 159.

³⁹ Id. at 161-169.

⁴⁰ Olson, *Union Experiences With Worker Ownership: Legal and Practical Issues Raised by ESOPs, TRASOPS, Stock Purchases and Co-operatives*, 1982 Wis. L. Rev. 729 (1982).

⁴¹ Gagala, *Union Organizing and Staying Organized*, 106-113 (1983).

⁴² Id. at 125-129.

⁴³ Id. at 118-123.

⁴⁴ Bok, *The Regulation of Campaign Tactics in Representation Elections Under The National Labor Relations Act*, 78 Harv. L. Rev. 38, 49-55 (1964).

⁴⁶ See, e.g., *Kerr-McGee Coal*, supra, 40 F.3d at 1263-1264 (UMWA officials may serve at a nonunion mine as a designated miners' safety representative under Sec. 813(f) of the Federal Mine Safety and Health Amendments Act of 1977, resulting in the gain of legitimacy and credibility among the miners by assisting them with health and safety issues); and *Thunder Basin v. Federal Mine Safety & Health Review Commission*, 56 F.3d 1275 (10th Cir. 1995).

⁴⁷ See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962) (Act does not prescribe the manner in which employees may choose to spotlight their work-related complaints in order to bring about improvement); and *U.S. v. Hutcheson*, 312 U.S. 219, 232 (1941) (whether union conduct is unlawful under the Clayton Act is not predicated on "any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means").

⁴⁸ We do not believe, however, that the Court's two-prong test in *Bill Johnson's* for determining whether the Board may enjoin a civil lawsuit as an unfair labor practice is directly applicable to this proceeding. The Board is not called on in this representation proceeding to enjoin the FLSA lawsuit as an unfair labor practice.

The constitutional protection afforded union conduct in conferring with employees concerning the potential of unionization to improve working conditions is not limited to the mere narration to workers of the theoretical advantages of self-organization. Rather, the constitutional protection extended to union conduct necessarily includes the opportunity to persuade employees to action and to assist them in doing so. As the Court instructed in *Thomas v. Collins*, supra at 537, in deeming constitutionally protected the efforts of a union official to organize workers, “[f]ree trade in ideas’ means free trade in the opportunity to persuade to action, not merely to describe facts.”

Supreme Court jurisprudence further establishes “that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” *Transportation Workers v. Michigan Bar*, 401 U.S. 576, 585 (1971). The Court has thus held that the First Amendment grants a labor union the right to hire attorneys on a salaried basis to assist its members in the assertion of their legal rights. *Mine Workers District 12 v. Illinois State Bar Assn.*, supra, 389 U.S. at 221–222. The Court has further held that the First Amendment protects the right of union members, through their labor organization, to maintain a program for advising injured members and their dependents to obtain legal advice, and recommending specific lawyers to handle claims arising from their injuries, and that lawyers accepting employment under this constitutionally protected program enjoy a like constitutional protection. *Railroad Trainmen v. Virginia Bar*, supra, 377 U.S. at 8. “The Court has held that the First and Fourteenth Amendments prevent state proscription of a range of solicitation activities by labor unions seeking to provide low cost, effective legal representation to their members.” *In Re Primus*, supra, 436 U.S. at 412. It is accordingly not disputed by any of the parties or the amici that the Petitioner’s funding of workers’ FLSA litigation would be protected by the First Amendment had that funding been provided to its membership.

The Employer and amicus COLLE nevertheless argue that the Petitioner’s provision of legal representation to Novotel employees is not protected by the First Amendment, because at the time the lawsuit was initiated the Novotel employees were not members of the Petitioner nor represented by the Petitioner.⁴⁹ While the Supreme Court has not had occasion to address explicitly whether the First Amendment encompasses a labor union’s financing, as here, of litigation brought by workers who are not members of the union, Supreme Court jurisprudence strongly suggests that

⁴⁹The record establishes that while the majority of the petitioned-for employees were not members of the Petitioner, some of the Novotel employees may have been members of the Petitioner based on their previous employment in union shops.

such First Amendment interests do indeed attach to the Petitioner’s conduct.

The Court’s decisions in the *Railroad Trainmen* and *Mine Workers* cases establishing the First Amendment right of unions to provide legal representation for its members were grounded in the Court’s earlier decision in *NAACP v. Button*, supra, 371 U.S. 415. The Court held in *Button* that the First Amendment protected an NAACP program recommending attorneys to its members and others for school desegregation litigation, where the association paid the lawyers and financed the litigation. *Id.* at 431–438.⁵⁰ The Court underscored in *Button* that the First Amendment protection afforded to the NAACP legal program was not limited to the financing of litigation on behalf of members of the NAACP.⁵¹ Rather, the Court held that the constitutional protection afforded the NAACP legal program encompassed NAACP lawyers, members, and non-member sympathizers involved in the NAACP-funded litigation. *Id.* at 434. The Court specifically warned that the Virginia statute at issue in *Button* was constitutionally defective because it would chill the conduct of any individuals—lawyers, members, or sympathizers—who appeared in or had any connection with litigation supported with NAACP funds. *Id.* at 434–435. Indeed, the dissent in *Button* assailed the majority decision for failing to distinguish between affording constitutional protection to the NAACP for asserting the rights of its members and funding litigation on their behalf, as contrasted with extending such constitutional protection to NAACP involvement with other individuals engaged in litigation involving claims that the organization promoted. *Id.* at 462 (Harlan, J., dissenting). In cases issued subsequent to *Button*, the Court has consistently emphasized that the constitutional protection in *Button* encompassed the “solicitation of prospective litigants, many of whom were not

⁵⁰In *In Re Primus*, supra at 425 fn. 16, the Court described its holding in *Button* as follows:

Whatever the precise limits of the holding in *Button*, the Court at least found constitutionally protected the NAACP program “advising Negroes of their constitutional rights, urging them to institute litigation of a particular kind, recommending particular lawyers and financing such litigation[.]” quoting *Button* at 447 (White, J. concurring in part and dissenting in part). [Emphasis added.]

Our dissenting colleague’s contention that the holding in *Button* was limited solely to the solicitation of litigants, and did not encompass the constitutionally protected right of the NAACP to finance litigation, is accordingly contradicted by the express language of the Court.

⁵¹See *Button*, supra, 371 U.S. at 420 (litigants under the NAACP program may or may not be NAACP members); supra at 428 (NAACP program assists *persons* who seek legal redress of their constitutionally guaranteed and other rights) (emphasis added); supra at 437 (the NAACP urged Negroes aggrieved by the unconstitutional segregation of public schools to exercise their legal rights and to retain the association’s legal staff); supra at 443 (nonmember Negro litigants participated in the NAACP program).

members of the NAACP.” *In Re Primus*, supra at 423–424 (footnote omitted). As the Court stated in *Railroad Trainmen v. Virginia Bar*, supra, 377 U.S. at 7, “attorneys [in *Button*] were actually employed by the association which recommended them, and recommendations were made even to nonmembers.”

We would accordingly be ignoring the language and logic of *Button* if we construed its holding as limiting constitutional protection solely to the provision by the NAACP of legal services to its members. Certainly, the Supreme Court did not articulate such a limitation. Rather, the Court has held that “[t]he common thread running through our decisions in *NAACP v. Button*, *Trainmen*, and *Mine Workers* is that collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment.” *Transportation Workers v. Michigan Bar*, supra at 585. We can discern no requirement in Supreme Court jurisprudence predicating the exercise of such First Amendment rights on membership in the organization.⁵²

In light of the holding in *Button* affording constitutional protection to the financing by the NAACP of litigation brought by nonmembers of the NAACP, and the Court’s specific linkage of *Button* with its jurisprudence involving labor unions, we reject the contention of the Employer and amicus COLLE that the Petitioner here has no First Amendment interest in providing access to the courts for pursuit of the FLSA claims of the nonmember Novotel employees.⁵³ Indeed, as the Court has made clear in *Thomas v. Collins*, supra, that a union’s advocating to nonmembers of lawful means to vindicate their legal rights is protected by the First Amendment, *Button*, supra at 437, the position of the employer and amicus COLLE would paradoxically result in the removal of constitutional protection the moment the union took the next logical step and sought financially or otherwise to assist nonmembers in gaining access to the Courts for vindication of their lawful rights. “It was not by accident or coincidence that the

⁵² See also *Railroad Trainmen v. Virginia Bar*, supra, 377 U.S. at 5 (constitutional protection of union program which offered legal advice to injured union members, as well as their nonmember dependents).

⁵³ Our dissenting colleague disagrees with our analysis, but fails to give appropriate weight to the fact that the Court’s decisions in *Button* and its progeny encompassed nonmembers. Further, contrary to Member Cohen’s assertion, we have not concluded that Supreme Court precedent bestows on the Petitioner “a First Amendment right to finance litigation on behalf of non-member employees during the pre-election period.” (Emphasis added.) Rather, we have concluded that Court precedent strongly suggests that First Amendment interests may inhere to the financing of litigation by labor unions on behalf of members and nonmembers alike. As the Board has been instructed by the Court to be sensitive to First Amendment values when construing the NLRA, *Bill Johnson’s*, supra, 461 U.S. at 741, we believe that it is surely appropriate to take those values into account in deciding whether the Petitioner engaged in objectionable conduct by financing the FLSA litigation during the critical period.

rights to freedom in speech and press were coupled in a single guaranty with the rights of the people peacefully to assemble and to petition for redress of grievances. All these, though not identical, are inseparable.” *Thomas v. Collins*, supra at 530.

C. Statutory Protection of Union Conduct to Improve Employee Working Conditions

“Section 7 [of the Act] affirmatively guarantees employees the most basic rights of industrial self-determination, ‘the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection,’ as well as the right to refrain from these activities.” *Emporium Capwell Co. v. Western Addition Community Organization*, 420 U.S. 50, 61–62 (1975). It is fundamental to the statutory framework of the Act that unions play an integral role in the fulfillment of these Section 7 rights. Indeed, under the Act, unions are employees joining together to exercise their Section 7 rights.⁵⁴

A union chosen as the bargaining representative of employees occupies a central position in the collective-bargaining system created and encouraged by the Act to minimize industrial strife. “National labor policy has been built on the premise that by pooling their economic strength and acting through a labor organization freely chosen by the majority, the employees of an appropriate unit have the most effective means of bargaining for improvements in wages, hours, and working conditions.” *NLRB v. Allis-Chalmers Mfg. Co.*, 388 U.S. 175, 180 (1967).

The statutory framework of the Act likewise establishes that unions play a central role in assisting employees whom they do not represent in the exercise of their Section 7 rights. The Court has thus warned that employee “organization rights are not viable in a vacuum.” *Central Hardware Co. v. NLRB*, 407 U.S. 539, 543 (1972). Rather, the Court has emphasized for decades that “[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.” *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 113 (1956); *Central Hardware*, supra, 407 U.S. at 543; and *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 533 (1992). The Supreme Court has thus specifically held that the guarantees of Section 7 “include[] both the right of union officials to discuss organization with employees, and the right

⁵⁴ Sec. 2(5) of the Act defines a “labor organization” in terms of two basic requirements: first, there must be “an organization in which employees participate; and second, it must exist for the purpose . . . of dealing with employers concerning wages, hours, and other terms and conditions of employment.” *Alto Plastics Mfg. Corp.*, 136 NLRB 850, 851 (1962).

of employees to discuss organization among themselves.” *Central Hardware Co. v. NLRB*, supra at 542. Indeed, the Court has explained that labor union organizers possess Section 7 rights derivative from employees they are seeking to organize, but do not currently represent. *Lechmere*, supra at 533.

The essential role of union conduct to assist workers in the exercise of their Section 7 rights to better their working conditions is accordingly fundamental to the statutory scheme of the Act.

D. The Petitioner’s Provision of Legal Services to Novotel Employees was Protected by the First Amendment and the NLRA

At the inception of the organizing campaign, complaints of alleged irregularities regarding Novotel’s payment of overtime wages were received by the Petitioner from employees. Consistent with the role unions have traditionally played in the American labor movement, the Petitioner discussed these complaints with employees it was seeking to represent, addressed the complaints in its campaign literature, and advised the employees how the collective power of unionization could aid the employees in pursuing their wage claims. There can be no dispute that this initial union conduct was statutorily and constitutionally protected. *Central Hardware Co. v. NLRB*, supra at 542; and *Thomas v. Collins*, supra at 532–534.

The Petitioner, thereafter, dispatched its counsel to discuss with employees legal redress to rectify their wage claims. The Petitioner’s conduct in explaining to Novotel employees their FLSA rights and urging them to seek redress via the FLSA lawsuit remained statutorily and constitutionally protected, as the Petitioner was not limited to merely describing the FLSA to Novotel employees. Rather, the Petitioner was privileged to advocate lawful means of vindicating legal rights under the FLSA and to persuade the employees to act regarding their wage complaints. *Thomas v. Collins*, supra at 537; and *Button*, supra at 437.

Thereafter, 48 Novotel employees agreed that they wished to join together to seek legal redress for their wage claims, and thereby engaged in protected, concerted activity under Section 7 of the Act. The Board and the courts have long held that conduct of employees to vindicate rights to payment for overtime work, and availing themselves of the safeguards of the Fair Labor Standards Act, is protected, concerted activity under Section 7 of the Act. See, e.g., *Moss Planing Mill Co.*, 103 NLRB 414, 418–419 (1953), enf. 206 F.2d 557 (4th Cir. 1953); *Poultrymen’s Service Corp.*, 41 NLRB 444, 462–463 (1942), enf. 138 F.2d 204, 210 (3d Cir. 1943); *Lion Brand Mfg. Co.*, 55 NLRB 798, 799 (1944), enf. 146 F.2d 773 (5th Cir. 1945); *Cristy Janitorial Service*, 271 NLRB 857 (1984); *Triangle Tool & Engineering*, 226 NLRB 1354, 1357 fn.

5 (1976); *Joseph De Rario, DMD, P.A.*, 283 NLRB 592, 594 (1987); and *Nu Dawn Homes*, 289 NLRB 554, 558 (1988). As the Board stated long ago in *Moss Planing Mill Co.*, supra at 419:

[Employees] Wynne and Speare acted in concert for their mutual aid and protection in prosecuting their wage claims under the wage and hour law. The right to engage in such concerted activity, whether or not associated with a particular labor organization, is guaranteed by Section 7 of the Act. [Footnote omitted.]

Indeed, the Court has made clear that Section 7 of the Act extends to employee efforts “to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Section 7 thus specifically affords protection to employees “when they seek to improve working conditions through resort to administrative and judicial forums.” *Id.* at 566. The Court in *Eastex*, supra, underscored that the express language of Section 7 protects concerted activities for the broad purpose of “mutual aid or protection,” in addition to concerted activity for “self-organization” and “collective bargaining.” *Id.* at 565.

Exercising its First Amendment rights under *Button*, supra, and its progeny, the Petitioner thereafter provided the funding for its counsel to investigate, prepare, and file the FLSA lawsuit brought by the 48 Novotel employees. The Petitioner thus provided critical assistance to these employees who had joined together for their mutual aid and protection through resort to a judicial forum. That the employees were unlikely to have initiated the lawsuit themselves is apparent from the record evidence before us, due to lack of familiarity with legal remedies and lack of financial resources. Their attempt to engage in fundamental Section 7 activity to improve their working conditions by pressing their wage claims through resort to a judicial forum might well have been fruitless without union assistance. This circumstance starkly illustrates the basic statutory scheme of the Act that employees have the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection, and that unions assist employees in exercising their Section 7 rights. The Petitioner here did precisely what the Act intended labor organizations to do: it aided employees engaged in concerted activity. As Chief Justice Hughes declared in affirming the constitutionality of the Labor Act in *NLRB v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 33 (1937):

Long ago we stated the reason for labor organizations. We said that they were organized out of the necessities of the situation; that a single employee was helpless in dealing with an employer; that he

was dependent ordinarily on his daily wage for the maintenance of himself and family; *that if the employer refused to pay him the wages that he thought fair*, he was nevertheless unable to leave the employ and resist arbitrary and unfair treatment; *that union was essential to give laborers opportunity to deal on an equality with their employer.* [Emphasis added.]

Our dissenting colleague is willing to “assume arguendo” that the employees had a Section 7 right to “listen to the Petitioner’s advocacy of a lawsuit,” but is unwilling to accord any statutory protection to the legal assistance the Union afforded the employees that enabled the lawsuit to be filed. We find no basis in law or policy for the dissent’s wooden construction of the Act.

Contrary to our dissenting colleague’s position, more than 50 years ago the Board held that the Act protected the activity of four employees who filed lawsuits against their employer under a state wage statute. *M.F.A. Milling Co.*, 26 NLRB 614, 622–627 (1940). The Board specifically found that these lawsuits were filed “through the Union’s attorney.” *Id.* at 626.

Similarly, in *Moss Planing Mill*, supra, 103 NLRB at 418, the Board held that the Act protected the activity of two employees who “enlisted the assistance of the Union to process their wage claims against the Respondent.” The union did not merely “advocate” that the employees file wage claims; the Board specifically found that “the Union presented their wage claims to the wage and hour office.” *Id.* In enforcing the Board’s Order, the Fourth Circuit also took note of the fact that the two employees “sought the aid of the union in presenting claims against the company under the wage and hour law.” 206 F.2d 557, 559 (4th Cir. 1953). In words that are clearly applicable to the case before us, the court quoted from Section 7 and held as follows: “*The 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 Act.*” *Id.* (Emphasis added.)

Member Cohen’s approach would sharply curtail a union’s ability to give such aid during an organizational campaign. A union could “advocate” to employees that they are underpaid, but the union would not be permitted to expend funds on a wage survey to establish that the employer’s wage rates are below those of its competitors; a union could “advocate” to employees that their employer can afford a wage increase, but the union would not be permitted to expend funds on a financial analysis of the employer’s profitability; a union could “advocate” to a discharged employee that he file an unfair labor practice charge, but the union would not be permitted to expend funds on an attorney to file a charge on his behalf or to represent him at trial. Our dissenting colleague would thus

relegate the Union’s role during an organizational campaign to essentially that of a mere mouthpiece unable to assist employees in any meaningful way toward the achievement of their goal of improving their terms and conditions of employment. In our view, the dissent’s construction of the statute is contrary to what the Supreme Court has described as a fundamental purpose of the Act, “eliminat[ing] the inequality of bargaining power between employees . . . and employers.” *NLRB v. J. Weingarten*, 420 U.S. 251, 261–262 (1975).

In sum, the Petitioner’s conduct here falls well within labor’s historical role, is protected by the First Amendment to the Constitution, and is blessed by the Act. To hold that the Petitioner’s conduct nevertheless constitutes grounds for setting aside a Board election would be, to say the least, highly anomalous. In the section that follows, we will explain why Board and court precedent does not compel such an incongruous result.

E. The Key Distinction Between the Petitioner’s Conduct and a Union’s Objectionable Grant of Benefits

In light of the statutory and constitutional considerations discussed above, we conclude that the Petitioner’s financing of the employees’ FLSA lawsuit is fundamentally different from conduct condemned in the precedent as an objectionable grant of benefits. Protected union conduct aimed at assisting employees in improving their terms and conditions of employment, or otherwise improving their lot as employees, is clearly distinguishable from objectionable union conduct which bears no connection to the employer-employee relationship and does not fall under the aegis of the Act and the First Amendment.⁵⁵

Under established precedent, it is, of course, clearly objectionable for a union to explicitly buy votes by giving employees cash payments.⁵⁶ Such a conferral of benefits is totally unrelated to any effort to improve employee conditions of employment and constitutes

⁵⁵ Member Cohen misstates our key distinction when he claims that we would find union conduct to be unobjectionable if it merely “relates to” or “affects” terms and conditions of employment. As discussed *infra*, a payment to Novotel employees of the back wages allegedly due them or the outright grant of any job-related benefit would constitute an objectionable attempt to buy votes, even though such a payment or benefit would “relate to” or “affect” terms and conditions of employment.

⁵⁶ See *Revco D.S., Inc. (DC) v. NLRB*, 830 F.2d 70, 72 (6th Cir. 1987) (union offer of \$100 for a pronoun vote); *General Cable Corp.*, supra, 170 NLRB 1682 (\$5 gift certificate to employees by the union before the election was an objectionable inducement to vote for the union); and *Teletype Corp.*, 122 NLRB 1594 (1959) (payment of money by rival unions to those attending pre-election meetings constituted objectionable conduct).

nothing less than an attempt to corrupt the election process.

A second category of impermissible union conduct is the one addressed by the Supreme Court in *NLRB v. Savair Mfg. Co.*, 414 U.S. 270 (1973). In *Savair*, the Court held that the union's preelection offer to waive initiation fees to employees who agreed to sign union recognition slips as a show of preelection support constituted an impermissible inducement. The Court's rationale was two fold. First, the Court reasoned that the union could point to the recognition slips and paint a false portrait of employee support for the union. Second, the Court was concerned that employees who signed the slips might then feel obliged to carry through on their stated intention to support the union, even though the slips were in fact signed to obtain the fee waiver. 414 U.S. at 277-278.

The latter rationale of *Savair*, supra, forms the basis for a third, more general category of cases in which the union has conferred on "potential voters a financial benefit to which they would otherwise not be entitled." *Mailing Services*, supra, 293 NLRB 565. The grant of such a benefit "subjects the donees to a constraint to vote for the donor union." *Wagner Electric Corp.*, supra, 167 NLRB at 533. In *Mailing Services*, supra, for example, the Board found objectionable the union's preelection provision of free medical screenings to employees. Similarly, in *Wagner Electric*, the Board found objectionable a union's preelection provision of life insurance coverage to employees.

The common thread running through all these cases has been well stated by the Third Circuit in *NLRB v. L & J Equipment Co.*, 745 F.2d 224 (1984). The court explained that the policy prohibiting preelection benefits is "rooted in the idea that an employee's vote should be governed only by consideration of the advantages and disadvantages of unionization in his or her work environment, and not by any extraneous inducements of pecuniary value." *Id.* at 231. The Petitioner's conduct here did not offend this policy because the legal services it provided were integral to the Novotel workers' employment-related concerns and their concerted efforts, protected by Section 7 of the Act, to vindicate those concerns.

The main issue raised by the petitioned-for employees from the inception of the representation campaign was Novotel's wage practices. The Petitioner vigorously pursued these concerns in its campaign literature. The Employer likewise actively rebutted claims of improper wage practices, specifically informing employees that it had invited an audit by the New York State Department of Labor. Indeed, the Employer urged in its campaign literature that unionization was unnecessary because it would promptly investigate and correct any mistake made in an employee paycheck, while the

Petitioner pressed its contention that Novotel's pay practices violated the Fair Labor Standards Act.

The provision of legal services by the Petitioner, thus, directly implicated the chief employment-related concern of Novotel employees, proper payment of wages, and cannot be characterized as a pecuniary inducement extraneous to efforts to vindicate employment-related concerns, in contrast to the objectionable provision of medical testing, life insurance, cash payments, or waiver of initiation fees. Based on the record evidence, we cannot conclude that the effect of the provision of legal services here was to "purchase" votes for the union by giving employees a substantial inducement unconnected to their employment-related concerns and their efforts to improve their working conditions.⁵⁷

Indeed, the legal representation conferred here is similar to a variety of conduct undertaken by unions on behalf of employees they are seeking to organize in order to show their suitability for selection as bargain agent. As we observed at the outset of our analysis, the Board's experience in conducting representation elections establishes that unions frequently confer services during the critical period prior to an election that may reasonably be viewed by employees as beneficial, but which do not constitute an objectionable benefit. Such economic analyses, education, safety advice, and the like, as we described supra, may be the product of organizers, economists, safety experts, or lawyers, retained as consultants or employed directly as union staff members.⁵⁸

⁵⁷ Of course, this would be a very different case if it had been established that the Petitioner granted employees legal services for matters unrelated to their efforts to improve their terms and conditions of employment, such as a divorce proceeding or personal injury lawsuit. See *NLRB v. Madisonville Concrete Co.*, 552 F.2d 168 (6th Cir. 1977) (objectionable conduct found where, prior to the election, the union told an employee that his traffic ticket would be taken care of and an attorney retained by the union appeared in court on behalf of the employee at no charge to him).

Nor has it been shown that the Petitioner conditioned the continued receipt of legal representation on a favorable result in the election. The Petitioner's officials testified without contradiction by any other witness that they assured employees that the lawsuit would be funded by the Petitioner whether or not it prevailed in the election. Although the Employer disputes this testimony by pointing out (1) the failure of the Petitioner to state in its campaign literature the assurance that the lawsuit would continue even if the Petitioner lost the election; and (2) the Petitioner's statement that it would be reluctant to expend more resources on another organizing campaign if the Petitioner lost the election, it has not presented us with any contrary evidence. Indeed, the Employer has presented us with no evidence that the Petitioner told employees that it would cease providing them with legal representation if they did not choose to be represented by the Petitioner.

⁵⁸ Union organizer Schneider testified that "we have lawyers doing research for us constantly during union organizing drives." In this case, for example, the Petitioner directed its counsel to prepare a memorandum to Novotel employees explaining their rights under

Continued

Congress has created the Board as an administrative agency to accumulate specialized knowledge in the field of labor relations, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 488 (1951), and our charge is to apply that knowledge to the infinite variety of workplace controversies that may arise, in a manner that effectuates national labor policy. *Beth Israel Hospital v. NLRB*, 437 U.S. 483, 500–501 (1978); and *NLRB v. Curtin Matheson Scientific, Inc.*, 494 U.S. 775, 786 (1990). Our administrative experience convinces us that these activities do not implicate the long-established proscription against the conferral by a union during the critical period of pecuniary inducements extraneous to employee's efforts to improve their working conditions.

Further, the Board's statutory duty to protect employees' Section 7 rights precludes us from finding that Novotel employees exercising their Section 7 right to form, join, or assist labor organizations may not during the critical period likewise exercise their Section 7 right to engage in concerted activity for their mutual aid or protection in pursuit of their FLSA claims. Employees who thus complain during an organizational campaign of improprieties regarding safety, wage payments, discriminatory employment practices, or, to be sure, unfair labor practices, are protected by Section 7 in seeking resort to administrative and judicial forums for redress. The fundamental statutory role of unions is to assist employees in engaging in such Section 7 activity, and we cannot conclude that the Petitioner's fulfillment of that role during the critical period impaired voter free choice by Novotel employees.⁵⁹ Indeed, the Supreme Court has held that the general equalization of bargaining power between employees and their employer sought by Congress in the enactment of Section 7 of the Act encompasses "the entire process of *labor organizing*, collective bargaining, and enforcement of collective-bargaining agreements." *NLRB v. City Disposal Systems*, 465 U.S. 822, 835 (1984) (emphasis added).

In sum, we would be standing the statute on its head if we were to set the election aside on the ground that the legal services the Petitioner provided the Novotel employees were a "financial benefit to which they

the FLSA, and counsel reviewed that memorandum with employees at the November 15 and 16 meetings.

Schneider further testified that during the organizing drive conducted by the Union immediately prior to that at Novotel, 30 employees were laid off or fired during the campaign, and the Union provided counsel to help represent them in that case. Schneider likewise testified that during a previous organizing drive the Petitioner paid the legal fees for an employee who "felt she was fired for discriminatory reasons."

⁵⁹In his dissent, Member Cohen attempts to draw a sharp distinction between employee interests and union interests. Member Cohen fails to recognize that a central premise of our national labor policy is that employees and unions share the common interest of advancing the rights of workers. See, e.g., Sec. 1 of the Act.

would otherwise not be entitled." *Mailing Services*, supra. Because the Act protects the Petitioner's conduct, we conclude that the legal services it provided Novotel employees were a benefit to which they were entitled under national labor policy.⁶⁰

F. *The Sixth Circuit's Nestle Decision*

In the preceding sections of this decision, we have set forth at length the reasons why we firmly believe that providing legal services to employees to assist them in their efforts to improve their terms and conditions of employment is fundamentally different from other union conduct traditionally analyzed in the case law as an objectionable grant of benefit. We recognize, however, that in *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578 (6th Cir. 1995), the Sixth Circuit examined a union's filing of an employment-related lawsuit under precedent governing preelection benefits. Although we do not agree with the Sixth Circuit's analysis in this respect, we nevertheless submit that our analysis is compatible with that court's, and that the same result would obtain in this and other similar cases even if they were to be analyzed under that court's rationale.

In *Nestle*, supra, the court reviewed at considerable length Board and court cases on the effects of preelection benefits on representation elections. Based on its survey of the law, the court fashioned the following two-part test for determining whether a grant of benefit warrants the setting aside of an election: (1) "Are the articles sufficiently valuable and desirable in the eyes of the person to whom they are offered, to have the potential to influence that person's vote;" and (2) "Also, the potential to influence must be to purchase or *unduly* influence votes, that is, influence votes without relation to the merits of the election." 46 F.3d at 583 (emphasis in original; internal quotations omitted).

Under the *Nestle* test, we would find that the provision of legal services is sufficiently valuable to have the potential to influence voter choice. Because the first part of the test is satisfied, "the question becomes whether the benefits' influence was to 'purchase' votes or was otherwise 'undue.' That is, we ask whether the benefits influenced the vote without relation to the merits of the election." 46 F.3d at 584.

⁶⁰The statutory protection afforded the Petitioner's conduct is what distinguishes this case from *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995), and *Perdue Farms*, 320 NLRB 805 (1996), relied on by our dissenting colleague. In *Sunrise*, supra, the Board found objectionable an offer to provide employees who were not scheduled to work on the day of the election 2 hours of pay to come to work to vote. In *Perdue Farms*, supra, the Board similarly found objectionable an offer and payment of 4 hours of pay to employees not scheduled to work on the day of the election. There is nothing in the Act that protects the conduct of a party to an election in offering and giving employees money merely for showing up at the polls.

For many of the reasons that we have already set forth, we would find that the Union's assistance to Novotel employees was intimately related to the question presented by the election. As discussed above, the benefit at issue here is essentially no different from other union benefits accorded employees during organizational campaigns that the Board has never found to be objectionable, e.g., providing the services of organizers, economists, safety experts, and attorneys. Union assistance of this kind is not objectionable because it demonstrates the kind and quality of services the Union 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.

In *Nestle*, supra, the court specifically recognized the strength of the argument that a union's filing of an employment-related lawsuit "might show that [the union] would vigorously promote employees' rights, and thus make [the union] more worthy of selection." 46 F.3d at 584. On the particular facts of *Nestle*, however, the court ultimately found, for the following two reasons, that the provision of legal services was objectionable.

First, the court said that "the legal fees smacked of a 'purchase' of votes because [the union] had no responsibility to provide the services." *Id.* Second, the court was fearful that employees would vote for union representation "simply out of a desire to continue receiving the benefit." *Id.*

Our decision today addresses both of the court's concerns. First, although the Petitioner here had no legal obligation to file the FLSA lawsuit, we have found that it had a protected right to do so. See the discussion in section V,D, supra. Because the *Nestle* Board did not rest its decision on this ground, the court of appeals had no occasion to consider our rationale that the Petitioner's conduct was not an impermissible attempt to purchase votes, but rather a protected effort to improve employee terms and conditions of employment.⁶¹

⁶¹ We recognize that the Sixth Circuit in *Nestle* found that the unions therein did not have a First Amendment interest in the RICO lawsuit at issue in that proceeding. The issue addressed by the Sixth Circuit in *Nestle*, however, was whether a union has standing to itself assert in court legal claims of employees as their class representative. 46 F.3d at 586. That issue is wholly distinct from whether the Petitioner has a First Amendment interest in providing meaningful access to the courts for Novotel employees by providing them with assistance and funding to bring their own lawsuit. Unlike the circumstance at issue in *Nestle*, the Petitioner here is not and does not seek to be a party to the FLSA lawsuit. Compare *Auto Workers v. Brock*, 477 U.S. 274 (1986) (applying the test for determining whether a union itself has standing to bring suit on behalf of employees); *Food & Commercial Workers Local 751 v. Brown Shoe Co.*, 152 LRRM 2193 (May 13, 1996) (union has associational standing to sue on behalf of employee-members under the Worker Adjustment and Retraining Notification Act).

Second, as stated in footnote 57, supra, the Employer has not presented any evidence in support of its claim that the Petitioner conditioned the continued receipt of legal representation on a favorable result in the election. To the contrary, the Petitioner's officials testified without contradiction that they assured employees that the lawsuit would be funded by the Petitioner whether or not it prevailed in the election.

Contrary to our dissenting colleague, we find that the filing of the lawsuit 8 days before the election did not have the effect of unduly influencing employees in a manner diverting attention from the merits of the election. As the dissent concedes, the hearing officer credited the testimony of the Petitioner's organizer Schneider that the timing of the filing was a function of several factors, including the completion of the investigation of the employees' claims, the receipt of consent forms from a sufficient number of employees, and the preparation of the lawsuit by the Petitioner's counsel. Consistent with Schneider's testimony, the record shows that the Petitioner and its counsel discussed the FLSA lawsuit with employees at the November 15 and 16 meetings, that employees thereafter continued to visit the Petitioner's office to obtain consent forms, and that time was, of course, needed to prepare the necessary legal papers for filing. Schneider further testified that when the suit was ready for filing, the Petitioner decided to proceed, because the Petitioner had told the employees that "the lawsuit was completely independent of the election." As Schneider testified, "[O]nce we had the complaint and everything finalized, we had no reason to hold off on it." Contrary to our dissenting colleague, we find that Schneider's testimony establishes a wholly legitimate explanation for the timing of the filing of the suit on December 1.

Nor does the fact that the employee consent forms necessary to officially "commence" the lawsuit were not filed until several weeks after the election undercut the Union's legitimate reasons for the timing of the filing of the lawsuit. Again, Schneider's credited testimony provides a reasonable explanation. Schneider testified that the Petitioner had made a commitment to employees that the consent forms would not be filed with the court until after the election because of the fear expressed by employees that the Employer could discover the identities of the employees participating in the lawsuit by examining the consent forms.

It is well established that employees have a paramount interest in keeping their union activities confidential from their employer. See, e.g., *National Telephone Directory Corp.*, 319 NLRB 420 (1995), and cases cited therein. Thus, it was entirely reasonable for the Petitioner to delay filing the consent forms until January 1995. Employees could well feel more secure in participating in the lawsuit if their identities were

not disclosed to the Employer until after the expected union victory in the election when the Petitioner might be better able to protect them against any employer reprisals.

Accordingly, for all of the above reasons, we believe that our decision today provides a substantial basis for finding, even under the Sixth Circuit's *Nestle* test, that the Employer's objection should be overruled, because the Petitioner's conduct was related "to the merits of the election."

G. An Objectionable Promise of Benefits did not Occur

The record evidence does not support the Employer's additional contention in Objection 1 that the Petitioner engaged in objectionable conduct by promising Novotel employees thousands of dollars in monetary recovery from the FLSA lawsuit. Our review of the assertions in the Petitioner's campaign literature, some of which we have set forth above, shows that the Petitioner did not explicitly or implicitly promise or claim that monetary recovery was a certainty, but rather specifically stated that recovery was dependent on whether the lawsuit was successful. The Petitioner likewise did not explicitly or implicitly promise or claim that Novotel employees would obtain the same recovery as did the unionized workers at the Waldorf-Astoria hotel. The Petitioner's assertions that a successful lawsuit would bring monetary recovery, and that it had succeeded in this regard in a prior lawsuit, fall short of a promise, implicit or otherwise, of monetary recovery for Novotel employees. Rather, we find that these assertions fall well within the range of campaign propaganda whose merits employees are fully capable of evaluating. See *Midland National Life Insurance Co.*, 263 NLRB 127, 132-133 (1982). We cannot conclude that campaign propaganda distributed by the Petitioner such as a mock paycheck (which may or may not have been related to the FLSA claim), or a listing of the monetary recovery of each Waldorf-Astoria employee, would reasonably be construed by Novotel employees as a promise of monetary recovery.

H. The Additional Contentions of the Employer, COLLE, and the Dissent

We find meritless the Employer's additional contention that the Petitioner's provision of legal services violated the common-law doctrine of maintenance. As the Court made clear in *Button*, supra, "[m]alicious intent was of the essence of the common-law offenses of fomenting or stirring up litigation." 371 U.S. at 439. The Employer has made no attempt to establish malicious intent on the part of the Petitioner here, and our review of the record evidence does not support such a finding. The Court further observed in *Button* that "regulations which reflect hostility to stirring up litigation

have been aimed chiefly at those who urge recourse to the courts for private gain, serving no public interest."⁶² The Petitioner did not stand to earn any monetary gain from the FLSA lawsuit. Rather, the FLSA lawsuit served the public interest vindicated by employee assertion of their rights under Section 7 of the Act and the FLSA.⁶³

We likewise find without merit the Employer's claim that the Petitioner's assistance to Novotel employees is objectionable conduct because it violates the rule against solicitation set forth in New York State Judiciary Law. We recognize that the State of New York has broad powers to regulate the practice of law within its own borders. See *Railroad Trainmen v. Virginia Bar*, supra, 377 U.S. at 6. Nevertheless, because the Petitioner's activity was integral to the Section 7 conduct of Novotel employees, and indeed has constitutional implications, fundamental principles of Federal preemption preclude a finding that New York State Judiciary Law forecloses our holding today.

We further find meritless the Employer's contention that this proceeding be remanded for a de novo hearing before a hearing officer from outside the Board's Region 2. The Employer has not pointed to any conduct or statements by the hearing officer, other than her legal conclusions adverse to the Employer's position, showing that she was biased against the Employer, and we are unable to identify any such evidence in the record before us. Further, the Board followed its normal practice in this proceeding; that is, when the Board reverses a Regional Director's decision that a hearing is not required on objections in a representation case, the Board remands the case to that same Regional Office for a hearing.

We have additionally considered the efficacy of a straightforward rule prohibiting the filing of a lawsuit during the critical period, as suggested by the arguments of amicus COLLE. Our dissenting colleague likewise declares that had the Petitioner "merely waited" until the day after the election to file the FLSA lawsuit, it would have "avoid[ed] the grant of benefit problem before us." Important legal and practical considerations convince us that such a bright line rule is inappropriate.

Initially, even the Employer does not advocate a bright line rule because it took the position at oral argument that the filing of a lawsuit before the critical period may be evidence of objectionable conduct. Furthermore, even if the filing of a lawsuit prepetition were considered nonobjectionable, maintaining that lawsuit would certainly necessitate further legal assist-

⁶² Supra at 440, and cases cited therein at fn. 19.

⁶³ See *Shaffer v. Farm Fresh, Inc.*, 966 F.2d 142 (4th Cir. 1992) (outside counsel for union did not violate Virginia Code of Professional Responsibility by representing nonunion employees, whom union was organizing, in FLSA lawsuit which union financed).

ance during the critical period which undoubtedly would be challenged as objectionable. Similarly, even if the Petitioner's attorney had waited until the day *after* the election to file the lawsuit, all of the other legal services which the Petitioner's counsel had already provided, such as advising the employees, investigating their wage claims, and preparing the FLSA lawsuit, would have been performed during the critical period. Indeed, a so-called bright line rule forbidding the filing of a lawsuit during the critical period in reality would not decide the issue this case raises, because it would not resolve whether the Petitioner's conferral of other legal services during the critical period constituted an objectionable grant of benefits. Finally, because the conduct of Novotel employees to vindicate backpay claims with union assistance was protected by Section 7 of the Act and has constitutional implications, we cannot prohibit such conduct without a specific showing that voter free choice was impaired.⁶⁴

Indeed, the holding here sought by the Employer and COLLE would have a further anomalous result springing from the role of the passage of time in the life of an FLSA lawsuit and of a representation campaign. Recoveries in wage and hour lawsuits may only reach to violations occurring 2 years (or 3 if the conduct was found to be willful) from the filing of the suit,⁶⁵ and the statute of limitations is tolled at the time the complaint and the consent forms are filed with the court.⁶⁶ Thus, a rule forbidding the filing of the lawsuit during the critical period would deprive employees of recovery under the statute of limitations applicable to the FLSA.⁶⁷ Moreover, campaigns and the legal proceedings surrounding them can be protracted (often by factors not within the control of the petitioned-for employees or the Union). Thus, employ-

ees will find themselves with a Hobson's choice, for at least some period of time, between their Section 7 right to seek the legal assistance of the Union and their Section 7 right to seek representation by that Union.

The present case provides an example of this problem. The critical period here began on October 6, 1994, and continues until a valid election has been held.⁶⁸ Because the Employer asks the Board to invalidate the December 9, 1994 election and to order a new one, under Novotel's theory, the critical period is still in effect. If the Union and the employees are required to forgo the filing of an FLSA complaint (and perhaps, as argued by the Employer, even the investigation and preparation of a lawsuit) during this period, these employees would have already lost over 18 months of any available recovery. While the significance of the legal issues in this case has delayed finality longer than is usual in Board proceedings, it is not at all unusual for an employer dissatisfied by an NLRB representational decision to seek circuit court review through a refusal to recognize and bargain with a certified union. Such proceedings could easily eliminate any right to union assistance in pursuing an FLSA remedy if the employees and the union had to delay filing the lawsuit until the election was final to a certainty.⁶⁹ Indeed, a rule prohibiting such a filing on pain of tainting the election might well serve as an incentive to employers to prolong litigation of representation case issues.

I. *The Employer's Objection 4*

The issue presented by Objection 4 is whether during the critical period the Petitioner impermissibly promised Novotel employees that, if the Petitioner won the election, employees would receive credit under the Petitioner's pension plan for the years they had worked at Novotel. On October 11, 1995, Hearing Officer Terry A. Morgan issued a report recommending that Objection 4 be overruled. The Employer filed excep-

⁶⁴ In this regard, *Kalin Construction Co.*, 321 NLRB No. 94 (July 8, 1996) is distinguishable. In that case, we specifically found that the employer's eleventh-hour changes in the paycheck process, for the purpose of influencing the employees' vote in the election, gave it an unfair advantage and had the effect of disturbing the laboratory conditions necessary for a fair election. Under such circumstance, the right of free speech guaranteed by the First Amendment did not bar setting the election aside.

⁶⁵ 29 U.S.C. § 255.

⁶⁶ 29 U.S.C. § 256. See *Perella v. Colonial Transit*, 148 F.R.D. 147, 149 (W.D. Pa. 1991) ("The statutory language makes clear that the filing of the consent may come after the filing of the complaint, but that a claim is not asserted, for purposes of the statute of limitations, until both the complaint and the claimant's individual written consent are filed.") (citations omitted), *affd.* 977 F.2d 569 (3d Cir. 1992), cert. denied 507 U.S. 917 (1993).

⁶⁷ Our dissenting colleague points out that, here, the filing of the lawsuit prior to the election did not toll the statute of limitations because the employee consent forms were not filed until after the election. However, as discussed herein, a delay in the filing of the lawsuit until after the election could still result in its being filed during the critical period (if that period were extended by objections) and ignores the fact that the preparation of the lawsuit occurred during the critical period before the election.

⁶⁸ As a general rule, the period during which the Board will consider conduct as objectionable (the critical period) is the period between the filing of the petition and the date of the election. *Ideal Electric & Mfg. Co.*, 134 NLRB 1275 (1961). If the election is set aside, the critical period for the second election begins running from the date of the first election. *Singer Co.*, 161 NLRB 956 fn. 2 (1966).

⁶⁹ We are thus mindful of the FLSA rights of the Novotel employees implicated in this proceeding, consistent with the Supreme Court's admonition that the Board should accommodate other statutory objectives when administering the NLRA. "[T]he Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives. Frequently, the entire scope of Congressional purpose calls for careful accommodation of one statutory scheme to another . . ." *Southern Steamship Co. v. Labor Board*, 316 U.S. 31, 47 (1942). Indeed, we are cognizant that "[t]he Fair Labor Standards Act . . . is part of the social legislation of the 1930's of the same general character as the National Labor Relations Act[.]" *Rutherford Food Corp v. McComb*, 331 U.S. 722, 723 (1947).

tions and a supporting brief, and the Petitioner filed a brief in opposition to the Employer's exceptions and in support of the hearing officer's report. We have reviewed the record concerning Objection 4 in light of these exceptions and briefs and we adopt the hearing officer's findings and recommendations with regard to Objection 4.

Although the record evidence establishes that the Petitioner's pension plan grants newly organized employees credit for their past service with their employer, the record also establishes that this pension credit is only applicable if that newly organized employer agrees in collective-bargaining negotiations to take part in the Petitioner's pension plan. The Employer contends that the Petitioner omitted this latter fact when explaining its pension benefits to employees, and thereby misled employees by promising them pension service credit contingent simply on the Petitioner's victory in the election and not dependent on the parties' collective-bargaining negotiations. The Employer presented several witnesses to support this contention, including Novotel employees Velez, Pazmino, Osei-Owusu, and Vira. The hearing officer discredited the testimony of the Employer's witnesses.

The Employer has excepted to the hearing's credibility findings. The Board's established policy is not to overrule a hearing officer's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Barton Nelson, Inc.*, 318 NLRB 712 (1995); and *Stretch-Tex Co.*, 118 NLRB 1359, 1361 (1957). We have carefully reviewed the record and find no basis for reversing the findings.⁷⁰

The hearing officer's finding that employees were not objectionably promised pension service credit is buttressed by the record evidence establishing that the campaign literature of both the Petitioner and the Employer consistently emphasized that all aspects of the employees' terms and conditions of employment, including pension benefits, were subject to negotiations if the Petitioner won the election. Indeed, both employees Pazmino and Vira, on whose testimony the Employer relies in support of Objection 4, testified that they understood, based on the parties' campaign representations, that union pension benefits could only be provided on contractual agreement by the parties.⁷¹

⁷⁰ We note that the hearing officer based her recommendations "[u]pon the entire record of this case, including [her] observations of the demeanor of the witnesses." The Employer's contention that the credibility determinations of the hearing officer had no basis in a reevaluation of the demeanor of the witnesses is accordingly meritless.

⁷¹ Pazmino testified as follows on cross-examination:

Q. And do you remember the employer in the movie [shown by Novotel to employees 3 days before the election] specifically saying that nothing the Union has promised happens automatically, it's all subject to negotiation?

A. I remember.

We further find without merit the Employer's additional contentions in support of Objection 4. We cannot agree with the Employer's assertion that the testimony of its witnesses, Velez, Pazmino, Osei-Owusu, and Vira, was mutually corroborative and therefore should have been credited by the hearing officer. Each of these witnesses testified about different incidents, and we are unable to find corroborative testimony by witnesses describing separate and distinct events. Nor can we find merit in the Employer's contention that the hearing officer erroneously found that Osei-Owusu testified that a union official described to her the Union's pension benefits, while in the same conversation stating that the Petitioner needed to "win big" to secure such benefits at the bargaining table. The record shows that Owei-Owusu did in fact so testify on cross-examination.⁷²

We accordingly find the Employer's exceptions to be meritless, and we adopt the hearing officer's recommendation that Objection 4 be overruled.

Conclusion

This proceeding implicates two fundamental duties of the Board: to ensure the free choice of bargaining representatives; and to protect the right of employees to engage in or refrain from engaging in self-organization and other concerted activities for their mutual aid or protection. We believe our holding today effectuates each of these statutory goals. Being ever mindful of the Supreme Court's instruction to "appraise carefully the interests of both sides of any labor-management controversy[.]" *NLRB v. Steelworkers (Nutone, Inc.)*, 357 U.S. 357, 362-363 (1958), we have done so today and find, for all the above reasons, that the Employer's

Q. So after you saw that movie, Ms. Pazmino, didn't you understand that union pension benefit wouldn't be provided to you unless a contract was negotiated.

A. Yes, I always feel that there had to be a contract had to be made [sic], a contract had to be made.

Q. So then on December 6th, you knew that [the] union couldn't give you pension benefits upon winning the election. It needed a contract.

A. Yes, I knew.

Vira likewise testified on cross-examination as follows:

Q. [A]t the first [union] meeting you went to, you understood that certain benefits like sick days, like wages, medical, pension had to be negotiated in a contract.

A. Yes.

Q. Didn't you remember at the second [union] meeting you went to with the union that benefits such as wages holidays, medical benefits, pension, had to be agreed to in a contract.

A. Yes.

⁷² The following exchange occurred:

Q. The question was that [the union official's] statement to you that we have to win big was separate from his statements about the pension.

A. It was the same day he talked to me.

Q. The same conversation?

A. The same conversation.

Objections 1 and 4 should be overruled, and that a certification of representative should issue.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for Hotel and Motel Trades Council, AFL-CIO, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

INCLUDED: All full-time and regular part-time employees of the Employer employed at its facility at 226 West 52nd Street, New York, New York including housekeeping attendants, on-call housekeeping attendants who worked an average of at least 4 hours per week during the preceding calendar quarter, lobby service agents, lead lobby service agents, guest service agents, guest service agent interns, lead guest service agent, front office coordinator, guest relations coordinator, night auditor, night manager, commis de cuisine, first commis de cuisine, tournant, utility persons, cashier/hostesses, buffet persons, banquet housemen, chef de rang, commis de rang, mini bar attendant, bartenders, general maintenance mechanics and lead engineers. *EXCLUDED:* All Accounting Department employees, all Sales department employees, all managerial employees (including General Manager, Director of Operations, Food and Beverage Director, Human Resources Director, Engineering and Housekeeping Director, Front Office and Guest Services Director, Chef de Cuisine, International General Manager Trainee, Director of Sales, National Director of Sales, Store Room Manager, Executive Secretary), house officers, on-call housekeeping attendants who did not work an average of at least 4 hours per week during the preceding calendar quarter, all other interns, and guards, professional employees and supervisors as defined in the Act.

MEMBER COHEN, dissenting in part.¹

In *Mailing Services*, 293 NLRB 565 (1989), a case that my colleagues do their best to deemphasize, the Board summarized the law with regard to union grants of benefits as follows:

The Board has long held that a Union's actual grant of benefits to potential members during the critical period is "akin to an employer's grant of a wage increase in anticipation of a representation election . . . [which] subjects the donees to a constraint to vote for the donor union."

. . . .

¹I join my colleagues in adopting the hearing officer's recommendation that the Employer's Objection 4 be overruled.

Although a Union may *promise* an existing benefit to new members if its receipt is not conditioned on the recipient's demonstration of preelection support, . . . it is, like an employer, barred in the critical period prior to the election from conferring on potential voters a financial benefit to which they would otherwise not be entitled.

. . . .

We do not condemn a Union's efforts to make itself "more attractive as a candidate for election," but we do require that its methods of self-enhancement exclude the direct conferral of substantial benefits on its target audience during the critical period.

Id. at 565-566 (emphasis in original, citations omitted).

Notwithstanding these principles, and maintaining that they are merely "clarify[ing] Board law," my colleagues today sanction a union's grant of thousands of dollars in legal services to unit employees, only 8 days before a Board election. I would adhere to the Board's traditional principles and find that such a grant of benefits is objectionable. Therefore, I dissent.

Facts

The facts, briefly stated, are as follows. The Petitioner learned of possible wage violations by the Employer in early September 1994.² It first contacted the Employer regarding these alleged violations, and issued its first campaign document on the subject on October 25, the day after the parties' Stipulated Election Agreement was approved. On that date, the Petitioner delivered a letter to then Novotel General Manager Bernard Rudler stating that it had been informed that the Employer had violated the Fair Labor Standards Act (FLSA), and that if the charges were true, "it is very possible that individual employees are owed *thousands of dollars* in back pay . . . *with interest*." (Emp. Exh. 10; emphasis in original.) The Petitioner distributed this letter to the unit employees.

Later in the campaign, the Petitioner distributed a mock check in the amount of \$3411.20, signed by "Bernie N. Novotel" and made out to "One Novotel Room Attendant." The check was accompanied by a leaflet tying the check to the Employer's alleged failure to pay proper wages.

The Petitioner's counsel discussed a potential FLSA lawsuit with the employee organizing committee on November 10, and with other employees on November 15 and 16. By November 16, 43 of the 48 consent or "opt-in" forms eventually obtained by the Petitioner had been signed.

²Hereinafter, all dates refer to 1994 unless otherwise indicated.

The Petitioner's counsel filed the lawsuit on December 1, 8 days before the election. Union Organizer Heather Schneider testified that the timing was determined by the following factors: the time it took to investigate the employees' claims and to prepare the lawsuit, the desire to protect individual employees by waiting until there were a substantial number of plaintiffs, and the continued running of the statute of limitations.

Regarding why the Petitioner did not wait until after the election to file the lawsuit, Schneider testified that "we wanted to try to get it in before the election, because we were afraid if we waited until after the election, it would look like we were only doing it because we won." (Tr. 1267.) Asked the same question, Union Official Peter Ward cited the continued running of the statute of limitations; Ward stated that, other than 8 or 9 days' backpay out of a 3-year backpay period,³ he was not aware of anything that could have been lost by the plaintiffs by filing after the election. (Tr. 1401.) The Petitioner's counsel did not file the employees' consent forms with the court—the action necessary to toll the statute of limitations⁴—until January 13, 1995. (Tr. 1264–1265; Jt. Exh. 1(c); see also P. Br. 8.)

On December 2, the day after the lawsuit was filed, the Petitioner invited the employees to meet unionized workers from the Waldorf-Astoria and other hotels. At the meeting, the Petitioner distributed a flyer stating that the Waldorf employees had "heard about the gimmicks your management uses to cheat you out of wages [including] unpaid overtime." The flyer announced that 73 Waldorf employees had received a total of \$184,000 in backpay as a result of the union's pursuit of their claims, and listed the amount received by each individual. (Emp. Exh. 18.) Another such meeting was held on December 6.

The election took place on December 9. The tally of ballots showed 70 votes for the Petitioner, 56 votes against, and 10 challenged ballots. As of the election date, the Petitioner had paid \$8,145.85 in legal services to the unit employees, or \$163 per plaintiff.⁵ The Petitioner held no further meetings inviting employees to join the lawsuit before filing the consent forms on January 13, 1995. (Tr. 1398–1399.)

Analysis

The law concerning grants of benefits is well established. Over 30 years ago, the Supreme Court held that a grant of benefits undertaken with the purpose of infringing on employees' free choice and reasonably cal-

culated to have that effect violates the Act. See *NLRB v. Exchange Parts Co.*, 375 U.S. 405, 409 (1964). In the objections context, intent need not be shown. See, e.g., *Speco Corp.*, 298 NLRB 439, 442 (1990); *Nestle Ice Cream Co. v. NLRB*, 46 F.3d 578, 582 (6th Cir. 1995); and *NLRB v. Gulf State Cannery*, 585 F.2d 757, 759 (5th Cir. 1978). That is, the paramount issue is whether the conduct alleged to be objectionable had a tendency to influence the outcome of the election. *Nestle*, supra, 46 F.3d at 582; *Gulf State Cannery*, supra, 585 F.2d at 759. If it did, the election must be set aside. *Id.*

Most grant of benefit cases involve employer conduct, for it is usually the employer who controls wages and other terms and conditions of employment. Where, however, the union does control a particular benefit, it is subject to the same constraints as the employer.⁶ The Board has long equated union grants of benefit during the critical period with employer grants of a wage increase during that period, and found them objectionable. See, e.g., *Wagner Electric Corp.*, 167 NLRB 532, 533 (1967); and *Mailing Services*, supra. In short, according to precedent, what is sauce for the goose is sauce for the gander.

In policing union gifts to employees during the critical period, the Board has been quite stringent; it has overturned elections where a union gave employees a \$5 gift certificate, see *General Cable Corp.*, 170 NLRB 1682 (1968) (a \$16 union jacket); see *Owens-Illinois, Inc.*, 271 NLRB 1235 (1984) (a certificate for \$500 worth of life insurance); see *Wagner Electric*, supra, 167 NLRB at 533 (or free medical screening); see *Mailing Services*, supra, 293 NLRB at 565–566.

Moreover, it is no defense that the benefit granted is one routinely extended to union members. In *Wagner Electric*, supra, the Regional Director had found the gift of insurance coverage unobjectionable because such coverage was an incident of union membership. 167 NLRB at 533. The Board, however, strongly disagreed. It held that extending insurance coverage to the employees prior to the election was "a tangible economic benefit" that was "akin to an employer's grant of a wage increase in anticipation of a representation election." The Board overturned the election on the ground that the benefit "subject[ed] the donees to a constraint to vote for the donor union." *Id.*

Mailing Services, supra, is to the same effect. There, a few days before the election, the union made available to the unit employees the free medical screening

³The FLSA has a 2-year statute of limitations, which is extended to 3 years if a wilful violation is proven. See 29 U.S.C. § 255. Here, plaintiffs claimed the alleged violations to be wilful.

⁴See *infra*, slip op. at 22.

⁵By April 1995, the amount had risen to \$11,090.80, or \$230 per plaintiff.

⁶Indeed, the Board has explicitly recognized the applicability of the *Exchange Parts* rationale to cases in which the union, rather than the employer, controls the benefit in question. See *Alyeska Pipeline Service Co.*, 261 NLRB 125, 127 (1982) (where union controls access to all construction jobs in state and hence has the power to effectuate its promise, promise that members will have an advantage over nonmembers in obtaining those jobs is coercive and hence objectionable) (citing *Exchange Parts*, supra, 375 U.S. at 409).

routinely provided to employees it represented, stating, “Please take advantage of your first union benefit.” 293 NLRB at 565. The Board again equated a union’s grant of benefits during the critical period with an employer-granted wage increase. The Board ordered a new election because the union had instilled in the employees a sense of obligation to the donor union and thereby tainted employee free choice. *Id.* at 566 and fn. 3. The Board emphasized that the union was free to *promise* employees that they would receive this benefit, but was precluded from giving it to them shortly before the election: “We do not condemn a Union’s efforts to make itself ‘more attractive as a candidate for election,’ but we do require that its methods of self-enhancement exclude the direct conferral of substantial benefits on its target audience during the critical period.” *Id.* at 565–566 (citation omitted).

There can be little doubt, then, that the grant of benefits at issue here is objectionable under established principles of Board law. If a gift of a life insurance policy or medical screening—or even a \$5 gift certificate or a \$16 jacket—constitutes an improper inducement, plainly a gift of thousands of dollars in legal services does as well. The Petitioner was perfectly free to promise the employees that, should it be elected, it would finance an FLSA suit on their behalf; what it was not free to do was to attempt to curry favor with the employees by filing an all-expenses paid, risk-free lawsuit for them a week before the election.

In reaching a contrary result in this case, my colleagues seek to avoid an application of the principles and case law discussed above. In addition, they ignore the Board’s usual test in “grant of benefit” cases. Under that test, in determining whether a grant of benefit would tend unlawfully to influence the outcome of an election, the Board looks to: (1) the size of the benefit in relation to the stated purpose for granting it; (2) the number of employees receiving the benefit; (3) how the employees would reasonably view the purpose of the benefit; and (4) the timing of the grant of benefit. See *B & D Plastics*, 302 NLRB 245 (1991). The Petitioner’s conduct is plainly objectionable under this test.

The size of the benefit—over \$8000, or \$163 per plaintiff, is huge, and certainly far outstrips other union-granted benefits that the Board has found objectionable. See, e.g., *General Cable*, supra (\$5 gift certificates); and *Owens-Illinois*, supra, 271 NLRB 1235 (\$16 union jacket). Here, moreover, the Petitioner exacerbated the effect of the gift by emphasizing the magnitude of the likely payoff. It kicked off its campaign with a letter announcing that “it is very possible that individual employees are owed *thousands of dollars* in back pay . . . *with interest*” (emphasis in original). For a closing gambit—nicely timed in the narrow window between the filing of the lawsuit and

the election—the Petitioner arranged meetings with Waldorf-Astoria employees, and trumpeted the fact that its pursuit of wage claims on these employees’ behalf had resulted in a backpay award of nearly \$200,000. Lest any unit employee be incapable of imagining him or herself as one of the recipients, the flyer listed each of the 73 Waldorf beneficiaries by name and amount received. While such intimations are not in themselves objectionable, they operated to heighten the value of the legal services in the employees’ minds, thereby amplifying the effect of the Petitioner’s grant of benefits.

As to the stated purpose for the grant of benefits, the Petitioner asserts that giving the employees \$8000 worth of legal services during the critical period was necessary to enable the Novotel employees to vindicate their rights under the FLSA. Given this purpose, the gift was not only quite large, but disproportionate. First, the Petitioner could have helped the Novotel employees vindicate their FLSA rights, without bestowing \$8000 on them, by advising them as to how to file an administrative claim with New York State authorities. Second, as discussed in detail below, the employees’ rights could have been equally well vindicated—indeed, they would not have lost a penny in potential backpay—had the Petitioner merely waited until after the election to file the lawsuit.⁷

The second factor to be considered under *B & D Plastics*, supra, is the number of employees receiving the benefit. Here, that number, like the size of the benefit, was extremely large; 43 unit employees were plaintiffs and hence likely to be influenced by the gift.⁸ The large number of recipients is particularly significant when one considers that a switch of only two votes could have made the difference in this election.⁹ In *Owens-Illinois*, supra, the Board found a grant of \$16 union jackets objectionable. The Board noted that “[w]hile only five or six employees received jackets before voting, the vote tally . . . show[s] that five or six votes could have determined the election’s re-

⁷The Petitioner asserts that another purpose of the grant of legal services was to ensure that nonunion hotels like Novotel do not engage in unfair competition with unionized hotels. See P. Br. 6. The FLSA, however, confers neither rights nor standing upon unions; it is not intended to serve their interests as opposed to those of individual employees. Moreover, since the lawsuit concerned only an alleged past failure to pay proper overtime—the Petitioner having conceded that Novotel’s current practices were lawful—the Petitioner’s \$8000 gift to the Novotel employees was not necessary to strip Novotel of some unfair advantage over its unionized competitors. Finally, even putting these factors aside, my comments in text regarding the utter lack of necessity for filing the lawsuit before the election apply with equal force to this asserted purpose.

⁸Five additional plaintiffs were former unit employees or nonunit employees.

⁹There were 70 votes for the Petitioner and 56 against, with 10 challenged ballots. If all of the challenged ballots are counted as votes against, a switch of only two votes cast would deprive the Petitioner of the necessary majority.

sults.” 271 NLRB at 1235. In short, a one-to-one ratio between recipients and the votes necessary to affect the outcome was deemed grounds for a new election. Here, if the far more valuable gift of \$163 in legal services swayed only 1 employee out of every 20 who accepted it—much less every employee-recipient as the Board assumed in *Owens-Illinois*—it would have been determinative of the election’s outcome. Under these circumstances, it is clear that the union’s conduct “had a tendency to influence the outcome of the election,” see *NLRB v. Gulf State Cannery*, supra, 585 F.2d at 759,¹⁰ and the election must therefore be set aside. *Id.*

Turning to the third factor considered by the Board—how the employees would reasonably view the grant of benefit—the answer to that question is plain: they were likely to feel a constraint to vote for the union as a result. See *Wagner Electric*, supra, 167 NLRB at 533 (gift of life insurance coverage “subjects the donees to a constraint to vote for the donor union”); *Mailing Services*, supra, 293 NLRB at 565, 566 fn. 3 (same concerning provision of free medical screening; recipient of gift would likely have felt a sense of obligation to the donor union); and see also *NLRB v. Savair Mfg Co.*, 414 U.S. 270, 279 fn. 6 (1973) (quoting *Wagner* with approval).

The majority asserts that this is not so because there is no evidence that the Petitioner told the employees that continuation of the lawsuit was dependent on a union victory. I disagree with their analysis on two counts. First, under *Exchange Parts*, supra, a grant of a benefit immediately prior to the election is unlawful and objectionable without regard to whether the grantor says that the benefit will be taken away if the election goes against the grantor’s wishes.

My second disagreement with the majority goes to the manner in which grants of benefits may influence employees’ votes. My colleagues appear to proceed on the assumption that the Novotel employees would have been influenced by the benefit conferred only to the extent that they were concerned with continued receipt of that benefit. That, however, is simply not the case.

As the Sixth Circuit recognized in *Nestle*, supra, 46 F.3d 578, a preelection grant of benefits can influence employees’ votes in two different ways; it may lead employees to vote for the donor: (1) out of a desire to continue receiving the benefit; or (2) simply because they have received a valuable gift from that party. See 46 F.3d at 584. In *Nestle*, supra, the court found the unions’¹¹ provision of legal services objectionable not only on the ground that the employees might vote for

the unions to ensure that they continued receiving those services, but also because “the legal fees . . . smacked of a ‘purchase’ of votes because the Unions had no responsibility to provide the services.” 46 F.3d at 584.

Thus, even setting aside the employees’ concerns about the continuation, and level of financing of the lawsuit in the event of a union loss, the Petitioner’s gift is objectionable on the wholly independent ground that at least some employee-plaintiffs would reasonably feel a sense of obligation to support an organization that had bestowed an extremely valuable gift on them: a gift aggregating several thousands of dollars that might ultimately result, as the employees were told, in a payoff of \$2000 or \$3000 per plaintiff. Here, as in *Nestle*, supra, the employees were well aware “that they were receiving ‘something for nothing,’ and the ‘something’ was quite valuable,” 46 F.3d at 584, and it is clear to me that some votes were likely swayed by that awareness.

My colleagues concede that the union’s gift of free legal service had the “potential to influence voter choice.” However, they say that there was no potential “to purchase or unduly influence votes.” In this regard, they argue that the benefit here was not different from other union benefits provided during a campaign (e.g., the services of organizers, economists, attorneys, and others who assist the campaign). However, there is a clear distinction between a union’s spending money on its own campaign, and a union’s giving money to employees for their lawsuit. The Sixth Circuit correctly saw that the latter “smacked of a ‘purchase’ of votes because the Union had no responsibility to provide the services.”

My colleagues’ position in this case is inconsistent with their position in *Sunrise Rehabilitation Hospital*, 320 NLRB 212 (1995).¹² In *Sunrise*, my colleagues overturned an election because the employer had offered 2 hours’ pay to employees who were not scheduled to work on the election date but rather came to work only to vote. My colleagues stated that employees “would reasonably perceive the 2 hours’ pay as a favor from the Employer which the employees might feel obligated to repay by voting against the Union.” *Id.*, They endorsed the view that “[employees receiving such a monetary offer] would have to choose among three unsatisfying courses of action: (1) accepting the payment, voting for the union, and feeling like an ingrate who bit the benefactor’s hand; (2) voting against the union so as to avoid any such feelings of guilt; and (3) foregoing the payments and following their initial inclinations in voting.” *Id.* (citation omit-

¹⁰ *Gulf State Cannery*, supra, involved a union-granted benefit, and is the source of the four-factor test endorsed by the Board in *B & D Plastics*, supra. See *B & D*, supra, 302 NLRB at 245 (setting forth factors listed in *Gulf State Cannery*, supra, 585 F.2d at 759).

¹¹ In *Nestle*, supra, two unions sought joint representation. See 46 F.3d at 579.

¹² I dissented in *Sunrise*, supra, arguing that the Board lacked knowledge of certain pertinent facts and should obtain those facts before overruling precedent. See 320 NLRB 212. (Member Fox was not yet on the Board when *Sunrise* was decided.)

ted). It seems to me wholly obvious that if employees are thought likely to be bought off by the mere offer of 2 hours' pay—in return for which they must come to the worksite on their day off—they are certainly likely to be influenced by a gift of free legal services which might ultimately net them thousands of dollars apiece.¹³

The fourth and last factor that the Board typically considers in grant of benefit cases is timing. Here, the hearing officer credited Organizer Schneider's testimony that the timing of the lawsuit was determined by the time it took to investigate the employees' claims, the desire to protect individual employees by waiting until there were a substantial number of plaintiffs, the time necessary to prepare the lawsuit, and the continued running of the statute of limitations. This, however, hardly establishes that the timing of the lawsuit was innocuous.

The first three factors listed by Schneider—i.e., all but the running of the statute of limitations—go to why the lawsuit was not filed *sooner*. The real issue here, however, is not why the Petitioner did not file sooner, but why it did not file *later*—i.e., why it could not have waited until the day after the election to file, thereby avoiding the grant of benefit problem before us. On that score, the Petitioner's explanation is wholly inadequate.

Both Schneider and Union Official Peter Ward cited the continued running of the statute of limitations as the reason the Petitioner did not wait to file the lawsuit.¹⁴ Indeed, Ward testified that, except for 8 or 9 days' backpay out of a 3-year backpay period,¹⁵ he

¹³My colleagues say that there is nothing in the Act which protects the conduct of a party who gives employees money to induce them merely to show up at the polls. However, they say that there *is* something in the Act which protects a party who gives employees money for the purpose of having employees show up and vote for that party. I believe that there is an inconsistency. My position on this issue is consistent with my position in the instant case. Where an employee expends time and money traveling to a Board election, a party may reimburse that reasonable expense. See *Perdue Farms*, 320 NLRB 805 (1996). However, where as here, the employees are expending nothing, a party cannot give them "something for nothing." By contrast, my colleagues are inconsistent. They condemned the employer's payment of \$27 in *Perdue*, and yet they give their blessings to the Union's benefit here of hundreds of dollars per employee.

¹⁴Schneider also testified that "we wanted to try to get it in before the election, because we were afraid if we waited until after the election, it would look like we were only doing it because we won." Tr. 1267. This explanation is rather peculiar on its face. It suggests that the employees would be more likely to connect the lawsuit to the election if the lawsuit were filed after the election rather than before. Of course, both law and experience indicate precisely the opposite. They tell us that employees are more likely to see a connection if a benefit is conferred *before* the election, i.e., during the critical period. See *Exchange Parts*, supra, and *Ideal Electric*, 134 NLRB 1275 (1962).

¹⁵See supra, slip op. 19 (lawsuit alleges willful violation, to which 3-year limitations period applies).

was not aware of anything that would have been lost by waiting until after the election. (Tr. 1401.) This statute of limitations argument is specious, however, for as explained below, the statute was not tolled until the consent forms were filed with the court—an action not taken until several weeks after the election.

Where a collective action is brought under the FLSA, the lawsuit is not considered "commenced," and hence the statute of limitations is not tolled, as to the individual claimants merely by the filing of the complaint. To the contrary:

[A] collective or class action . . . shall be considered to be commenced in the case of any individual claimant—

(a) on the date when the complaint is filed, if he is specifically named as a party plaintiff in the complaint and his written consent to become a party plaintiff is filed on such date in the court in which the action is brought; or

(b) if such written consent was not so filed or if his name did not so appear—on the subsequent date on which such written consent is filed

29 U.S.C. § 256; see also 29 CFR § 790.21 (same). That is, the statute continues to run on a particular plaintiff's claim until both the complaint is filed and the plaintiff's consent form is filed with the court. *Id.*; see also *Perella v. Colonial Transit*, 148 F.R.D. 147, 149 (W.D. Pa. 1991) ("The statutory language makes clear that the filing of the consent may come after the filing of the complaint, but that a claim is not asserted, for purposes of the statute of limitations, until both the complaint and the claimant's individual written consent are filed.") (citations omitted), *affd.* 977 F.2d 569 (3d Cir. 1992), *cert. denied* 507 U.S. 917 (1993).

Here, the Petitioner's counsel filed an FLSA complaint on December 1, 8 days before the election, seeking relief on behalf of six named plaintiffs and all similarly situated employees who chose to opt into the lawsuit. Exhibit 1 to Employer's Exceptions to Regional Director's Report. It did not, however, file any of the employee opt-in forms with the court until January 13, 1995, 5 weeks after the election. (P. Br. 8; see also *Jt. Exh. 1(c)*.) During this interim, the statute of limitations continued to run.¹⁶ See 29 U.S.C. § 256.

In sum, the Petitioner made sure to take the action—the filing of the complaint—that would gain the employees' attention and induce their gratitude, the week before the election. It did not, however, take the step necessary to actually stop the clock on the employees' claims until weeks later—a fact that wholly invalidates the claim that the Petitioner filed the lawsuit before the

¹⁶This is so even as to the six named plaintiffs. See *Perella*, supra, 148 F.R.D. at 149 (statute continued to run even as to named plaintiff until her consent form was filed).

election to save the employees a few days worth of backpay.¹⁷

In sum, under the four-factor test that is used in “grant of benefit” cases, the grant here was clearly objectionable.¹⁸ My colleagues attempt to evade the weight of Board precedent and the application of the Board’s traditional analysis by arguing that the grant of benefits at issue here is fundamentally different from the type of union-granted benefits that the Board has found objectionable in prior cases. It is different, they contend, because the Petitioner’s bestowal of \$8000 in legal services on the employees during the critical period is conduct protected both by Section 7 of the Act and the First Amendment to the United States Constitution. In my view, the majority’s statutory and constitutional arguments are unpersuasive.

The majority’s Section 7 argument appears to go something like this: (1) The right to self-organization set forth in Section 7 depends on employees’ ability to learn about the potential benefits of unionization from others, such as union organizers; (2) therefore, the Petitioner had a Section 7 right to discuss the employees’ wage complaints with them, to advocate that they pursue a wage claim against their employer, and to advise them as to how unionization could aid them in pursuing such a claim; and (3) the Petitioner’s right to engage in these discussions implies a Section 7 right to give the employees free legal services. An alternative thread running through the majority’s argument suggests the following chain of reasoning: (1) the employees had a Section 7 right to band together in pursuing a wage claim against their employer; and (2) therefore, the Petitioner had a Section 7 right to give them free legal services to pursue such a claim.

My colleagues have engaged in a classic nonsequitur. I assume *arguendo* that the employees had a Section 7 right to listen to the Petitioner’s advocacy of a lawsuit on their behalf. However, it surely does not

follow that the employees have a “right” to free legal services. Further, assuming *arguendo* that the employees somehow had a right to receive such a benefit, it does not follow that the Petitioner has a right to grant it. As *Lechmere*¹⁹ and the statute make plain, Section 7 rights belong to employees, not to the union that seeks to represent them. Accordingly, the Petitioner cannot successfully defend its conduct by saying that it had a Section 7 right to give free legal services.²⁰

My colleagues assert that, under my analysis, unions are not “permitted” to expend funds to help employees improve their terms and conditions of employment. My colleagues err in two ways. First, my position, set forth above, is simply that the Union has no Section 7 right to do what it did here. Secondly, the only thing not “permitted” in this case (in my view) is the Union’s financing of the employees’ lawsuit. That direct gift, from the Union to the employees, is the only matter involved herein. The “chamber of horrors,” paraded by my colleagues, does not involve that kind of direct gift.

Finally, it may well be that a union which represents employees has a Section 7 right to do things on their behalf, on the view that the union is their representative. However, that does not help the Union here, for it was not the representative of the employees.

The majority’s First Amendment argument is prone to similar leaps of logic. The majority begins by noting that unions have a constitutional right to confer with employees, including nonmembers, and to advocate that employees use lawful means to vindicate their rights. See *Thomas v. Collins*, 323 U.S. 516 (1945). It further notes that unions have a First Amendment right to hire lawyers to assist union members in asserting their legal rights. See *Mine Workers v. Illinois State Bar Assn.*, 389 U.S. 217, 221–222 (1967). From these two principles, my colleagues purport to derive the conclusion that unions have a First Amendment right to finance litigation for nonmembers during a union campaign—a conclusion that simply does not follow, involving as it does unjustified extrapolations from advocacy to funding, and from a union’s activities on behalf of members to those on behalf of nonmembers.²¹

The majority appears to recognize that it is on tenuous ground in moving from members to nonmembers. On this crucial point they acknowledge that the Supreme Court has never addressed the question whether First Amendment protection extends to union financing

¹⁷ The Union asserts that it did not file the employee opt-in forms until after the election because employees were concerned about revealing their identities before the election. However, even accepting *arguendo* this assertion, it does not explain why the Union filed the complaint before the election. As explained above, that action was timed to influence the election.

¹⁸ The only case even arguably supporting the majority’s position is *Nestle Dairy Systems*, 311 NLRB 987 (1993) (union’s filing of class-action lawsuit against employer shortly before election not objectionable). *Nestle*, *supra*, however, was reversed by the Sixth Circuit. See 46 F.3d 578. It was, moreover, an aberrant decision in that it simply ignored prior Board law and failed to employ the Board’s traditional analysis. Indeed, Member Stephens, who applied the traditional analysis, would have found an objectionable grant of benefits. See 311 NLRB at 989–991 (Member Stephens dissenting in relevant part). Finally, the Board’s decision in *Nestle* is readily distinguishable. There, the record did not reveal the cost incurred by the union in filing the lawsuit, and the Board presumed the legal fees to be “minimal at best” and therefore not a tangible benefit. 311 NLRB at 988. Here, in contrast, the record makes clear that a valuable benefit was conferred.

¹⁹ *Lechmere, Inc. v. NLRB*, 112 S.Ct. 841 (1992).

²⁰ My colleagues see “no basis in law or policy” for the distinction between the employee activity of filing a suit and the union activity of financing the suit. The distinction is in Sec. 7. As *Lechmere* makes plain, employees have Sec. 7 rights; unions that seek to represent them do not.

²¹ The record affirmatively establishes that most of the unit employees involved herein are nonmembers of the Union. The record is silent as to the others.

of lawsuits on behalf of nonmembers as opposed to members, but state that “Supreme Court jurisprudence strongly suggests that such First Amendment interests do indeed attach.” (Slip op. at 8.)

The “jurisprudence” relied on does no such thing. The “jurisprudence” consists essentially of the Court’s decisions in *NAACP v. Button*, 371 U.S. 415 (1963), and in *In Re Primus*, 436 U.S. 412 (1978). According to the majority, *Button* “underscored . . . that the First Amendment protection afforded to the NAACP legal program was not limited to the financing of litigation on behalf of members of the NAACP,” and “held that the constitutional protection afforded the NAACP legal program encompassed NAACP lawyers, members, and nonmember sympathizers involved in the NAACP-funded litigation.” (Slip op. at 8.)

In fact, neither *Button* nor *Primus* advances the argument of my colleagues. In those cases, the state sought to prohibit organizations (NAACP & ACLU) from informing persons of their rights and from advising them to seek the assistance of attorneys working for those organizations. The Supreme Court held that the state was impermissibly interfering with constitutional rights of free expression and association. The fact that the NAACP & ACLU offered *free* legal services was clearly not the focus of these cases. Rather, the state was acting under its ostensible power to bar the solicitation of legal business, whether for pay or not. Thus, the issue was whether there was a right to solicit, not whether there was a right to offer free legal services. My colleagues’ bare reference to a single phrase in *Primus*, supra (“financing such litigation”), cannot and does not change the major thrust of the Court’s opinions. In addition, the organizations there were not seeking to have the recipients do anything in return. By contrast, in the instant case, the Union granted free legal services for the purpose of inducing the employees to vote for the Union in the election campaign.

I do not here take issue with the notion that the Petitioner had a First Amendment right to urge the employees to file suit, or to finance a suit on their behalf after it had attained representative status. Nothing in the majority’s recitation of Supreme Court precedent convinces me, however, that the Petitioner had a First Amendment right to finance litigation on behalf of nonmember employees during the preelection period—or, stated more plainly, to give thousands of dollars in legal services to employees whose votes it sought in the upcoming election.²² Indeed, my colleagues cannot

²² This case, in my view, is completely distinguishable from *Kalin Construction Co.* 321 NLRB No. 94 (July 8, 1996), where I would find that the employer has a constitutional right to issue a split paycheck to employees to convey the message that if they select a union, their check will be reduced by the amount to be accorded to union dues. In *Kalin*, the conduct that I would find constitutionally protected involves an effort to communicate a distinct message to

bring themselves to say that the Supreme Court precedents support the view that the union has a constitutional right to give free legal services to nonmembers during the preelection period. They say only that the Court precedent “strongly suggests” that view. However, Supreme Court precedent directly condemns the grant of benefits during the preelection period (*Exchange Parts*, supra, 375 U.S. 405), and the cited cases do not even remotely suggest that free legal services are to be exempted from that salutary rule.

In their attempt to differentiate the Petitioner’s conduct from other union-granted benefits long considered objectionable by the Board, my colleagues make one more argument in addition to the Section 7 and constitutional arguments discussed above. Here, they assert that the “key distinction” is between actions that are related to terms and conditions of employment, and those which are not; the first, they state, are wholly legitimate, the second objectionable. This argument, it seems to me, brings us full circle, for the majority’s contention runs head on into *Exchange Parts*, supra, the seminal case concerning grants of benefits with which I began my discussion.

Exchange Parts condemned an employer’s grant of new and improved benefits in the preelection period. See 375 U.S. at 409. The benefits conferred—a new system for computing overtime and a new vacation schedule—obviously pertained to terms and conditions of employment. Nonetheless, they were considered objectionable. Indeed, the classic example of an objectionable grant of benefits, a wage increase, involves the most fundamental term and condition of all.

As I noted at the outset of this dissent, most grant of benefit cases involve employer conduct precisely because it is the employer, not the union, who controls the terms and conditions of employment and is therefore best situated to bestow favors on the employees in the preelection period. Nonetheless, the Board has always treated union-granted benefits, where they do occur, as akin to employer-granted wage increases and therefore grounds for a new election. See, e.g., *Wagner Electric*, supra, 167 NLRB 532; and *Mailing Services*, supra, 293 NLRB 565. Most union-granted benefits, given that the locus of control over these matters lies with the employer, do not directly affect terms and conditions of employment. Where, however, a union does grant a benefit that is related to terms and conditions, I fail to see how that fact makes the gift any the less objectionable. Surely the Board would not, for instance, sanction union gifts of equipment such as safety shoes or safety glasses during the critical period, despite the fact that such gifts affect the employees’

employees. Here, the conduct that the majority finds constitutionally protected involves no message whatsoever; the Union is not seeking to communicate anything, but merely to bestow a gift of several thousand dollars on the employees.

working conditions. Nor, I would think, would my colleagues allow a union, in the days preceding an election, to give employees cash to hire lawyers to pursue an ERISA claim, a discrimination claim, or a wage and hour suit such as that at issue here—notwithstanding the relationship of such gifts to terms and conditions of employment.

The key point in this case, it seems to me, is not, as the majority stated, that the benefit conferred was “integral to the Novotel workers’ employment-related concerns,” but rather that it was “clear to the employ-

ees that they were receiving ‘something for nothing,’ and the ‘something’ was quite valuable.” *Nestle Ice Cream Co.*, supra, 46 F.3d at 584. I remain convinced that the very substantial gift conferred on the Novotel employees only days before the Board election had a tendency to influence their votes. I would, therefore, in accord with established Board law, require a new election so that the employees may choose whether or not to be represented by the Petitioner in an atmosphere untainted by inducements from either side.