OFFICE OF THE GENERAL COUNSEL
Division of Operations-Management

MEMORANDUM OM 11-58 May 10, 2011

TO: All Regional Directors, Officers-in-Charge, and Resident Officers

FROM: Richard A. Siegel, Associate General Counsel

SUBJECT: Submission to Advice of Information Cases in Relocation Situations

In *Embarq Corp*., 356 NLRB No. 125 (2011), the Board held that the Employer did not violate Section 8(a)(5) by refusing to bargain with the Union over its decision to close a call center in Nevada and relocate that work to its call center in Florida. Applying *Dubuque Packing Co.*, 303 NLRB 386 (1981), *enforced in pertinent part,* 1 F.3d 24 (D.C. Cir. 1993), *cert. denied,* 511 U.S. 1138 (1994), the Board found that, although the decision did not involve a change in the scope or direction of the enterprise, and labor costs were a factor, the relocation was nevertheless not a mandatory subject of bargaining because the Union could not have offered labor-cost concessions sufficient to alter the Employer's decision. The Board also dismissed an allegation that the Employer had violated Section 8(a)(5) by refusing to provide information relevant to its relocation decision; since the decision was not a mandatory subject of bargaining, there was no obligation to provide information about it.

In a concurring opinion, however, Chairman Liebman suggested that she would consider modifying the *Dubuque Packing* framework with regard to information requests if a party were to ask the Board to revisit existing law in this area. Specifically, she identified an anomaly in present law, which provides somewhat inconsistently that: (1) an employer would enhance its chances of establishing that labor-cost concessions could not have altered the decision, under the *Dubuque Packing* standard, "by describing its reasons for relocating to the union, fully explaining the underlying cost or benefit considerations, and asking whether the union could offer labor cost reductions that would enable the employer to meet its profit objectives," 303 NLRB at 392, and (2) a union is not entitled to such information if the Board determines in hindsight that the union could not have made sufficient concessions to change the decision and therefore that the decision was not a mandatory subject of bargaining. Chairman Liebman would consider modifying the *Dubuque Packing* framework by requiring employers to provide requested information about relocation decisions whenever there is a reasonable likelihood that labor-cost concessions might affect the decision. She posits that, if the employer provided the information and the union failed to offer concessions, the union would be precluded from arguing to the Board that it could have made concessions. If, on the other hand, the employer failed to provide such information where labor costs were a factor, it would be precluded from arguing that the union could <u>not</u> have made sufficient concessions.

The General Counsel wishes to examine the concerns raised by Chairman Liebman in *Embarq*, and determine whether to propose a new standard in cases involving these kinds of information requests. That determination will be made based upon a case-by-case review of submissions to the Division of Advice. Therefore, Regions should submit to Advice all cases presenting the question of whether an employer violated Section 8(a)(5) by refusing to provide information related to a relocation or other decision properly analyzed under *Dubuque Packing*.

/s/
R.A.S.

cc: NLRBU