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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 more than 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).[1] 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 serve on the Board when it is at full strength;[2] the General Counsel of the agency is an independent office.[3] The Act was amended to restrict union organizing and bargaining tactics in 1947[4] and 1959.[5] Aside from the 1974 amendments that extended the Act's reach to the not-for-profit health care sector,[6] there have been no further substantive changes in the statute. The Act has not been changed despite a plummeting unionization rate in private companies—from thirty-five percent in the mid-1950s to under eight percent today—and persistent complaints from the labor movement and its congressional allies, who argue that employer opposition, both lawful and unlawful, is eviscerating the rights of association and collective bargaining the Act supposedly safeguards.

Labor's effort during the Carter administration to bolster NLRA remedies for unlawful employer conduct, the Labor Reform Act of 1977, did not gather enough support to overcome a threatened filibuster in

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1. 29 U.S.C. § 151–69 (2006).
2. National Labor Relations Act (NLRA) § 3(a), 29 U.S.C. § 153(a).
3. *Id.* § 3(d), 29 U.S.C. § 153(d).
4. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).
5. Labor-Management Reporting and Disclosure Act of 1959, Pub. L. No. 86-257, 73 Stat. 519 (codified as amended in scattered sections of 29 U.S.C.).
6. Act of July 26, 1974, Pub. L. No. 93-360, 88 Stat. 395 (codified at 29 U.S.C. §§ 152, 171, 168 (2006)).

the Senate.[7] Twenty years later, President Clinton had his secretaries of labor and commerce appoint the Commission on the Future of Worker-Management Relations, chaired by Harvard professor John T. Dunlop, who served as secretary of labor in the Ford administration. Though tempered by the 1994 midterm election results, the Dunlop Commission recommended greater access to employers' property by union organizers, quicker representation elections, and stronger remedies for employer violations.[8] Those recommendations were not implemented. Since the Clinton administration, a rising chorus of voices among union-side practitioners and academics has questioned whether the NLRA has become obsolete.[9]

The 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, Barack Obama regained the presidency for the Democrats and brought with him commanding Democratic majorities in both houses of Congress. There is now considerable avowed support for the proposed Employee Free Choice Act (EFCA), labor's principal legislative priority. The EFCA, which passed the House of Representatives in 2007,[10] would alter labor law in three significant ways.

First, section 2 authorizes so-called "card-check certification" by the NLRB. Such certification essentially allows unions to obtain bargaining authority and trigger an employer's duty to bargain solely by presenting to the agency authorization card signatures from a majority of employees in an appropriate unit. Elections would no longer be required.

Second, section 3 provides that if ninety 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). The FMCS initially would provide mediation services, but if the parties do not come to a voluntary agreement, it would be required to refer the dispute to an arbitration panel that "shall render a decision settling the dispute" for a two-year period.

Third, section 4 requires the Board to seek preliminary injunctions to reinstate workers discharged during organizing and election campaigns. It authorizes the agency to levy liquidated damages of twice

7. S. 2467, 95th Cong. (1978); H.R. 8410, 95th Cong. (1977); 124 CONG. REC. 18,398, 18,400 (1978).

8. U.S. DEP'T. OF LABOR & U.S. DEP'T. OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, REPORT AND RECOMMENDATIONS xvii–xxi (1994) [hereinafter DUNLOP COMMISSION REPORT]. *See also* Samuel Estreicher, *The Dunlop Report and the Future of Labor Law Reform*, 12 LAB. LAW. 117, 121 (1996).

9. *See, e.g.*, Cynthia L. Estlund, *The Ossification of American Labor Law*, 102 COLUM. L. REV. 1527 (2002).

10. Employee Free Choice Act of 2007, H.R. 800, 110th Cong. (2007).

back pay owed to those discharged workers and, in the case of willful or repeated employer violations, to impose a civil penalty of up to $20,000 per violation.

As of this writing, it is not clear whether the EFCA as proposed will be enacted. Much depends on whether its proponents can in fact marshal a filibuster-proof majority of sixty votes in the Senate and, if not, whether a compromise can be struck that will garner the necessary support. This Article does not take a position on whether the EFCA should become law. It instead identifies changes the NLRB can implement on its own, without statutory amendment, to improve its administration of 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 happen regardless of whether the 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 a victorious secret-ballot election confers on the bargaining agent. Moreover, elections will still be needed to decide whether to decertify unions or to de-authorize union-security arrangements.[11]

As the Board continues to hold elections, it is important to determine whether it can hold them more quickly, how it can handle unit certification and other issues more expeditiously, whether it can provide union organizers greater and earlier access to employees, and whether it can enhance remedies for unlawful employer and union conduct that mars fair election conditions. Similarly, the Board will still need to address bargaining obligations under the Act, whatever the EFCA's legislative fate. Even under a first-contract interest-arbitration regime, issues of bargaining obligation are likely to arise during the early stages when the parties attempt to negotiate or secure arbitral imposition of a first contract, and the resolution of those issues may inform what the arbitration panel includes in a first contract.[12] When all contracts are up for renewal—whether those negotiated by the parties or those imposed by arbitrations the first time around—the NLRB will still need to determine whether a party has satisfied its duty to bargain in good faith, and identify appropriate remedies for any violations.

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11. For a proposal conducive to an "easy in, easy out" approach to representation elections, see Samuel Estreicher, *Deregulating Union Democracy*, 2000 COLUM. BUS. L. REV. 501 (2000).

12. As an example of how bargaining issues may be considered, see section 43(2) of the Ontario Labour Relations Act, which provides for consideration of the employer's (or union's) unreasonable bargaining as a factor in whether to direct a first-contract interest arbitration:

> (2) The Board shall consider and make its decision on an application under subsection (1) within 30 days of receiving the application and it shall direct

The scope of any legislative change depends in significant part on the degree of confidence the players in the system have in the utility and fairness of the Board's administration of existing law, and their views of the suitability of that law to current conditions.

This Article begins with suggestions for improving the Board's procedures in representation and unfair labor practice (ULP) cases; the next section suggests modifications of key substantive rules or policies of the agency. No attempt is made here, however, to provide a comprehensive account of what the Board can and should do in the process of administrative overhaul.

I. Suggestions for Improving NLRB Procedures

A. *Identify and Address Causes of Delay*

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 factors cause delay; and how the Board can minimize those factors without undermining the overall goal of fair, efficient procedures for investigations, fact finding, adjudication, and internal review and decision making. "Physician, heal thyself" is the appropriate maxim here. This is not the place for an extensive analysis of the problem of administrative delay under the NLRA.[13] 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 and other improvements.

1. Representation Cases

a. *Reducing the Time Period Between Filing a Petition and Holding an Election*

(i) "An Appropriate Hearing"? The current debates over the EFCA and the 1994 Dunlop Commission report suggest that too much time expires between filing an election petition and holding a representation election. This is considered problematic because employee interest in collective representation can wane and dissipate simply by the passage of time. The gap in time before the election

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the settlement of a first collective agreement by arbitration where, irrespective of whether section 17 has been contravened, it appears to the Board that the process of collective bargaining has been unsuccessful because of,

(a) the refusal of the employer to recognize the bargaining authority of the trade union;
(b) the uncompromising nature of any bargaining position adopted by the respondent without reasonable justification;
(c) the failure of the respondent to make reasonable or expeditious efforts to conclude a collective agreement; or
(d) any other reason the Board considers relevant.

S.O. 1995, ch. 1, sched. A (amended 2006).

13. For a limited initial effort, see Samuel Estreicher & Matthew T. Bodie, *Administrative Delay at the NLRB: Some Modest Proposals*, 23 J. LAB. RESEARCH 87 (2002).

takes place also enables employers to reduce support for the union by running anti-union campaigns, whether or not the tactics used are deemed unlawful.[14]

How long is the gap between petition and election? The Dunlop Commission noted in 1994 that the "median time from petitioning for an election to a vote has been roughly fifty days for the last two decades (down considerably from the time taken in the 1940s and 1950s)."[15] The Board has made considerable progress in this area. In fiscal year 2008, initial elections in representation cases were held in a median of thirty-eight days from the filing of the petition, and 95.1% of all initial elections were conducted within fifty-six days of the filing of the petition.[16]

The NLRA 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 no later than two weeks after a petition is filed."[17] The 1977 proposed labor reform legislation[18] would have required an election between twenty-one days (under the House bill) or thirty days (under the Senate bill) from the filing of a petition if the petitioned-for unit was appropriate under a Board regulation.[19] Presumably, the Board could implement even a fourteen-day proposal on its own. It is not clear, however, that decreasing the existing median

14. The assumption of this essay is that it is desirable to reduce the time between the filing of a petition and the holding of an election. This is not necessarily true, however, if the predominant objective is to provide for an opportunity for the employee electorate to hear opposing views before casting their ballots.

15. U.S. DEP'T. OF LABOR & U.S. DEP'T. OF COMMERCE, COMMISSION ON THE FUTURE OF WORKER-MANAGEMENT RELATIONS, FACT-FINDING REPORT 68 (1994) [hereinafter DUNLOP COMMISSION FACT-FINDING]. *See also* Myron Roomkin & Richard N. Block, *Case Processing Time and the Outcome of Representation Elections: Some Empirical Evidence*, 1981 U. ILL. L. REV. 75, 85 (1981) (reporting that between 1972 and 1978, the average time in uncontested cases between filing a petition and holding an election was about 1.75 months, compared to about 3.5 months in contested cases).

16. *See* OFFICE OF THE GEN. COUNSEL, NLRB, MEM. GC 09-03, SUMMARY OF OPERATIONS FOR FISCAL YEAR 2008, *available at* http://www.nlrb.gov/research/memos/general_counsel_memos.aspx (select "2009" and follow hyperlinks to GC 09-03). Table 1 *infra* indicates that median and average time periods between filing a petition and holding an election are nearly the same for 2000 and 2008. Ferguson also reports that for the period 1999 to 2004, "[t]he average case that went to election did so in 41 days, and 95% of elections were held within 75 days of filing." 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 (2008).

17. DUNLOP COMMISSION REPORT, *supra* note 8, at 19.

18. *See supra* note 7 and accompanying text.

19. *See* H.R. REP. No. 95-637, at 55 (1977) (requiring an election to be held within twenty-one days after filing of petition if petitioned-for unit was defined as appropriate in a rule or prior decision in the industry; in other cases, the election would be held within forty-five days unless issues of exceptional novelty or complexity were presented); S. REP. No. 95-628, at 50–51 (1978) (same, except providing for a period of twenty-one to thirty days in cases where a rule defined the requested unit as appropriate).

Table 1: Petition, Election, Certification Comparisons, 2000 and 2008.

Petition to Election	2008	2000
Min. No. of Days from Petition to Election	3	6
Max. No. of Days from Petition to Election	2,152	2,108
Average No. of Days from Petition to Election	57	53
Median No. of Days from Petition to Election	38	41
No. of Elections More Than 56 Days from Petition	251 of 2,024, or 12.43%	532 of 3,497, or 15.21%
Election to Certification	**2008**	**2000**
Min. No. of Days from Election to Certification	0	0
Max. No. of Days from Election to Certification	458	3,307
Average No. of Days from Election to Certification	22	31
Median No. of Days from Election to Certification	11	11
No. of Certifications More Than 21 Days from Election	361 of 1,898, or 19.20%	747 of 3,325, or 22.47%
Petition to Certification	**2008**	**2000**
Min. No. of Days from Petition to Certification	18	15
Max. No. of Days from Petition to Certification	2,275	3,341
Average No. of Days from Petition to Certification	77	84
Median No. of Days from Petition to Certification	50	54
No. of Certifications More Than 100 Days after Election	250 of 1,898, or 13.17%	486 of 3,325, or 14.62%

Source: NLRB data (on file with author)

from thirty-eight days to fourteen days would be administratively feasible[20] or otherwise desirable.[21]

Where cases do not involve significant issues (or the parties stipulate to an accelerated schedule), the regional director should be able to hold a fairly prompt election, perhaps within a two-week period. It is doubtful, however, whether two weeks would be sufficient time, even with a strong administrative hand, to address difficult unit and supervisor-exclusion issues responsibly. To reduce the number of such cases, the Board might consider changing the sequence in which it considers unit and exclusion issues. Currently, supervisor-exclusion issues are addressed in a hearing before an election is conducted. Perhaps in many cases the election could happen first, based on an electorate that reflects well-established Board decisions as to the presumptively appropriate unit and likely disposition of eligibility issues. This could be possible in many cases, even in the absence of a consent-election agreement between the parties. The election results would not be certified, however, until the unit and eligibility issues were 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 might require a second election; in most cases, they would not.

During the Clinton administration, the Board looked into the issue and decided that section 9(c)(1) of the Act mandates the current sequence.[22] The section provides in pertinent part:

> Whenever a petition shall have been filed, in accordance with such regulations as may be prescribed by the Board...the Board shall investigate such petition and if it has reasonable cause to believe that a question of representation affecting commerce exists shall provide for *an appropriate hearing upon due notice*.... If the Board finds upon the record of such hearing that such a question of representation ex-

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20. The problem may not be with average or median periods but with highly contested cases. *See* discussion and Table 2 *infra* Part I.A.1.a.ii. Professor Cooper's 1984 study suggests that during the period she examined quick elections do not always benefit the union. *See* Laura J. Cooper, *Authorization Cards and Union Representation Election Outcome: An Empirical Assessment of the Assumption Underlying the Supreme Court's* Gissel *Decision*, 79 NW. U. L. REV. 87, 122, 122 tbl.12 (1984) (unions succeed 18.4% of the time when elections are held within two to four weeks).

21. Expanding union access to the employee electorate would also require additional time. *See supra* note 14 and discussion *infra* Part II.A.

22. *See* Angelica Healthcare Serv. Group, Inc., 315 N.L.R.B. 1320, 1321 (1995) ("We find that the language of Section 9(c)(1) of the Act and [29 C.F.R.] Section 102.63(a) of the Board's Rules required the Acting Regional Director to provide 'an appropriate hearing' prior to finding that a question concerning representation existed and directing an election."); DUNLOP COMMISSION REPORT, *supra* note 8, at 19 ("The requirement that the Board hold pre-election legal hearings prevents it from expediting the election process in a significant way."). Former NLRB Chairman William B. Gould notes that the Board in *Angelica* held that "a hearing in some form is required prior to the time the election takes place...although it was not addressed...precisely how one would define a hearing." WILLIAM B. GOULD IV, LABORED RELATIONS: LAW, POLITICS, AND THE NLRB 410 app. (2000).

> ists, it shall direct an election by secret ballot and shall certify the results thereof.[23]

Originally enacted as part of the 1947 Taft-Hartley amendments,[24] the provision arguably narrowed the discretion the Board had under the Wagner Act,[25] in part to implement the Taft-Hartley requirement of elections as a prerequisite to NLRB certification.[26]

Section 9(c)(1) plainly requires the Board to hold "an appropriate hearing" prior to the election to satisfy itself that a question concerning representation exists. The issue is whether more is required in this pre-election hearing other than to determine whether the labor organization has petitioned for an election in a unit whose appropriateness is well-established under agency case law, to determine whether the agency has statutory jurisdiction in the particular case, and to mandate the sealing of any challenged ballots, including challenges

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23. NLRA § 9(c)(1), 29 U.S.C. § 159(c)(1) (2006) (emphasis added).

24. Labor Management Relations (Taft-Hartley) Act, Pub. L. No. 80-101, 61 Stat. 136 (1947) (codified as amended in scattered sections of 29 U.S.C.).

25. Section 9(c) of the original Wagner Act provided:

> Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of employees, or utilize any suitable method to ascert[a]in such representatives.

49 Stat. 449, 453 (1935) (current version at 29 U.S.C. § 159(c) (2006)).

26. The Board experimented with prehearing elections starting in 1945. *See* NLRB, THIRTEENTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDING JUNE 30, 1948, at 20 (1949); NLRB, TWELFTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDING JUNE 30, 1947, at 3 (1948). During the Taft-Hartley deliberations, Congress rejected a provision in conference that would have expressly authorized such elections. Explaining the conference committee's actions, Senator Taft insisted that the committee was not changing existing law:

> Section 9(c)(4): The conferees dropped from this section a provision authorizing pre-hearing elections. That omission has brought forth the charge that we have thereby greatly impeded the Board in its disposition of representation matters. We have not changed the words of existing law providing a hearing in every case unless waived by stipulation of the parties. It is the function of hearings in representation cases to determine whether an election may properly be held at the time; and if so, to decide questions of unit and eligibility to vote. During the last year the Board has tried out a device of holding the election first and then providing the hearing to which the parties were entitled by law. Since its use has been confined to an inconsequential percentage of cases, and more often than not a subsequent hearing was still necessary and because the House conferees strenuously objected to its continuance it was omitted from the bill.

93 CONG. REC. S7002 (daily ed. June 12, 1947), *reprinted in* 2 NLRB, LEGISLATIVE HISTORY OF THE LABOR RELATIONS MANAGEMENT ACT, 1947, at 1625 (1985). The Board in 1948, however, read the 1947 amendment as "abolish[ing]...a practice instituted in 1945, of permitting the Regional Director in appropriate circumstances to conduct the election, upon due notice to the parties, before holding the hearing." NLRB, THIRTEENTH ANNUAL REPORT, *supra*, at 20.

based on eligibility issues. If the respondent believes that the facts of its case require some variance from well-established Board law, that matter, if properly preserved, could be taken up after the election in a second-stage precertification inquiry. Functionally, this precertification inquiry would be similar to the situation where the Board grants a request for review from the regional director's decision directing an election. Neither the request nor the grant of the request operates as a stay of the election.[27]

(ii) Addressing Highly Contested Cases The problem of delay in representation cases may have less to do with the median cases than with highly contested cases.[28] Consider the following preliminary results from NLRB data:

Table 2: Effect of Blocking Charges, 2008.

No. of Petitions Proceeding to Election in 2008	2,024
No. of Blocked Petitions	284
Median No. of Days from Petition to Election in Blocked Cases	139
No. of Unblocked Petitions	1,740
Median No. of Days from Petition to Election in Unblocked Cases	38
Average No. of Days from Petition to Election in Unblocked Cases	39

Source: NLRB data (on file with author).

The Board should study the characteristics of the cases that take the longest time. For example, in 2008, 12.4 percent of the cases took longer than the median time to go to election and took longer than three weeks from the election for the results to be certified. As Table 2 indicates, in 284 of the 2,024 petitions that proceeded to election in 2008, allegations of employer violations triggered the filing of a "blocking charge" by a labor organization, delaying the holding of the election. The median for this subset was 139 days compared to thirty-eight days overall. To the extent the Board's blocking-charge policy is exploited by charging parties unreasonably to delay elections, the Board should reexamine that policy and hold elections sooner even in the face of outstanding unfair labor practices.[29]

27. *See* 29 C.F.R. § 102.67(b) (2009).

28. Thus, for example, Ferguson reports: "The tail...is quite long; the maximum delay before election recorded in the data is 1,705 days.... The average time to election or withdrawal was 50 days, and cases in the 95th percentile were open for 234 days." Ferguson, *supra* note 16, at 10 n.9. *See also* DUNLOP COMMISSION FACT-FINDING, *supra* note 15, at 82 ex.III-3. A good portion of this tail appears to be comprised of "blocked" cases. *See* Berton B. Subrin, *The NLRB's Blocking Charge Policy: Wisdom or Folly?* 39 LAB. L.J. 651 (1988), and *infra* Table 2.

29. *See* Subrin, *supra* note 28. It is not always clear that the best response to alleged employer unlawful practices is deferring the holding of an election; it is hardly inconceivable that the relatively prompt convening of an election, coupled with broadened

B. *EXPERIMENTING WITH INTERNET AND MAIL BALLOTING*

The Board could experiment with broader use of mail balloting and possible Internet polling procedures that permit employees to cast anonymous ballots away from the employer's premises.[30] This would meet the criticism that making employees vote on representation at their workplace unnecessarily brings home the message of employer power and possible intimidation.[31] The National Mediation Board (NMB), the agency responsible for conducting representation elections under the Railway Labor Act, uses such procedures and, as Professor Sachs suggests,[32] the Board can adapt them for NLRA purposes.[33] Nothing in the NLRA 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 in connection with unfair labor practices could occur at several stages: (1) the period between filing a charge and issuing a complaint; (2) the period between issuing the complaint and closing the record of the adversary hearing before an administrative law judge (ALJ); (3) the period between closing the record and issuance of the ALJ's decision; (4) the period between 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.

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section 10(j) preliminary injunctive relief, provides a better cure. See discussion *infra* Part II.C.

30. The Board presently uses mail balloting when eligible voters are "scattered," meaning they work over a vast geographic area or their work schedules vary significantly. *E.g.*, Halliburton Serv., 265 N.L.R.B. 1154, 1188 (1982) (noting that an election should be held on the employer's premises absent good cause to the contrary, as determined by the regional director). *See* NLRB, CASE HANDLING MANUAL, pt. 2 § 13301.2 (2003), *available at* http://www.nlrb.gov/nlrb/legal/manuals/CHM2/CHM2.pdf.

31. *See* Craig Becker, *Democracy in the Workplace: Union Representation Elections and Federal Labor Law*, 77 MINN. L. REV. 495, 565–69 (1993). On the other hand, mail or Internet balloting raises issues of possible intimidation by union representatives and may lead to lower employee turnout than workplace balloting.

32. *See* Benjamin Sachs, *Card Check and Employee Choice: A New Altering Rule for Labor Law's Asymmetric Default*, 123 HARV. L. REV. 3 (forthcoming, Jan. 2010).

33. The NMB's Telephone Electronic Voting and Internet Voting system does not presently permit employees to change their votes once they have been cast. Nat'l Mediation Bd., Frequently Asked Questions: Representation, http://www.nmb.gov/representation/faqs-ola.html (last visited Oct. 24, 2009). The NLRB, however, would be well-advised to allow a short period for employees to reconsider their vote in light of new information and as a safeguard against possible coercion or confusion respecting the initial ballot.

Table 3: Section 10(j) Cases Resulting in District Court Filings, 2004–2008

Filing of Charge to District Court Filing	
Minimum No. of Days	88
Maximum No. of Days	1,658
Average No. of Days	334
Median No. of Days	263
Filing of Charge to RD Determination	
Minimum No. of Days	22
Maximum No. of Days	1,603
Average No. of Days	187
Median No. of Days	120
From RD Determination to Advice Determination	
Minimum No. of Days	15
Maximum No. of Days	550
Average No. of Days	111
Median No. of Days	65
Filing of Charge to Advice Determination	
Minimum No. of Days	70
Maximum No. of Days	1,630
Average No. of Days	309
Median No. of Days	219
Filing of Charge to Board Determination	
Minimum No. of Days	88
Maximum No. of Days	1,652
Average No. of Days	334
Median No. of Days	264
From Advice Determination to Board Determination	
Minimum No. of Days	0
Maximum No. of Days	106
Average No. of Days	23
Median No. of Days	29
From Board Determination to District Court Filing	
Minimum No. of Days	1
Maximum No. of Days	68
Average No. of Days	5
Median No. of Days	3

Source: NLRB data (on file with author). Details of the cases referenced in Table 3 are provided in Appendix A.

For cases completed 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.[34] For fiscal year 2003, the numbers were, respectively, 647 days and 420 days.[35]

These figures suggest a continuing problem. Once the Board reaches its full membership complement, the Board should authorize its chairman to assign cases to Board members,[36] place time limits on how long a case can remain on a Board member's desk, and, if those limits are not met, reassign the case to another Board member.[37]

B. Greater Use of Rulemaking

The Supreme Court made clear in a unanimous 1991 decision, *American Hospital Association v. NLRB*,[38] that the Board has substantive rulemaking authority under section 6 of the Act.[39] The Board has not used this authority, however, with the exception of the rules for bargaining units in acute health care facilities upheld by *American Hospital Association*.[40] One reason the Board may hesitate to use its rulemaking power is a desire to shield itself from congressional scrutiny that may not occur when Board members embed their policy judgments in factual determinations made in the course of adjudications. During

34. *See* NLRB, SEVENTY-THIRD ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2008, at 138, *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2008Annual.pdf. While 2008 may not be a representative year because the Board only had two members, the figures for 2003, when the Board enjoyed a full complement of five members, suggest even longer time periods. NLRB, SIXTY-EIGHTH ANNUAL REPORT OF THE NATIONAL LABOR RELATIONS BOARD FOR THE FISCAL YEAR ENDED SEPTEMBER 30, 2003, at 199, *available at* http://www.nlrb.gov/nlrb/shared_files/brochures/Annual%20Reports/Entire2003AnnualReportreduced.pdf.

35. NLRB, SIXTY-EIGHTH ANNUAL REPORT, *supra* note 34, at 199.

36. 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), 29 U.S.C. § 154 (2006). This should not prevent the agency chairman or any other member from using his or her attorney staff and sometimes pooling several members' staff to screen cases that can be decided by summary decision and those that require assignment to a Board member for a more extended decision. *See generally* 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 (1998).

37. *See* Estreicher & Bodie, *supra* note 13, at 95–96.

38. 499 U.S. 606 (1991).

39. *Id.* at 609 ("Section 6 granted the Board 'authority from time to time to make, amend, and rescind...such rules and regulations as may be necessary to carry out the provisions' of the Act." (quoting NLRA § 6, 29 U.S.C. § 156 (2006))).

40. *See generally* Samuel Estreicher, *Policy Oscillation at the Labor Board: A Plea for Rulemaking*, 37 ADMIN. L. REV. 163 (1985); Mark H. Grunewald, *The NLRB's First Rulemaking: An Exercise in Pragmatism*, 41 DUKE L.J. 274 (1991).

the Clinton administration, the Board proposed a rule establishing the appropriateness of a single-location bargaining unit in the absence of "extraordinary circumstances." Congress barred use of any monies on the single-location proceeding, however, and the Board abandoned the effort after three years.[41] This experience suggests that the Board will not readily embark on additional experiments of this type.

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 for all industries irrespective of countervailing factual circumstances—such as the presumptive appropriateness of single-location units—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 employers would be required to post in cafeterias and break areas alongside similar notices from other government agencies.[42] Another potentially fruitful effort would be a proposed rule containing the text of a model authorization card that would be used for ascertaining both 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 proposed by section 2 of the EFCA).

NLRB policy reversals—which come with each new administration as surely as spring follows winter—is another area where properly

41. *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, 501–02, nn.151–52 (2000). Congress in 1947 also curiously barred the Board from "appoint[ing] individuals for...economic analysis." NLRA § 4(a), 29 U.S.C. § 154(a) (2006). A history of this exclusion is given in Catherine Fisk & Deborah C. Malamud, *The NLRB in Administrative Law Exile: Problems with Its Structure and Function and Suggestions for Reform*, 58 DUKE L.J. 2013, 2045–49 (2009). The section 4(a) limitation did not hamper the Board when it promulgated health care bargaining units in 1988. *See Collective-Bargaining Units in the Health Care Industry*, 54 FED. REG. 16,336, 16,336–46 (Apr. 21, 1989) (codified at 29 C.F.R. § 103.30) (certification required by Regulatory Flexibility Act, 5 U.S.C. §§ 601–12 (2006)). In the Small Business Regulatory Enforcement Fairness Act of 1996, Congress provided for judicial review of agency compliance with its regulatory fairness review requirements. 5 U.S.C. § 805 (2006) (amended 2007). Whatever the intention behind the section 4(a) prohibition, it does not bar the Board from hiring individuals with statistical expertise, or from borrowing staff from other agencies, to help it conduct regulatory compliance reviews.

42. Along with Professor Charles J. Morris, the author asked the Board to issue such a rule back in 1993—a petition the Board has yet to act upon. *See* AFL-CIO General Counsel Urges NLRB to Require Notices Describing NLRA Rights, 192 Daily Lab. Rep. (BNA) A-10 (Oct. 3, 2003). The Department of Labor has issued a notice of proposed rulemaking that would require a similar notification of NLRA rights by federal contractors. Notification of Employee Rights Under Federal Labor Laws, 74 Fed. Reg. 38,488 (proposed Aug. 3, 2009) (to be codified at 29 C.F.R. pt. 471).

employed rulemaking would enhance the confidence of the parties that acting in conformity with preexisting Board law will not result in adverse remedial consequences. Confining policy reversal to the rulemaking process also would encourage greater judicial deference. It would be strongly presumed that until a new rule has been promulgated, the General Counsel would issue complaints on the basis of preexisting NLRB law. The Board thus would promote certainty and establish a process likely to lead to better rules. 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.[43]

II. Substantive Changes in NLRB Policy

I address here only three of the several areas of Board policy that should be revisited: union access rules, voluntary "framework" agreements subject to "ex post authorization," and 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 section 8(a)(1) of the NLRA if, without discrimination, they refuse to allow nonemployee union organizers on their property to address employees.[44] The Court has not purported, however, to alter the scope of the Board's authority,[45] first announced in *General Shoe Corp.*,[46] to establish under section 9 of the NLRA 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 has been committed and presumably without regard to statutory limits on its ULP authority, such as the so-called employer free speech provision, section 8(c) of the NLRA.[47] The Board has used its *General Shoe*

43. Even if the Board does not employ rulemaking, it could still use a better process for policy reversals. The Board could publish notice of an Agenda of Proposed Policy Changes with an opportunity for public 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 on the Agenda thought to be a vehicle for a policy reversal. To focus attention and avoid repetition, any oral argument should be limited to one hour for each side of the issue. Thus, absent special circumstances, the General Counsel and the charging party would be limited to a half hour each, and the respondent to one hour. Any *amici* wishing to argue would need to secure consent of the party to share its time.

44. Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992).

45. NLRA § 9, 29 U.S.C. § 159 (2006).

46. 77 N.L.R.B. 124 (1948).

47. *Id.* at 126 ("Conduct that creates an atmosphere which renders improbable a free choice will sometimes warrant invalidating an election, even though that conduct may not constitute an unfair labor practice.").

authority to bar massed-assembly speeches on company time within twenty-four hours of a scheduled election,[48] and to require employers to transmit a list of the names and addresses of the employees eligible to vote in the election to the petitioning union seven days after the scheduling of an election. (The latter is called an "*Excelsior* list" because the rule was announced in *Excelsior Underwear, Inc.*[49])

The Board's *Excelsior* decision suggests a persuasive rationale for expanding union access rights in particular circumstances. The Board distinguished earlier Supreme Court decisions in *NLRB v. Babcock & Wilcox Co.*[50] and *NLRB v. United Steelworkers of America*,[51] which barred union access rights under the Board's section 8 ULP authority.[52] In the *Excelsior* context, the Board reasoned, employees' section 7 interests were centrally involved, thus altering the balance between employer interests and section 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....[53]

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 to trigger a representation election, 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.[54] Similar to the access rules often sought by unions in "neutrality" agreements, 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

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48. *See* Peerless Plywood Co., 107 N.L.R.B. (1953).

49. 156 N.L.R.B. 1236 (1966).

50. 351 U.S. 105 (1956) (presaging the Court's decision in Lechmere, Inc. v. NLRB, 502 U.S. 527 (1992)).

51. 357 U.S. 357 (1958).

52. *Id.* at 363–64; *Babcock & Wilcox*, 351 U.S. at 112.

53. *Excelsior*, 156 N.L.R.B. at 1245.

54. *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.").

proposal would be triggered by the Board's determination of an interest requirement rather than any particular expressive activity of the employer, there should be no serious section 8(c) concern with this application of the *General Shoe* doctrine.[55]

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

The Board should revisit its prior decision in *Majestic Weaving Co., Inc.*,[56] in which it ruled that employers violate the law if they recognize unions before they have obtained majority support even if the recognition or agreement is expressly subject to a later showing of majority support. The Board's ruling is based on a flawed analysis. The statutory prohibition is employer recognition of a minority union, not discussions with a union on the basic approach to future bargaining should the union demonstrate majority support in an appropriate unit. Overturning *Majestic Weaving* would provide employers and unions greater leeway to enter into agreements providing a framework for future recognition even if the union does not have the majority support of employees in the bargaining unit at the time of the agreement. The Board should, however, insist on two essential requirements:

(1) transparency—the parties must openly state that they are entering into a framework agreement setting only guidelines for any future bargaining for a collective bargaining agreement, and that bargaining would not take place until the union obtains bargaining authority; and
(2) "ex post authorization"—the agreement must expressly provide an opportunity for the employees to decide later, preferably by secret ballot, whether they wish to authorize the union's bargaining authority.

This approach would impart valuable information to employees to guide their decision because the framework agreement would illuminate the union's bargaining objectives and its likely efficacy as a bargaining agent. It also would provide an opportunity for the parties

55. For developments under the Railway Labor Act, see *US Airways, Inc. v. Nat'l Mediation Bd.*, 177 F.3d 985 (D.C. Cir. 1999) (holding NMB's order for rerun election on grounds of employer interference violated employer's right to free speech when employer speech based on objective predictions); Shawn J. Larsen-Bright, *First Amendment and the NLRB's Laboratory Conditions Doctrine*, 77 N.Y.U. L. REV. 204 (2002) (arguing that laboratory conditions doctrine as currently enforced is contrary to statute and to employer's First Amendment right to free speech).

56. 147 N.L.R.B. 859, 860 (1964), *enforcement denied on other grounds*, NLRB v. Majestic Weaving Co., Inc., 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, 39 (1949) (holding in pertinent part that a contract begun with a minority union is valid if the union has a majority by the time the contract is executed).

to explore new approaches to a bargaining relationship, especially at new sites of employment.[57]

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 deal more with its statutory authority than it has in the past.

1. Delegation of section 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. Apparently, the Board's data did not differentiate ULP charges filed during union organizing campaigns from those against unionized employers until 2007.[58] Rough estimates of the frequency before 2007 vary. Harvard law professor Paul Weiler estimated in 1983 that one in twenty union supporters is unlawfully fired.[59] The late University of Chicago law professor Bernard Meltzer and economist Robert LaLonde calculated a one-in-sixty-three probability of unlawful discharge in 1991.[60] Researchers John Schmitt and Ben Zipperer estimated a one-in-seventy-three rate of retaliatory discharge for 2000 and a one-in-fifty-two rate for 2001–2007.[61]

The Board's data since 2007 on the incidence of section 8(a)(1) and (3) charges during organizing campaigns reveal that 1,454 representation cases contained such charges in fiscal year 2007, 830 representation cases contained such charges in fiscal year 2008, and, so far in fiscal year 2009 (as of October 1, 2009), 584 representation cases contain such charges.[62] Unfortunately, the Board's figures do not reveal

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57. The author advanced this proposal in Samuel Estreicher, *Freedom of Contract and Labor Law Reform: Opening up the Possibilities for Value-Added Unionism*, 71 N.Y.U. 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 Commission Report, *supra* note 8, 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 Berkeley J. Emp. & Lab. L. 293, 301–06 (2005).

58. *See* J. Justin Wilson, An Analysis of Current NLRB Data on Unlawful Terminations During Union Organizing Campaigns, 2007 to 2008, at 1, 2 n.5 (2009), http://server1.laborpains.org/wp-content/uploads/2009/03/nlrbcuf-analysis-of-nlrb-data.pdf.

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

60. *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).

61. *See* John Schmitt & Ben Zipperer, Dropping the Ax: Illegal Firings During Union Election Campaigns, 1951–2007, at 5, 10–11 (2009), http://www.cepr.net/documents/publications/dropping-the-ax-update-2009-03.pdf.

62. NLRB data (on file with author).

the number of employees discriminated against or the disposition of those charges.

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 employer discharged the employee for seeking collective representation. No other remedy under current law would more effectively bring home the central message of the NLRA: Employees will not suffer any loss of employment or benefit if they choose to engage in concerted activity. Section 10(*l*) expressly grants the Board this authority and requires the regional director to seek preliminary injunctions to restrain certain union ULPs.[63] 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...."[64]

Although section 10(j) speaks in terms of action by the Board, the agency has from time to time, with judicial approval,[65] 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 section 10(j) authority to the General Counsel.[66] Even after the Board reaches full strength, it should keep in place this delegation. This will eliminate the delay inherent in requiring the regional director to obtain authority to seek a preliminary injunction from both the General Counsel and the Board. Moreover, the Board should direct the General Counsel to seek section 10(j) relief in *every* case where there is reasonable cause to believe an employer fired an employee during an organizing drive or an election campaign for exercising statutory rights. To bolster the agency's credibility in the district courts, and in fairness to legitimate employer interests, the General Counsel should provide employers an opportunity to challenge the credibility of witnesses in a one- or two-day hearing before authorizing the section 10(j) application.[67] The Board and General Counsel also should systematically review procedures for processing section 10(j) requests in order to minimize avoidable delay.[68]

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63. NLRA § 10(*l*), 29 U.S.C. § 160(*l*) (2006).

64. *Id.* § 10(j), 29 U.S.C. § 160(j) (2006).

65. *See, e.g.*, Muffley v. Spartan Mining Co., 570 F.3d 524 (4th Cir. 2009).

66. *See id.* at 540.

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

68. Time periods for 2004–2008 are set forth in Table 3, *supra*. Detail on the cases referenced in Table 3 are provided in Appendix A to this article.

2. Imposing Bargaining Obligations Due to the Absence of Good-Faith Doubt in 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.[69] Prior to the Supreme Court's decision in *NLRB v. Gissel Packing Co.*,[70] the Board asserted the authority to impose such obligations on employers that commit ULPs indicating a lack of good-faith doubt.[71] In *Gissel*,[72] the Court noted that the Board said that it no longer followed the "good faith doubt" policy the Board had previously established in *Aaron Brothers Co.*[73] and *Joy Silk Mills, Inc.*[74] The Court's *Gissel* decision and its subsequent ruling in *Linden Lumber Division, Summer & Co. v. NLRB*[75] 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.[76]

3. Remedies for Unlawful Refusal to Bargain

Under section 8(d), the Board does 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.[77] The Board in appropriate circumstances may impose so-called extraordinary union access[78] as well as

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69. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969).
70. *Id.*
71. *Id.* at 591–92.
72. *Id.* at 590–94.
73. 158 N.L.R.B. 1077 (1966).
74. 85 N.L.R.B. 1263 (1949).
75. 419 U.S. 301, 306 (1974).
76. The *Aaron Brothers–Joy Silk* approach is administratively more manageable and more consistent with underlying deterrence goals than the present "can-a-fair-rerun-election-be-held?" test. This is because, while the ultimate question is one of the employer's good faith doubt of the union's majority status, the inquiry is principally an objective one—whether the employer has committed unfair labor practices inconsistent with claimed good faith. Moreover, reviewing courts need to be reminded of the origins and limits of the Board's "election preference" policy in reviewing NLRB bargaining orders. Interim relief under section 10(j) is also important here. *See generally* Samuel Estreicher, *The Second Circuit and the NLRB 1980-1981: A Case Study in Judicial Review of Agency Action*, 48 BROOK. L. REV. 1063, 1084–94 (1982); Laura J. Cooper & Dennis R. Nolan, *The Story of* NLRB v. Gissel Packing: *The Practical Limits of Paternalism*, in LABOR LAW STORIES 213, 215–17, 219–22 (Laura J. Cooper & Catherine L. Fisk eds., 2005).
77. *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.
78. *See* Monfort, Inc. v. NLRB, 965 F.2d 1538, 1547–48 (10th Cir. 1992); Fieldcrest Cannon, 318 N.L.R.B. 470 (1995), *enforced in part*, 97 F.3d 65, 74 (4th Cir. 1996). General Counsel Ronald Meisburg has commendably given priority treatment to the need for special remedies in first-contract bargaining cases. *See* OFFICE OF THE GEN. COUNSEL, NLRB, MEM. GC 06-05 (2006); OFFICE OF THE GEN. COUNSEL, NLRB, MEM. GC 07-08 (2007); OFFICE OF THE GEN. COUNSEL, NLRB, MEM. GC 08-08 (2008); OFFICE OF THE GEN. COUNSEL, NLRB,

negotiation and litigation expense remedies,[79] but the Board's remedial apparatus also includes the ability to treat any strike in protest of the employer's ULPs as an ULP strike, thereby privileging the strikers to reinstatement in their previous jobs once they have made clear they wish to return.[80] Under current Board practice, the determination that a strike is an ULP strike occurs only retrospectively, after the strike has occurred and after employers have replaced striking employees.[81] 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 the Board for a nonbinding preliminary ruling as to whether the Board is likely to treat the strike as an ULP strike.[82]

A combination of the three remedial proposals offers a promising start. In addition to the "extraordinary" remedies now in use, the Board would be able to (1) reinstate employees preliminarily when there is reasonable cause to believe an employer discharged the person in violation of section 8(a)(3); (2) impose a bargaining obligation on the employer because of the absence of good-faith doubt, as evidenced by employer ULPs, in appropriate cases backed up by a petition for interim injunctive relief; and (3) employ an advisory ruling procedure to inform employees whether the Board is likely to treat the strike they are engaged in as an ULP strike. Together, the options would go far in allowing the Board to structure a meaningful remedy even in first-time bargaining situations.

III. Conclusion

These proposals are by no means exhaustive; more can be said and other ideas pursued. In any event, the NLRA has not "ossified," as some in academic circles have claimed. Rather, 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.

MEM. GC 08-09 (2008), *available at* http://www.nlrb.gov/research/memos/general_counsel_memos.aspx (select year of memorandum and follow hyperlink to document).

79. *See* Frontier Hotel & Casino, 318 N.L.R.B. 857, 859 (1995), *enforced in relevant part*, 118 F.3d 795 (D.C. Cir. 1997); Alwin Mfg. Co., 326 N.L.R.B. 646, 647 (1998), *enforced*, 192 F.2d 133 (D.C. Cir. 1999). The Board could make these remedies more readily available after proper rulemaking procedures. *See supra* Part I.B.

80. For an interesting proposal to protect ULP strikes, 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. L. REV. 813 (1994).

81. *Id.*

82. The entire issue of when an economic strike becomes converted into an ULP strike calls for greater reliance by the Board on declaratory orders. *See id.* The Board's current procedures provide for advisory opinions and declaratory orders regarding jurisdiction. *See* NLRB, RULES AND REGULATIONS AND STATEMENTS OF PROCEDURE § 101.39–.43 (2009).

Appendix A: Details of Section 10(j) Cases Resulting in District Court Filings, 2004–2008.

Date Charge Filed	10(j), Date Requested	10(j), Sua Sponte	Case Group, Lead	10(j), RD Determination Date	10(j), Advice Determination Date	10(j), Board Determination Date	10(j), Date Petition Filed
02/04/2003			Y				01/12/2004
02/04/2003			Y		12/05/2003		01/12/2004
02/04/2003			Y		12/05/2003	12/30/2003	01/12/2004
02/04/2003	02/03/2003	N	Y	10/27/2003	12/05/2003	12/31/2003	01/12/2004
06/09/2005	06/09/2005	Y		07/26/2005	10/19/2005	11/25/2005	12/01/2005
07/14/2003	02/09/2004	Y	Y	02/09/2004	04/16/2004	05/06/2004	05/11/2004
08/17/2004	08/18/2004	N	Y	09/08/2004		12/16/2004	12/22/2004
10/12/2005	01/04/2006	Y	Y	01/11/2006	05/17/2006	05/25/2006	06/06/2006
09/17/2004	09/17/2004	Y	Y	12/05/2004		07/13/2005	07/19/2005
04/07/2005	04/07/2005	N	Y	06/01/2005		10/19/2005	10/25/2005
05/12/2005	05/12/2005	N		08/16/2005			10/26/2005
07/09/2004	12/29/2004	N	Y	02/28/2005	06/08/2005	07/06/2005	07/11/2005
07/25/2005	07/25/2005	Y		10/27/2005	01/03/2006	02/15/2006	02/24/2006
10/06/2006	10/06/2006	Y		12/19/2006	01/26/2007	02/14/2007	04/23/2007
01/25/2005	01/25/2005	Y	Y	08/03/2005			10/24/2005
08/31/2005	11/30/2005	Y	Y	12/15/2005	04/05/2006	05/04/2006	05/08/2006
02/06/2006	03/01/2006	N	Y	05/23/2006	10/16/2006	12/06/2006	12/11/2006
05/03/2006			Y				12/11/2006

(Continued)

Appendix A: Details of Section 10(j) Cases Resulting in District Court Filings, 2004–2008. (*Continued*)

Date Charge Filed	10(j), Date Requested	10(j), Sua Sponte	Case Group, Lead	10(j), RD Determination Date	10(j), Advice Determination Date	10(j), Board Determination Date	10(j), Date Petition Filed
06/08/2006	12/06/2006	N	Y	04/19/2007	05/29/2007	07/11/2007	07/13/2007
07/22/2008			Y			11/17/2008	11/20/2008
07/22/2008			Y	03/16/2009		11/17/2008	11/20/2008
07/22/2008	07/22/2008	N	Y	09/24/2008		10/17/2008	11/20/2008
07/22/2008	11/21/2008	N	Y	03/16/2009		10/17/2008	11/20/2008
06/25/2004	08/13/2004	Y		11/05/2004	02/23/2005	03/21/2005	03/24/2005
03/24/2006	03/30/2006	Y		06/16/2006	07/18/2006	08/10/2006	08/15/2006
06/02/2005	06/28/2005	Y		07/28/2006	01/29/2008	01/29/2008	01/31/2008
07/06/2005	07/26/2005	Y		03/06/2006	04/26/2006	06/06/2006	06/09/2006
01/29/2007	10/24/2007	Y	Y	11/20/2007		12/28/2007	01/08/2008
05/16/2006	05/16/2006	Y	Y	09/06/2006		12/15/2006	01/10/2007
10/05/2007	10/05/2007	Y	Y	12/17/2007			04/22/2008
07/07/2006	07/07/2006	N		08/10/2006	09/18/2006	10/05/2006	10/10/2006
07/11/2007	08/01/2007	Y	Y	08/10/2007	09/19/2007	10/09/2007	10/12/2007
01/08/2008	02/22/2008	Y	Y	02/22/2008	04/09/2008	04/17/2008	04/18/2008
01/08/2008	05/02/2008	Y	Y	05/02/2008			08/05/2008
02/15/2008	02/15/2008	N		03/11/2008	05/08/2008	05/08/2008	05/13/2008
04/10/2007	04/10/2007	Y		06/25/2007	07/30/2007	08/16/2007	08/17/2007
07/08/2005	07/08/2005	Y		11/04/2005	02/16/2006	03/24/2006	03/28/2006

07/08/2005	07/08/2005	Y		11/04/2005	02/16/2006	03/24/2006	03/28/2006
08/14/2006	10/31/2006	Y	Y	11/17/2006	01/11/2007	02/01/2007	02/08/2007
12/08/2006	01/12/2007	Y	Y	02/16/2007	05/02/2007	05/16/2007	05/21/2007
12/22/2006	12/22/2006	N		03/12/2007	05/07/2007	05/25/2007	05/30/2007
08/30/2004	08/30/2004	Y		12/20/2004	01/04/2005	02/16/2005	03/01/2005
02/02/2005	02/24/2005	N	Y	04/04/2005	03/08/2006	05/10/2006	05/16/2006
11/16/2005	11/16/2005	N	Y	04/27/2006	05/30/2006	06/28/2006	06/29/2006
04/09/2003	07/29/2003	N	Y	05/13/2004	06/24/2004	07/29/2004	08/02/2004
10/18/2005	10/18/2005	Y		02/24/2006	10/31/2006	11/24/2006	11/28/2006
07/14/2004	08/10/2004	Y	Y	04/01/2005	08/18/2005	11/02/2005	11/17/2005
01/03/2005	01/19/2005	Y		05/19/2005	08/01/2005	11/07/2005	11/23/2005
09/21/2005	09/21/2005	N		01/18/2006	08/04/2006	08/27/2006	08/31/2006
11/21/2001	04/03/2006	Y		04/12/2006	05/09/2006	05/31/2006	06/06/2006
07/19/2002	12/17/2002	N	Y	02/14/2003	11/18/2003	02/10/2004	02/13/2004
01/20/2004	08/16/2004	Y	Y	08/19/2004	09/13/2004	10/22/2004	10/27/2004
06/13/2006	08/10/2006	Y		08/10/2006		03/14/2007	03/19/2007
09/18/2007	09/27/2007	Y	Y	01/16/2008	02/28/2008	02/28/2008	03/06/2008
10/31/2006	12/21/2006	Y		03/01/2007	06/01/2007	06/21/2007	06/27/2007
07/17/2002	04/17/2003	N	Y	11/07/2003	01/22/2004	01/22/2004	01/26/2004
08/09/2006	09/22/2006	Y	Y	01/10/2007			05/11/2007
09/07/2006	11/21/2006	Y					03/19/2007
09/18/2006	11/21/2006	Y	Y				03/19/2007

(Continued)

Appendix A: Details of Section 10(j) Cases Resulting in District Court Filings, 2004–2008. (*Continued*)

Date Charge Filed	10(j), Date Requested	10(j), Sua Sponte	Case Group, Lead	10(j), RD Determination Date	10(j), Advice Determination Date	10(j), Board Determination Date	10(j), Date Petition Filed
09/22/2006	11/21/2006	Y	Y	01/05/2007	01/31/2007	03/14/2007	03/19/2007
03/05/2007	03/26/2007	Y		04/25/2007	06/29/2007		07/27/2007
04/29/2002	05/01/2002	Y	Y	07/15/2002	09/12/2002		02/20/2004
07/14/2004	07/14/2004	Y	Y	11/19/2004	01/04/2005	02/15/2005	02/25/2005
09/27/2004	09/27/2004	Y	Y	02/24/2005	12/13/2005	03/29/2006	04/10/2006
07/22/2005	07/22/2005	Y	Y	07/28/2006	07/20/2007	07/24/2007	07/30/2007
10/11/2005	08/30/2006	Y	Y	03/29/2007			06/14/2007
03/24/2006	03/24/2006	Y	Y	03/29/2007	05/15/2007	06/05/2007	06/14/2007
09/29/2006	10/03/2006	Y	Y	07/13/2007		09/17/2007	09/25/2007
08/13/2007	08/15/2007	Y		12/28/2007	03/19/2008	03/19/2008	03/21/2008
09/03/2003	10/18/2005	Y	Y	10/18/2005	12/05/2005	01/24/2006	01/30/2006
01/12/2006	01/12/2006	Y	Y	05/23/2006	06/30/2006	07/20/2006	07/25/2006
08/18/2006	01/14/2008	N	Y	02/04/2008		02/29/2008	03/06/2008
01/26/2007	01/26/2007	N	Y	07/17/2007	02/07/2008	02/14/2008	02/20/2008
02/01/2007	02/08/2007	Y	Y	07/17/2007	02/07/2008	02/14/2008	02/20/2008
10/04/2005	10/18/2005	Y		11/23/2005		02/24/2006	03/01/2006
05/16/2008	06/09/2008	Y	Y	07/25/2008	09/23/2008		11/25/2008
12/19/2003	12/22/2003	Y	Y	02/11/2005	07/12/2006	07/26/2006	07/28/2006
01/29/2008	01/29/2008	Y		06/01/2008	07/10/2008	07/10/2008	07/14/2008

Source: NLRB data (on file with author).