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Improving the Administration of the National Labor Relations Act Without Statutory Change

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For the first time in over three decades there is now considerable political momentum for the passage of significant pro-union amendments to the basic federal labor law, the National Labor Relations Act (NLRA or Act). First enacted in 1935, the Act is administered by the National Labor Relations Board (NLRB or Board), an independent agency of the federal government. Five members comprise the Board when it is at all full strength; the General Counsel of the agency is an independent office. The Act was amended to introduce restrictions on union organizing and bargaining tactics in 1947 and 1959. But aside from 1974 amendments extending the Act's reach to the not-for-profit healthcare sector, there have been no further substantive changes in the statute -- despite a plummeting unionization rate in private companies from a high of 35% in the mid-1950s to under 8% today and persisting complaints from the labor movement and its allies in Congress and the wider society that employer opposition, both lawful and unlawful, was eviscerating the rights of association and collective bargaining supposedly safeguarded by the law. During the Carter administration, labor's effort to bolster NLRA remedies for unlawful employer conduct, the Labor Reform Act of 1977, passed both houses of Congress but did not garner enough to overcome a threatened filibuster in the Senate. Twenty years later, President Clinton had his Secretaries of Labor and Commerce appoint the Commission on the Future of Worker-Management Relations, chaired by the late Harvard professor John T. Dunlop, a former Secretary of Labor in the Ford Administration. Though tempered by 1994 midterm election results, the Dunlop Commission recommended greater union organizer access to the employer's property, quicker representation elections, and stronger remedies for employer violations.¹ Those recommendations were not implemented. Since the Clinton administration, a rising chorus of voices among union-side practitioners and academics have questioned whether the NLRA has become obsolescent.²

The November 2008 election cycle suggests, however, a shift in the political winds and a more promising political environment for pro-union changes in the NLRA. With strong backing from organized labor, President Barack Obama regained the White House for the Democrats and brought with him commanding Democratic majorities in both houses of Congress -- each branch openly committed to enactment of the proposed Employee Free Choice Act (EFCA), labor's principal legislative priority. EFCA, which

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¹ See U.S. Dept. of Labor & U.S. Dept. of Commerce, Commission on the Future of Worker-Management Relations, Report and Recommendations (Dec. 1994) (Dunlop Comm. Rep.), discussed in Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 *Lab. Lawy.* 117 (1996).

² See, e.g., Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 *Colum. L. Rev.* 1527 (2002).

passed the House of Representatives in 1997, would alter the labor law in three significant ways:

(1) § 2 authorizes so-called “card-check certification” by the NLRB, essentially allowing unions to obtain bargaining authority triggering an employer duty to bargain, without an election, solely on the presentation to the agency of authorization card signatures from a majority of employees in an appropriate unit:

(2) § 3 provides that if 90 days of bargaining between a certified union representative and the employer do not result in a collective bargaining agreement, either party may petition the Federal Mediation and Conciliation Service (FMCS), which initially would provide mediation services but, if voluntary agreement does not occur, must refer the dispute to an arbitration panel which “shall render a decision settling the dispute” for a two-year period; and

(3) § 4 requires the Board to seek preliminary injunctions to reinstate workers discharged during organizing and election campaigns and authorizes the agency to levy liquidated damages of twice back pay owed such discharges and, in the case of willful or repeated employer violations, a civil penalty of up to \$20,000 per violation.

As of this writing, it is not clear whether EFCA as proposed will be enacted into law. Much depends on whether its proponents can in fact marshal a filibuster-proof majority of 60 votes in the Senate and, if not, whether a compromise can be struck that will elicit the necessary support.

This paper does not take a position on whether EFCA should become law. Rather, the question it addresses is what sort of changes can the NLRB implement on its own, without statutory amendment, to improve the administration the NLRA in its core functions of resolving questions concerning representation and enforcing the Act’s prohibitions against employer and union misconduct. NLRB representation elections will not disappear whether or not EFCA becomes law. Even at the stage of initial organization, some unions and employee groups will continue to pursue the election route because they wish to obtain the greater legitimacy and bargaining leverage that winning a secret- ballot election can confer on the bargaining agent; and elections will still be needed to decide whether to decertify unions and to deauthorize union-security arrangements. If the Board will continue to hold elections, it is important to figure out whether they can be held more quickly, how unit certification and other issues can be handled more expeditiously, whether union organizers can be given greater and earlier access to employees, and whether remedies can be enhanced for employer and union unlawful conducting marring fair election conditions. Similarly, bargaining obligations under the Act will still need to be addressed whatever EFCA’s legislative fate. Even under a first-contract interest arbitration regime, issues of bargaining obligation are likely to arise during the period of attempting to negotiate or secure arbitral imposition of a first contract, and the resolution of those issues may inform what the arbitration panel stipulates in settling a first contract. And when all contracts are up for renewal – those

negotiated by the parties or imposed by the arbitration panel the first time around – whether a party has satisfied its duty to bargain in good faith and if not, what the appropriate remedy for any violation should be will continue to be issues that require NLRB resolution.

The extent and scope of any legislative change are also in significant part dependent on the degree of confidence the players in the system have in the utility and fairness of the Board’s administration of existing law as well as their views of the suitability of that law to current conditions.

We begin first with suggestions for improving some of the Board’s procedures in representation and unfair labor practice cases, and then follow with suggestions for changing some of the Board’s substantive rules. This essay is by no means a comprehensive examination of what the Board can and should do in the process of administrative overhaul.

I. SUGGESTIONS FOR IMPROVING NLRB PROCEDURES

A. Identify and Address the Causes of Delay

“Physician, heal thyself” is the appropriate maxim here. The first, and critical, step in any serious effort at reform of the Board’s administration of the Act is to examine where agency delay is a problem, what causes delay, and how those causes can be minimized without undermining the overall goal of fair, efficient procedures for investigations, finding of facts, adjudication and internal review. This is not the place for an extensive analysis of the problem of administrative delay under the NLRA.³ The Chairman of the Board would be well advised to appoint an advisory committee to investigate and analyze the problem and offer concrete recommendations for minimizing delay.

1. Representation Cases. Both in the current debates over EFCA and in the 1994 report of the Dunlop Commission, it has been suggested that too long a period of time transpires between the filing of an election petition and the holding of a representation election. This is considered problematic both because employee interest in collective representation can wane and be dissipated simply by the passage of time and, in any event, the time gap before the election takes place enables employers to reduce support for the union by running an anti-union campaign that intimidates employees whether or not the tactics used are technically lawful.

How bad is the time gap between petition and election? The Dunlop Commission’s report noted that it took an average of seven weeks for workers to obtain an election during the period it was studying; it also observed that “median time from petitioning for an election to a vote has been roughly fifty days for the last two decades

³ See Samuel Estreicher & Matthew T. Bodie, Administrative Delay at the NLRB: Some Modest Proposals, 23 J. Lab. Res. 87 (Winder 2002).

(down considerably from the time taken in the 1940s and 1950s).” A more recent study by MIT researcher John-Paul Ferguson notes that for the period 1999-2004 “[t]he average case that went to election did so in 41 days and 95% of election were held within 75 days.”⁴ The problem seems that while the average and median times fall within the 7-week period, some petitions are allowed to be drag on: “The tail, however, is quite long; the maximum delay before election recorded in the data is 1,705 days.”⁵

The statute itself does not prescribe when an election must be held after a petition has been filed. The Dunlop Commission recommended that representation elections “should be conducted as promptly as administratively feasible, typically within two weeks.” The Board could on its own implement such a recommendation. The question is whether bringing down the average from 41 days to 14 days is administratively feasible and otherwise desirable.

Where cases do not involve significant issues as to the appropriate bargaining unit or the classification of employees who fall outside the unit or who are supervisors, the Regional Director should be able to hold a fairly prompt election, perhaps within the two-week period. It is doubtful, however, whether two weeks would be sufficient time, even with a strong administrative hand, to address responsibly difficult unit and supervisor-exclusion issues.

To reduce the number of such cases, the Board should consider changing the sequence by which it considers unit and exclusion issues. Currently, the latter issues are first addressed in a hearing before an election is conducted. It may be possible in most cases to have the election held first on the basis of an electorate reflecting well-established Board decisions as to the presumptively appropriate unit and likely disposition of exclusion issues. The election results would not be certified, however, until the unit and exclusion issues are properly resolved in a hearing at the regional level with limited discretionary review by the Board. In some cases, the results of the post-balloting hearing may require a second election; in most cases, they would not.

It is unclear whether § 9(c)(1) of the Act mandates the current sequence. The section requires the Board to hold “an appropriate hearing upon due notice” to determine whether “a question of representation affecting commerce exists”; and that “[i]f the Board finds upon the record of such a hearing that such a question of representation exists, it shall direct an election by secret ballot and shall certify the results thereof.” Does this mean that the Board may hold an election only after the conclusion of a hearing investigating unit and exclusion issues or can the Board, satisfied on the basis of its prior decisions or rules that unit and exclusion issues are likely not to be meritorious in a given

⁴ See John-Paul Ferguson, *The Eyes of the Needles: A Sequential Model of Union Organizing Drives, 1999-2004*, 62 *Indus. & Lab. Rel. Rev.* 3, 10 n.9 (Oct. 2008). NLRB general counsel Ronald Meisburg reports that for fiscal year 2007, “93% of all initial elections were conducted with in [sic] 56 days of the filing of the petition”; and that initial elections “were conducted in a median of 39 days from the filing of the petition.” Office of the NLRB General Counsel, *Summary of Operations, Fiscal Year 2007*, p. 1.

⁵ *Id.*

case, hold the election subject to an opportunity for the loser of the election to raise properly preserved unit or exclusion issues?⁶

To meet criticism that having employees vote on representation at the place of work unnecessarily brings home the message of employer power and possible intimidation,⁷ the Board could experiment with use of internet polling procedures that permit employees to cast an anonymous ballot from their home or anywhere they can obtain access to the internet. The National Mediation Board (NMB), the agency responsible for conducting representation elections under the Railway Labor Act, presently uses such procedures and, as Professor Sachs suggests,⁸ they can be adapted for NLRA purposes. Nothing in the statute requires that the polling place be at the place of work or any other particular location.

2. Unfair Labor Practice Cases. Delay in the system here could occur at several stages: (1) the period between the filing of a charge and the issuance of a complaint by the Board's General Counsel; (2) the period between the issuance of the complaint and the close of the record of the adversary hearing before an administrative law judge (ALJ); (3) the period between the close of the record and the issuance of the ALJ's decision; (4) the period between the issuance of the ALJ's decision and, if there are exceptions, the order and decision by the Board itself; and (5) the period between the issuance of the Board's order and decision and the ruling of the court of appeals to enforce the Board's order. Only the first four areas are within the Board's ambit of influence. Dealing with the fifth would require a statutory amendment providing for self-enforcing Board orders with the burden on the respondent to secure a judicial stay of the agency order.

For cases competed during the Board's fiscal year ending September 30, 2008, a median of 559 days transpired from the filing of a charge to issuance of a Board decision. A good part of this delay is after the hearing has been completed and the ALJ has issued his or her decision; it took 269 days for the median ALJ decision to culminate in a Board decision. For fiscal year 2003, the numbers were, respectively, 647 days and 420 days.⁹

These figures suggest a continuing problem. Once it reaches its full complement, the Board should authorize its chairman to assign cases to Board members,¹⁰ place time

⁶ To the extent the Board's "blocking charge" policy (under which it declines to proceed with an election when unfair labor practice charges involving the unit are pending) is exploited by charging parties unreasonably to delay elections, that policy needs to be reexamined. See Berton B. Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?*, 39 Lab. L. J. 651 (1988).

⁷ See Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 Minn. L. Rev. 495, 565-69 (1993).

⁸ See Benjamin Sachs, *Card Check and Employee Choice: A New Altering Rule for Labor Law's Asymmetric Default*, 123 Harv. L. Rev. ____ (forthcoming, Jan. 2010). The NMB does not permit employees to change their vote once it has been cast; it may wise to allow a short period for employees to reconsider their vote in light of new information.

⁹ See Table 23 of NLRB Ann. Reports for fiscal years 2003 and 2008.

¹⁰ Congress barred the Board itself from employing "any attorneys for the purpose of reviewing transcripts of hearing or preparing drafts of opinions." NLRA §4(a). This should not prevent the agency chairman or any other member from using its attorney staff and sometimes pooling several members' staff to screen cases that can be decided by summary decision and those that require a more extended decision and thus

limits on how long a case can remain on the Board member's desk, and once if those limits are not met, reassign the case to another Board member.¹¹

B. Greater Use of Rulemaking

The Supreme Court made clear in a unanimous 1991 decision in *American Hospital Assn. v., NLRB*¹² that the Board has substantive rulemaking authority under § 6 of the Act. And yet with the exception of the rulemaking for bargaining units in acute healthcare facilities, upheld in *American Hospital Assn.*, this authority lies unused.¹³ One reason may be a desire on the Board's part to minimize scrutiny from Congress by embedding the members' policy judgments in factual determinations made in the course of adjudications. The Board's experience during the Clinton administration with proposing a rule establishing the appropriateness of a single-location bargaining unit in the absence of "extraordinary circumstances" suggests that it will not readily embark on additional experiments of this type. For three years, until the Board abandoned the effort, Congress barred use of any monies on the single-location proceeding.¹⁴

The Clinton Board's unhappy experience with the single-location rule offers a cautionary note but should not discourage use of rulemaking altogether. The agency is likely to be on a firmer footing if it uses rulemaking not for the purpose of rigidifying a Board standard (the presumptive appropriateness of single-location units) for all industries irrespective of countervailing factual circumstances, but for the more limited purpose of providing for a uniform rule where nationwide uniformity makes sense. One such area would be a proposed rule setting forth the text of a poster reciting the rights of employees under the NLRA that the agency would require be posted in cafeterias and break areas in U.S. workplaces alongside similar notices from other government agencies.¹⁵ Another viable effort would be a proposed rule containing the text of a model authorization card that would be used both for ascertaining whether there is sufficient interest to hold an election and whether there is a card majority in circumstances where bargaining authority could be established without an election (as under EFCA § 2).

NLRB policy reversals – which like the spring come with each new administration -- is another area for rulemaking that, if properly employed, would enhance the confidence of the parties that acting in conformity with preexisting Board law will not result in adverse remedial consequences as well as encourage greater

assignment to a Board member. Cf. John E. Higgins, Jr., Labor Czars – Commissars – Keeping Women in the Kitchen – The Purpose and Effects of the Administrative Changes Made by Taft-Hartley, 47 Cath. U. L. Rev. 941, 954 (1998); Edward Miller, An Administrative Appraisal of the NLRB 69 (1977).

¹¹ See Estreicher & Bodie, supra note ___, at 95-96; William B. Gould IV, *Labor Relations* 40 (2000).

¹² 499 U.S. 606 (1991).

¹³ Academic support for NLRB rulemaking has a long pedigree. I added to the mountain of appeals in Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 Admin. L. Rev. 163 (1985).

¹⁴ See Joan Flynn, "Expertness for What?": The Gould Years at the NLRB and the Irrepressible Myth of the "Independent" Agency, 52 Admin. L. Rev. 465, 501-502 & nn. 151-52 (2000).

¹⁵ Along with Professor Charles J. Morris, the author asked the Board to issue such a rule back in 1993 – a petition that has yet to be acted upon. See AFL-CIO General Counsel Urges NLRB to Require Notices Describing NLRA Rights, *BNA Daily Lab. Rep.*, No. 192 (Oct. 3, 2003).

judicial deference. The proposal here would be to confine policy reversals to the rulemaking process. It would be strongly presumed that until a new rule has issued, the General Counsel would issue complaints on the basis of preexisting NLRB law. The Board thus would be promoting certainty and establishing a process likely to lead to a better rule.¹⁶ In essence, the regulated public would be told in advance which prior decisions the Board is interested in possibly reversing and would be asked to address specific questions and identify sources of information that would aid the agency.¹⁷

II. SUBSTANTIVE CHANGES IN NLRB POLICY

I address here only three (of several more) areas of Board policy that should be revisited: (1) union access rules, (2) voluntary “framework” agreement subject to “ex post authorization”, and (3) remedies.

A. Access Rules

The Supreme Court has made clear that unless employees are living near worksites distant from the usual means of communication, the Board cannot hold employers in violation of §8(a)(1) of the NLRA if they refuse to allow nonemployee union organizers on their property to address employees.¹⁸ The Court has not purported, however, to alter the scope of the Board’s authority under § 9 of the NLRA, first announced in *General Shoe Corp.*,¹⁹ to establish the preconditions (“laboratory conditions”) under which it will certify the results of an election rather than hold a rerun election. Under this doctrine, the Board can overturn elections not conforming to laboratory conditions whether or not an unfair labor practice (ULP) has been committed and presumably without regard to statutory limits on its ULP authority such as § 8(c) of the NLRA. The Board has used its *General Shoe* authority to bar massed-assembly speeches on company time within 24 hours of a scheduled election²⁰ and to require employers seven days after the scheduling of an election to transmit to the petitioning union a list of the names and addresses of the employees who would be voting in the election. The latter is called an “*Excelsior* list” because the rule was announced in *Excelsior Underwear, Inc.*²¹

The Board’s *Excelsior* decision suggests a persuasive rationale for expanding union access rights in particular circumstances. The Board distinguished earlier Supreme

¹⁵ See Don Zimmerman, Restoring Stability in the Implementation of the National Labor Relations Act, 1 Lab. Lawy. 1, 7 (1985) (“By using rulemaking on a major question of statutory interpretation, the Board would be impelled to focus its attention on the entire spectrum of interrelated issues.”).

¹⁷ Even if rulemaking is not issued, the Board could still use a better process for policy reversals. The Board could publish notice of an Agenda of Proposed Policy Changes with an opportunity to comment. Cases presenting issues listed on this Agenda would be prime targets for issuance of a complaint and expedited consideration. Oral argument and briefing would be scheduled for every case thought to be a vehicle for a policy reversal listed on the Agenda. Based on past experience, any oral argument should be limited to one hour for each side of the issue so as to focus attention and avoid repetition.

¹⁸ See citations in note 22 infra.

¹⁹ 77 N.L.R.B. 124 (1948).

²⁰ See Peerless Plywood Co., 107 N.L.R.B. 427 (1953).

²¹ 156 N.L.R.B. 1236 (1966).

Court decisions in *NLRB v. Babcock & Wilcox Co.*²² and *NLRB v. United Steelworkers of America* (Nutone Inc.),²³ which barred union access rights under the Board's §8 ULP authority. In the *Excelsior* context, the Board reasoned, the employees' §7 interests were centrally involved, thus altering the balance between employer interests and § 7 rights:

[E]ven assuming that there is some legitimate employer interest in nondisclosure, we think it relevant that the subordination of that interest which we here require is limited to a situation in which employee interests in self-organization are shown to be substantial. For, whenever an election is directed (the precondition to disclosure) the Regional Director has found that a real question concerning representation exists.... The opportunity to communicate on company premises sought in *Babcock* and *Nutone* was not limited to the situation in which employee organizational interests were substantial....

By similar reasoning, the Board could claim authority under *General Shoe* to declare that a fair election process requires that once a union has presented a showing of interest sufficient for filing a representation petition, the interests of the employee electorate in making an informed decision require that the union be given limited access to the employees on the company premises to present its case for voting for that union.²⁴ Similar to access rules contained in "neutrality" agreements often sought by unions, the union's access could be limited to nonwork areas like the parking lot, cafeteria and break room and could be conditioned on compliance with reasonable security procedures.

Because union access under this proposal would be triggered by the Board's showing of interest requirement, not any particular expressive activity of the employer, there would appear to be no serious §8(c) concern with this application of the *General Shoe* doctrine.²⁵

B. Promoting Voluntary Recognition Agreements Subject to "Ex Post Authorization"

The Board should revisit its prior decision in *Majestic Weaving Co.*²⁶ to provide greater scope for agreements between employers and unions that provide a framework for future recognition even if the union does not at the time have the majority support of

²² 351 U.S. 105 (1956). *Babcock & Wilcox* essentially presaged the Court's decision in *Lechmere, Inc. v. NLRB*, 502 U.S. 527 (1992).

²³ 357 U.S. 357 (1958).

²⁴ See generally Julius G. Getman, Ruminations on Union Organizing in the Private Sector, 53 U. Chi. L. Rev. 45, 71-72 (1986): "The missing ingredient of free choice is most likely to be a sense of the particular union involved in the campaign: its representatives, its arguments, and its record. It seems obvious that employees who know the employer but are doubtful about the union ought to be given the chance to learn about the union at first hand."

²⁵ See generally Shawn J. Larsen-Bright, First Amendment and the NLRB's Laboratory Conditions Doctrine, 77 NYU L. Rev. 204 (2002); compare *US Airways, Inc. v. NMB*, 177 F.3d 985 (D.C. Cir. 1999).

²⁶ 147 N.L.R.B. 859 (1964), enf. den. on other gnds, 355 F.2d 854 (2d Cir. 1966). *Majestic Weaving* overruled the Board's prior decision in *Julius Resnick, Inc.*, 86 N.L.R.B. 38 (1949).

employees in a particular bargaining unit. The Board should insist on two essential requirements: (1) transparency -- the parties state openly what they are entering into a framework agreement that does not take effect until the union obtains bargaining authority; and (2) “ex post authorization” – the agreement expressly provides an opportunity for the employees later to decide, preferably by secret ballot, whether they wish to authorize the union’s bargaining authority. Such an approach would impart valuable information to employees to guide their decision (because the framework agreement would illuminate the union’s bargaining objectives and likely efficacy of the bargaining agency) and an opportunity for the parties to explore new approaches to a bargaining relationship especially at new sites of employment.²⁷

C. Remedies

Remedies are the linchpin. A law is only as good as its remedies and the NLRB’s remedial authority as practiced seems particularly deficient. Even here, the agency can do a good more with the statutory authority it has.

1. Delegation of §10(j) Authority to the General Counsel. The extent to which employers unlawfully discharge union supporters during organizing drives and elections remains unclear -- in part because the Board until very recently did not collect reliable data on the subject. Estimates vary. Harvard law professor Paul Weiler estimated that 1 in 20 union supporters are unlawfully fired²⁸; the late Chicago law professor Bernard Meltzer and economist Robert LaLonde calculated a 1-in-63 probability of unlawful discharge²⁹; Center for Economic and Policy Research researchers John Schmitt and Ben Zipperer estimate a 1-in-73 rate of retaliatory discharge for 2000 and 1-in-52 rate for 2001-2007.³⁰ Apparently, for years before fiscal year 2007, the Board’s data did not clearly delineate which ULP charges were filed during union organizing campaigns.³¹

Whatever the rate of retaliatory discharge, it is too high. The Board needs to make clear that it is prepared to seek court-imposed provisional reinstatement of every employee where there is reasonable cause to believe that the employee was discharged for seeking collective representation. No other remedy under current law would more effectively bring home the central message of the NLRA: employees do not suffer any loss of employment or working conditions if they choose to support a labor union.

²⁷The author advanced this proposal in Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 NYU L. Rev. 827, 834-40 (1996). The Dunlop Commission’s recommendation would allow a subsequent showing of majority support “either by card check or representation election.” Dunlop Comm. Rep., *supra*, at 11. See also Jonathan P. Hiatt & Craig Becker, *Forum: At 70, Should the National Labor Relations Act Be Retired?: A Response to Professor Dannin*, 26 Berk. J. Emp. & Lab. L. 293 (2005).

²⁸ See Paul C. Weiler, *Promises to Keep: Securing Workers’ Rights to Self-Organization Under the NLRA*, 96 Harv. L. Rev. 1769, 1781 (1983).

²⁹ See Robert J. LaLonde & Bernard D. Meltzer, *Hard Times for Unions: Another Look at the Significance of Employer Illegalities*, 58 U. Chi. L. Rev. 953, 992 (1991).

³⁰ See John Schmitt & Ben Zipperer, *Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951-2007* (Center for Economic and Policy Research, March 2009), pp. 5, 10-11 & Table 1.

³¹ See J. Justin Wilson, *An Analysis of Current NLRB Data on Unlawful Terminations During Union Organizing Campaigns, 2007 to 2008* (Center for Union Fact, Feb. 26, 2009).

Section 10(l) expressly grants the Board this authority and mandates the Regional Director to seek a preliminary injunction to restrain certain union ULPs. Section 10(j), the provision governing other ULPs (including all employer ULPs), is stated in more discretionary terms and contemplates action by the Board: “The Board shall have power ... to petition [the federal district court] for appropriate temporary relief or restraining order....”

Although § 10(j) speaks in terms of action by the Board, the agency has from time to time, with judicial approval, delegated this authority to either the General Counsel or the Regional Directors. Presently, because the Board has only two members, the Board has delegated its § 10(j) authority to the General Counsel. Even after the Board reaches full strength, it should keep in place this delegation. Such a step would eliminate the delay inherent in requiring the Regional Director to obtain both the General Counsel’s and the Board’s authority to seek a preliminary injunction. The Board should, moreover, direct the General Counsel to seek § 10(j) relief in every case where there is reasonable cause to believe an employee has been fired during an organizing drive or an election campaign because of the exercise of statutory rights. To bolster the agency’s credibility in the district courts, and in fairness to legitimate employer interests, the General Counsel would be wise to conduct a thorough investigation and give the employer an opportunity to challenge of witnesses in a one- or two-day hearing before authorizing the § 10(j) application.³²

2. Imposing a Bargaining Obligation Because of the Absence of Good-Faith Doubt of the Union’s Majority. The Board has the authority to dispense with its “election preference” policy and impose a bargaining obligation on employers who lack a reasonable good-faith basis for doubting the union’s card-based majority status. Prior to the Supreme Court’s decision in *NLRB v. Gissel Packing Co.*,³³ the Board asserted the authority to impose such an obligation in the event an employer committed ULPs indicative of a lack of good-faith doubt. The Court in *Gissel* noted that the Board no longer followed its “good faith doubt” policy in *Aaron Brothers Co.*³⁴ and *Joy Silk Mills, Inc.*³⁵ The *Gissel* decision and the subsequent ruling in *Linden Lumber Div., Summer & Co. v. NLRB*³⁶ make clear, however, that the Board’s “election preference” policy is an exercise of the Board’s policymaking discretion and is not affirmatively required by the Act.

3. Remedies for Unlawful Refusal to Bargain. Under §8(d) the Board may not have the authority to impose a contract or any contract term as a remedy for an employer’s refusal to bargain in good faith.³⁷ But in addition to so-called

³² I thank former NLRB Regional Director Daniel Silverman for the latter suggestion.

³³ 395 U.S. 575 (1969).

³⁴ 158 N.L.R.B. 1077 (1966).

³⁵ 85 N.L.R.B. 1263 (1949).

³⁶ 419 U.S. 301 (1974).

³⁷ See *H.K. Porter Co. v. NLRB*, 397 U.S. 99 (1970). The discussion assumes arguendo that *H.K. Porter’s* treatment of 8(d) bars the “make-whole” remedy considered but rejected in *Ex-Cell-O Corp.*, 185 N.L.R.B. 107 (1970). That assumption also warrants reexamination by the NLRB.

“extraordinary” union access³⁸ and negotiation and litigation expense³⁹ remedies (which after proper rulemaking procedures might be presented as more readily available)⁴⁰, the Board’s remedial apparatus also includes the ability to treat any strike in protest of the employer’s ULPs as an ULP practice strike privileging the employees to be reinstated to their previous jobs once they have made clear they wish to return to work. Under current Board practice, this determination occurs only retrospectively in characterizing a strike as an ULP strike after it has occurred and striking employees have been replaced. The Board should consider a more liberal advisory opinion practice, at least in first-time bargaining situations, that provides critical information to employees before they put their jobs at risk. Employees should be able to petition for a nonbinding preliminary ruling from the Board whether the strike they are engaged in is likely to be treated as a ULP strike.⁴¹

A combination of the three remedial proposals – (1) preliminary reinstatement of discharges where there is reasonable cause to believe they have been discharged in violation of §8(a)(3), (2) a bargaining obligation imposed on the employer because of the absence of good faith doubt as evidenced by employer ULPs, and (3) an advisory ruling procedure to inform employees whether the strike they are engaged in is likely to be treated as an ULP strike – offer a promising start, in addition to the “extraordinary” remedies currently in use, to structuring a meaningful remedy even in first-time bargaining situations.

* * *

More can be said and other ideas pursued. The NLRA has not ossified as much as its principal guardians, the members of the NLRB and General Counsel, need to take seriously their mandate to make this statute work as well as it can.

³⁸ See *Fieldcrest Cannon*, 318 N.L.R.B. 470 (1995), *enfd. in part*, 97 F.3d 65, 74 (4th Cir. 1996); *Monfort, Inc. v. NLRB*, 965 F.2d 1538, 1547-48 (10th Cir. 1992).

³⁹ See *Frontier Hotel & Casino*, 318 N.L.R.B. 857, 859 (1995), *enfd. in rel. part*, 118 F.3d 795 (D.C. Cir. 1997); *Alwin Mfg. co.*, 326 N.L.R.B. 646, 647 (1998), *enfd.*, 192 F.2d 133 (D.C. Cir. 1999).

⁴⁰ General Counsel Meisburg has commendably given priority treatment to the need for special remedies in first-contract bargaining cases. See GC Memorandum 06-05 (April 19, 2008), 07-08 (May 29, 2007), 08-08 (May 15, 2008), and 08-09 (July 1, 2008).

⁴¹ The entire issue of when an economic strike becomes converted into a ULP strikes calls for greater reliance by the Board on declaratory orders. See William R. Corbett, *A Proposal for Procedural Limitations on Hiring Permanent Replacements: “A Far, Far Better Thing” than the Workplace Fairness Act*, 72 N.C. K, Rev, 813 (1994). The Board’s current procedures provide for advisory opinions and declaratory orders regarding jurisdiction. See NLRB Rules & Proced. §§ 101.39-.43 (2002).

