Discriminatory Dismissal of Union Adherents During Organizing Campaigns: Suggested Remedial Amendments

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The author contends that the remedies for violations of section 8(a)(3) of the NLRA—discriminatory discharge of union supporters during organizational campaigns—are inadequate to protect the right of employees to free choice. After a critical review of current remedies, the author proposes a series of statutory amendments, based on an analysis of the effects of alternative remedies on the legitimate interests of each affected group—unions, employers, employees, and the public.

I

INTRODUCTION

Discrimination against employees on the basis of union activity has been illegal since the passage of the Wagner Act.1 This prohibition is embodied in section 8(a)(3) of the National Labor Relations Act (the Act),2 which provides in part that it shall be an unfair labor practice for any employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."3 Section 8(a)(3) thus forms the cornerstone of our scheme of labor-management relations by ensuring that employee self-determination can proceed without employer interference. As expressed in the 1935 Senate Report on the Act: "[I]f the right to self-organization is to have any practical meaning, it must be accompanied by the assurance that its exercise will not result in discriminatory treatment or loss of the opportunity to work."4

The strength of this assurance, however, is gauged not only by the

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4. S. Rep. No. 573, 74th Cong., 1st Sess. 11 (1935). See also Radio Officers' Union v. NLRB, 347 U.S. 17, 40 (1954): "Thus Sec. 8(a)(3) [is] designed to allow employees to freely exer-
substantive right but also by the legal remedies provided in the event of violation. It is a truism that a right without a remedy is in effect meaningless; the employee's freedom to organize is guaranteed only to the extent that employer violations are redressed.

Critical attention long has focused on remedies for a crucial category of section 8(a)(3) violations—discriminatory discharge of union adherents during organizing campaigns. For employers, the strategic value of dismissals is here at its greatest, since the dismissal of a key union adherent can often end the effectiveness of the campaign. If employees find that those who back the union suffer, they are not likely to take any risks to aid unionization. Legal sanctions thus play a particularly important role during campaigns in protecting employees' livelihoods. Since effective sanctions are needed to keep campaigns free from employer interference, the failure of legal remedies to provide adequate protection threatens the whole of a system based on employee free choice.

This article will: (1) review current remedies for discriminatory discharge and evaluate their effectiveness, highlighting the need for additional remedial protection during campaigns, and (2) recommend a program of amendments to the Act which would better effectuate its exercise their right to join unions, be good, bad, or indifferent members, or abstain from joining any union without imperiling their livelihood.

5. "[A]ll rights acquire substance only insofar as they are backed by effective remedies. Coke said it long ago: '[W]ant of right, and want of remedy are in one equipage.'" St. Antoine, A Touchstone for Labor Board Remedies, 14 WAYNE L. REV. 1039, 1039 [hereinafter cited as St. Antoine], quoting Brediman's Case, 77 Eng. Rep. 339, 342 (C.P. 1607).


7. SENATE COMM. ON HUMAN RESOURCES, LABOR LAW REFORM ACT OF 1978, S. REP. NO. 628, 95th Cong., 2d Sess. 12 (1978) [hereinafter cited as LLRA REPORT].

policies. This program will be based on an analysis of the effects of remedies on the legitimate interests of various affected groups, i.e., employers, unions, discriminatees, other workers, and the public. Remedies which accommodate these varying interests will best serve to protect employee free choice.

II

THE INEFFECTIVENESS OF PRESENT REMEDIES

A. Present Remedies

1. Substantive Provisions

Remedies for unfair labor practices, including discriminatory discharge during organizing campaigns, are set forth in section 10(c) of the Act. Section 10(c) requires the Board, upon the finding of an unfair labor practice, "[to] issue . . . an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this [Act]. . . ."10

The Supreme Court construed this language extensively in Phelps Dodge Corp. v. NLRB.11 The Court held that the statutory grant of authority to undertake "affirmative action" affords the Board broad discretion in fashioning remedies.12 This discretion is limited, however, by the statutory requirement that remedies "effectuate the policies of this Act. . . ."13 Because the fundamental aim of remedies under the Act is the restoration of the status quo rather than punishment of violators,14 according to the Court, Board remedies must be remedial, not punitive.15

Following this interpretation of section 10(c), the Board has relied on four remedies to curtail the consequences of discriminatory discharge: reinstatement, back pay orders, cease and desist orders, and

10. Id.
12. Id. at 194.
13. Id. at 187-88.
14. Id. at 194. See also H.N. Thayer Co., 115 N.L.R.B. 1591, 1606 (1956); F.W. Woolworth Co., 90 N.L.R.B. 289, 292 (1950): "The public interest in discouraging obstacles to industrial peace requires that we seek to bring about, in unfair labor practice cases, 'a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination.'" (quoting from Phelps Dodge Co. v. NLRB, 313 U.S. at 194).
15. See Phelps Dodge Co. v. NLRB, 313 U.S. at 194. See also Consolidated Edison Co. v. NLRB, 305 U.S. 197, 236 (1938): "The power to command affirmative action is remedial, not punitive . . . ."; Republic Steel Co. v. NLRB, 311 U.S. 7, 10 (1940): "The Act is essentially remedial. It does not carry a penal program declaring the described unfair labor practices to be crimes."
notice to employees of the employer's intent to comply with the law.\(^6\)

\(\textit{a. Reinstatement}\)

Reinstatement is the essential remedy for discriminatory discharge. The discriminatee cannot be restored to the status quo unless he regains his former position; furthermore, reinstatement is the remedy which most directly prevents the employer from benefitting from the unfair labor practice.\(^7\) Board reinstatement practices are relatively straightforward. The right of the discriminatee to reinstatement is usually considered automatic.\(^8\) When, however, the employer shows that reinstatement is no longer possible for legitimate business reasons, the Board will only order back pay or an alternate form of relief (\textit{e.g.}, preferential hiring when jobs become available).\(^9\)

Reinstatement of discriminatees during the pendency of litigation is possible under the Act, but is unlikely. Although section 10(j) grants the Board discretionary authority to seek injunctive relief in a federal district court upon issuance of a complaint for any unfair labor practice,\(^10\) section 10(j) has been invoked sparingly by the Board.\(^21\) Most


\(^7\) Phelps Dodge Co. v. NLRB, 313 U.S. 177, 195 (1941); H.N. Thayer Co., 115 N.L.R.B. 1591, 1606 (1956); F.W. Woolworth Co., 90 N.L.R.B. 289, 290 (1950): "[W]e, as well as the courts of review, have long regarded the remedy of reinstatement as one of the most effective measures expressly provided by the Act for expunging the effects of unfair labor practices and maintaining industrial peace."

\(^8\) D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 104 (1976) [hereinafter cited as McDowell & Huhn]. Strictly speaking, an order of reinstatement by the Board is discretionary. As the court in Phelps Dodge noted, "In the exercise of its informed discretion the Board may find that effectuation of the Act's policies may or may not require reinstatement." 313 U.S. at 195. In practice, however, reinstatement is routinely ordered in face of discriminatory discharge unless the employer presents legitimate reasons preventing reinstatement.

\(^9\) See discussion and cases cited in McDowell & Huhn, supra note 18, at 112-13; Note, \textit{A Survey of Labor Remedies}, 54 Va. L. Rev. 38, 89-90 (1968) [hereinafter cited as Survey of Labor Remedies].


\(^21\) Despite increased use in recent years, Board injunction proceedings against employers under section 10(j) have never exceeded seventy per year. In 1979, for instance, sixty-seven section 10(j) proceedings were pressed against employers. 44 N.L.R.B. Ann. Rep. 227 (1980). The infrequent use of section 10(j) can be traced to the Board's policy of restricted use initiated by General Counsel Robert Denham (served 1947-50) and adopted by subsequent General Counsels. Under this policy, section 10(j) relief is an extraordinary remedy meant to be applied only "to instances where the activities sought to be restrained have wide repercussions. . . ." Office of the General Counsel, NLRB, Release No. R-87 (June 4, 1949).

Increased use of section 10(j) injunctions has been recommended by a variety of congressional and scholarly commentators. In 1961, the Pucinski Subcommittee concluded: "This subcommittee therefore recommends that the labor Board give careful consideration to greater utilization of the 10(j) injunction when unfair labor practice charges are filed. . . ." Senate
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discriminatees in contested cases thus must await a decision on the merits before reinstatement will be ordered.

b. Back Pay

The Act itself does not define the scope of the back pay remedy. Board and judicial interpretations to date have developed a narrow view of the Board's authority in ordering back pay awards.22

The most significant limitation derives from the Supreme Court's directive that Board remedies must be "remedial, not punitive."23 While the application of this distinction is often problematic,24 its effect on back pay orders in discriminatory discharge cases is clear: since the Board is empowered only to dissipate the consequences of violation, a back pay order must be limited to the discriminatee's actual losses.25

In Phelps Dodge,26 the Supreme Court determined that a back pay award is to be measured by the wages the employee would have received from the violating employer and in accordance with the contract doctrine of mitigation.27 Back pay is computed on a quarterly basis28 by deducting net interim earnings (actual earnings29 minus expenses

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22. This view is illustrated by the Supreme Court's decision in UAW v. Russell, 356 U.S. 634, 643 (1958). The Court stated that the Act does not establish a "general scheme" to provide "full compensatory damages for injuries caused by wrongful conduct."

23. See cases cited at note 15 supra.

24. This distinction has been criticized by the Court itself in NLRB v. Seven-Up Bottling Co., 344 U.S. 344, 348 (1953) (Frankfurter, J.) (distinction between punitive and remedial sanctions a " bog of logomachy "). For further criticism, see Note, NLRB Power to Award Damages in Unfair Labor Practice Cases, 84 H A R V. L. R E V. 1670, 1680 (1971) [hereinafter cited as NLRB Damage Awards].

25. Local 60, Carpenters v. NLRB, 365 U.S. 651, 655 (1961); Phelps Dodge Co. v. NLRB, 313 U.S. 177, 197-98 (1941); Republic Steel Co. v. NLRB, 311 U.S. 7, 12-13 (1940); National Cash Register Co. v. NLRB, 466 F.2d 945 (6th Cir. 1972).

26. 313 U.S. 177 (1941).

27. Id. at 197.

28. Under the Woolworth formula, the Board calculates losses due to discharge and offsetting interim earnings on the basis of independent quarters. Losses or earnings in one quarter have no effect on back pay liability in another quarter. F.W. Woolworth Co., 90 N.L.R.B. 289, 291-94 (1950).

29. Only earnings received during the interim period attributable to services performed by
incurred in seeking and holding interim employment\(^{30}\) from gross back pay\(^{31}\) (the amount the employee would have earned but for dismissal).\(^{32}\) Imputed interim earnings also may be deducted under the "willful idleness doctrine," which allows offset of potential interim earnings where the employer proves that the discriminatee refused to search for or accept equivalent interim employment.\(^{33}\)

An accompanying limitation on the Board’s remedial authority under section 10(c) was pronounced by the Board itself. In National Maritime Union, the Board held that, in the absence of express congressional authorization, it does not have the power to award money damages.\(^{34}\) Thus, the Board does not compensate discriminatees for most consequential damages flowing from dismissal.\(^{35}\)

c. Cease and Desist Orders

Section 10(c) requires the Board to issue a cease and desist order in every case where it finds an unfair labor practice.\(^{36}\) In a case of discriminatory dismissal, such an order would, at a minimum, restrain future

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\(^{30}\) Such expenses include transportation, room and board, and employment fees incurred in connection with working elsewhere which would not have been incurred but for the unlawful discharge. Crossett Lumber Co., 8 N.L.R.B. 440 (1938), enforced per curiam, 102 F.2d 1003 (8th Cir. 1938); F.W. Woolworth Co., 90 N.L.R.B. 289 (1950).

\(^{31}\) Included in gross back pay computations are benefits such as bonuses, pension coverage, health and medical insurance, and vacation benefits. See discussion and cases cited in The Developing Labor Law, supra note 16, at 855.

\(^{32}\) Phelps Dodge Co. v. NLRB, 313 U.S. 177, 198 (1941). The Board explained: 
[Assessing money damages ... would involve our assuming a power which is appropriately a function of the courts, rather than of administration tribunals. We would take such a step only if we believed that it was clearly the intention of the Congress that we do so. We find no such mandate in the amended Act; to the contrary we find, in the structure of the Act, and in its legislative history, a clear prohibition against our granting the remedy ... .]

\(^{33}\) Bok, The Regulation of Campaign Tactics in Representation Elections under the National Labor Relations Act, 78 Harv. L. Rev. 38, 124-25 (1964) [hereinafter cited as Bok]; NLRB Damage Awards, supra note 24, at 1674-75. Some consequential damages flowing from dismissal are compensable under current law. Expenses incurred in seeking and holding interim employment are deducted as part of the "net interim earnings" calculation. See cases cited supra at note 30. Also, in Isis Plumbing & Heating Co., 138 N.L.R.B. 716 (1962), the Board held that interest at the rate of six percent per annum may be awarded for the duration of the back pay period. In Florida Steel Corp., 231 N.L.R.B. 651 (1977), the Board held that the I.R.S. interest rate (for over- or underpayment of taxes) would be used in calculating awards; the rate at the time was seven percent per annum.

\(^{34}\) Court interpretations have recognized that, while the authority to award affirmative remedies under section 10(c) is discretionary, section 10(c) mandates the issuance of a cease and desist
tute discrimination against employees; where a pattern of employer
unfair labor practices is evident, the order may be broadened to re-
strain other unfair labor practices.37 A cease and desist order issues
only after decision by the Board and, where necessary, must be en-
forced by a federal court of appeals.38 Its effect is then in the nature of
an injunction, enforceable by a contempt action.39

d. Notice to Employees

Every Board order or settlement agreement requires the posting of
notice by the violator of remedial action taken.40 In a case of discrimi-
natory discharge, the notice states that the employer will not interfere
with the employees' rights under the Act and recites the remedy offered
by the employer to discriminatees.41

2. Remedial Procedures

The adequacy of the Act's remedies for discriminatory discharge
cannot be assessed in the abstract. The effectiveness of the remedies
turns largely on the procedures by which the substantive law is admin-
istered.42

Under section 10(m)43 of the Act, discriminatory discharge cases
under section 8(a)(3) are given priority over some but not all other
classes of unfair labor practice charges.44 In all other respects, charges
of discriminatory dismissal are processed in the same manner as any
other unfair labor practice charge.45 Unfair labor practice proceedings

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37. See Developing Labor Law, supra note 16, at 852; McDowell & Huhn, supra note 18, at 19-37.
41. The NLRB prepares notice forms to be posted, tailored to the specific violation being
remedied. A sample form for discriminatory discharge is presented in McGuinness, supra note 16,
at 302.
42. Cox, Some Aspects of the Labor Management Relations Act, 1947, 61 Harv. L. Rev. 1, 38
(1947) [hereinafter cited as Cox].
44. Section 10(m) expressly provides that "cases given priority under subsection (f)" shall
receive higher priority than allegations under sections 8(a)(3) and 8(b)(2). Thus, allegations of
certain union unfair labor practices enjoinder under section 10(f)—hot cargo agreements under
section 8(e), secondary boycotts under section 8(b)(4), and recognition or organizational picketing
under section 8(b)(7)—receive higher priority than allegations of discriminatory discharge.
45. The Board does not publish statistics regarding discriminatory discharge as a distinct
unfair labor practice; cases involving discriminatory discharge are included under general statistics
regarding discrimination under section 8(a)(3), which may take several forms. See R. Williams,
P. Janus & K. Huhn, NLRB Regulation of Election Conduct 141 (1974). Discriminatory discharge, however, is considered the most common unfair labor practice commit-
may be divided into four phases for the purpose of analysis.

Phase One: From the filing of a charge to the hearing before an Administrative Law Judge (ALJ). An unfair labor practice case begins when a charge is filed with the Board. The regional office investigates the charge; if it is found to have merit, the office issues a complaint and docket the case for hearing before an ALJ. The process of investigating and issuing a complaint takes about six weeks. An additional four to five months pass before completion of the hearing. Comparatively few cases—approximately five percent in 1979—survive this process. Most cases are resolved informally prior to the issuance of a complaint, with a median time in 1977 of forty-eight days for disposition at this early stage. Of cases found to have merit by the Board, about half settle prior to the issuance of a complaint; another third settle prior to the issuance of an ALJ decision.

Phase Two: The ALJ Hearing. The ALJ hears arguments by the parties, determines an appropriate resolution on the merits, and issues a written decision with recommendations for remedial actions. The process of reaching and issuing a decision after hearing takes about five months. In 1979, about nineteen percent of merit unfair labor practice cases proceeded through ALJ decisions; a median time of 344 days elapsed between the filing of a charge and issuance of a decision.

46. Any individual or organization can file an unfair labor practice charge. 29 C.F.R. § 102.9 (1980). Thus unions can, and commonly do, file charges of discriminatory discharge for employees. McClintock, The Unreviewable Power of the General Counsel—Partial Enforcement of the Labor Act, 12 GONZ. L. REV. 79, 133 (1976) [hereinafter cited as McClintock]. It has been estimated that over fifty percent of all unfair labor practice charges filed against employers allege discriminatory discharge. Id. at 134.

47. Letter, N.L.R.B. Associate Executive Secretary Joseph E. Moore to author, March 26, 1980 [hereinafter cited as Moore letter].

48. In fiscal 1979, a median time of 45 days elapsed between filing and issuance of a complaint. Id. at 134.

49. Id. at 134. 44 NLRB ANN. REP. 11 (1979).

50. Informal resolution may occur through withdrawal by the charging party (30.4% in fiscal 1979), dismissal by the Regional Director (35.3% in fiscal 1979), or settlement with the charged party (27.9% prior to the issuance of a complaint in fiscal 1979). Id.

51. Nolan & Lehr, supra note 6, at 51 (citing Board Chairman Fanning).

52. Since 1962, more than 50% of merit charges have resulted in precomplaint settlements and adjustments; these amounted to 52% in fiscal 1979. Id.

53. 52. Since 1962, more than 50% of merit charges have resulted in precomplaint settlements and adjustments; these amounted to 52% in fiscal 1979. Id. of merit unfair labor practice cases were settled formally or informally prior to issuance of an ALJ decision in fiscal 1979. 44 NLRB ANN. REP. 6 (1979). Of these, some 52% settled prior to issuance of a complaint. See note 52 supra. Hence about 35% of merit unfair labor practice cases were settled between the issuance of a complaint and the issuance of an ALJ decision.

54. In fiscal 1979, a median of 157 days elapsed between the close of an unfair labor practice hearing and the issuance of an ALJ decision. Id.

55. 44 NLRB ANN. REP. 6 (1979).
Phase Three: Appeals to the Board. If no exceptions to the ALJ's decision are filed within twenty days, it is adopted automatically by the Board as its order.\textsuperscript{57} Most ALJ decisions, however, are appealed to the Board, adding about four months to the process.\textsuperscript{58} In 1979, about twelve percent of all merit unfair labor practice cases filed were contested through decision by the Board;\textsuperscript{59} a median time of 483 days elapsed between the filing of a charge and issuance of a decision in such cases.\textsuperscript{60}

Phase Four: Court Enforcement. The Act does not delegate enforcement power to the Board; for this it must rely on federal circuit courts.\textsuperscript{61} Further, the Act allows "[a]ny person aggrieved by a final order of the Board" to initiate appellate review of an unfavorable decision.\textsuperscript{62}

This is done with some frequency. In 1979 about one-half of Board unfair labor practice orders were disposed of by appellate court decree.\textsuperscript{63} While the time required to complete judicial review varies from circuit to circuit, appellate review generally postpones resolution for a term measured in years.\textsuperscript{64}

Thus, the fortunes of parties involved in unfair labor practices vary widely. In most instances, the case is settled informally within a few months. On the other hand, when either party persists in contesting liability, it may be years before their rights and duties are finally determined.

B. Evaluation of Current Remedies

Steadily mounting evidence suggests that current remedies for discriminatory discharge are inadequate. Complaints of inadequacy have
issued from almost all labor interest groups: Board members,\textsuperscript{65} Congress,\textsuperscript{66} courts,\textsuperscript{67} labor leaders,\textsuperscript{68} and a host of commentators.\textsuperscript{69}

The need for reform is illustrated most dramatically by the plight of the discriminatee—his injury is readily apparent and evokes a strong emotional response.\textsuperscript{70} Yet the temptation exists to overemphasize the individual rights of the discriminatee; his interest is only one of several protected by federal labor law.\textsuperscript{71} The need for reform is displayed fully by tracing the consequences of the current remedial scheme on all interested parties: employers, discriminatees, remaining employees, unions, and the public.

I. The Interests of Employers

The employer seeking to maximize profits and to maintain control of his business may view unionization as a threat to both aims. In the emotionally charged atmosphere of an organizing campaign, there is a great temptation to eliminate employees sympathetic to unionization.\textsuperscript{72} In some situations, this temptation is countered only by the fear of legal sanctions.\textsuperscript{73}

\begin{itemize}
\item \textsuperscript{65} F. McCulloch (former Board chairman) & T. Bornstein, \textit{The National Labor Relations Board} 180 (1974): “Nonpartisan observers agree that statutory remedies for serious unfair labor practices are woefully inadequate.”
\item \textsuperscript{66} \textit{House Comm. on Education and Labor, Labor Reform Act of 1977}, H.R. Rep. No. 637, 95th Cong., 1st Sess. 7 (1977), [hereinafter cited as LRA REPORT]: “The reinstatement with back pay does not undo the damage to the individual or dissipate the climate of fear that inhibits other employees.”
\item \textsuperscript{67} NLRB v. J.P. Stevens & Co. (Stevens XVIII), 563 F.2d 8, 25-26 (2d Cir. 1977): This case, perhaps destined to be bleakly denominated as \textit{Stevens XVIII} in the long list of \textit{Stevens} litigation, has been a troubling one not only because of the violations of the rights of the employees involved, but also because it raises grave doubts about the ability of the courts to make the provisions of the federal labor law work in the face of persistent violations.
\item \textsuperscript{68} \textit{Labor Reform Act of 1977, Hearings Before the Subcomm. on Labor of the Senate Comm. on Human Resources on S. 1883}, 95th Cong., 1st Sess., Pt. II, 1584 (1977) (testimony of Lane Kirkland) [hereinafter cited as \textit{LLRA Hearings}]: “I do not see how any conclusion can be reached other than the conclusion that the act is ineffectual in preventing employers from discriminating against their employees for exercising section 7 rights. . . . ”
\item \textsuperscript{69} \textit{E.g., Wilful Violator, supra} note 6, at 609: “In fact, the order of back-pay and reinstatement can do little toward effecting a lasting remedy when an employer demonstrates a determination to violate the NLRA. . . . ”
\item \textsuperscript{70} McDowell & Huhn, supra note 18, at 103: [T]he discriminatory discharge invites subjective considerations because it arises in an emotionally charged context. . . . [T]he discharge case may conjure an image of a “David and Goliath” encounter, in which the perceived economic strength of the employer is juxtaposed with the individual employee.
\item \textsuperscript{71} As the Supreme Court noted in \textit{National Licorice Co. v. NLRB}, 309 U.S. 350 (1939), the Board does not exist merely for the “adjudication of private rights,” \textit{Id.} at 362, but rather “asserts a public right vested in it as a public body, charged in the public interest with the duty of preventing unfair labor practices.” \textit{Id.} at 364.
\item \textsuperscript{72} See Cox, supra note 42, at 48.
\item \textsuperscript{73} Message from the President of the United States Regarding Labor Reform, 95th Cong., 1st Sess., H. Doc. No. 95-186 (July 18, 1977); \textit{LLRA Report}, supra note 7, at 12. See Cox, supra
\end{itemize}
The current remedial scheme fails adequately to deter discriminatory discharge during organizing campaigns.74 Despite legal sanctions, the employer may find it economically worthwhile to violate the law, as candid employers have acknowledged.75 Professor Skelton has framed the issue in cost/benefit terms: the perceived benefits of avoiding unionization for employers in many cases simply outweigh the costs of violating the law so that “[b]ased on current remedies . . . for 8(a) violations, the least cost economic alternative to the firm is to fight unions.”76

a. Benefits to the Employer of Discriminatory Discharge

The perceived benefits of avoiding unionization will vary according to the circumstances of the employer’s business and his subjective analysis. At a minimum, unionization may be expected to increase the costs of labor; other projected financial costs may include administrative expenses, negotiation costs, and the possibility of production delays due to strike.77 Intangible factors also may militate against allowing unionization: the employer may feel that maintaining exclusive control of business decisions is virtually priceless.78

It is commonly assumed that discharge of union adherents is the most effective method of preventing unionization,79 and that most cases of discriminatory dismissal occur during organizing campaigns.80 The employer may expect to achieve several strategic objectives through dismissal of union adherents. First, he can eliminate in-plant organizers who have day-to-day contact with employees, forcing the

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note 42, at 47: “When the union comes, the worker may have a fair hearing before an impartial tribunal before disciplinary measures become final. . . .”
74. McClintock, supra note 45, at 135: “From the employer’s standpoint, the law encourages deliberate violation.”
75. One employer put it this bluntly: “It’s cheaper to fire employees mixed up in union affairs, even if you have to pay their backpay. I would do it again if the problem came up. It’s the cheapest way out of it.” O’Hara & Pollitt, supra note 6, at 1113, citing L. Aspin, A Study of Reinstatement Under the National Labor Relations Act 72 (unpublished Ph.D. dissertation) [hereinafter cited as Aspin].
77. Id. at 224.
78. Professor Skelton notes, “Some managements value their prerogatives so highly that they will do whatever is necessary, whether legal or not, to avoid a union.” Id. This sentiment has been expressed by employers themselves: “In the last twenty-five years I’ve built this company up from nothing with my own hands and no union s.o.b. is going to come in here now and tell me how to run it.” O’Hara & Pollitt, supra note 6, at 1114, citing Aspin, supra note 75, at 36.
80. LRA Hearings, supra note 79, Pt. I, at 535 (statement of former General Counsel Peter G. Nash) and Pt. II, at 752 (statement of former Board Chairman Edward Miller).
union to rely on outside organizers (if any) who may face formidable obstacles in communicating with employees. Next, by demonstrating in certain terms his resistance to unionization and his willingness to exert economic force, he can exert a chilling effect on the organizing efforts of remaining employees. At minimum, he can remove a union voter from the eligibility list.

The effectiveness of discriminatory discharge as a campaign tactic turns largely on the ability of the employer to prevent reinstatement. Thus, procedural delay may be used as a secondary tactic. By contesting liability through Board procedures, the employer can virtually guarantee a year’s delay—through judicial review, an additional several years. In the meantime, the chances that the discriminatee will accept an offer of reinstatement dwindle. The employer stands a good chance of preventing reinstatement if he is willing to contest liability vigorously, and the choice is his.

The employer’s choice of campaign tactics may be influenced by the possibility that, due to discriminatory discharges during a campaign, the Board may order the violator to bargain with the union. Bargaining orders in fact pose little deterrent to such discriminatory discharges. A bargaining order normally issues only after the union has demonstrated majority support among the employees. Prompt dismissals of organizers early in the campaign may prevent the union

81. See J. Getman, S. Goldberg & J. Herman, Union Representation Elections: Law and Reality 156-59 (1976) [hereinafter cited as Getman, Goldberg & Herman].
83. LRA Hearings, supra note 79, Pt. II, at 226 (statement of B.R. Skelton). The significance of removing voters from the eligibility list should not be overlooked. In recent years more than half of the representation elections held by the Board have been in shops with fewer than fifty employees. In 1979, for instance, the figure was 69.4%. 44 NLRB Ann. Rep. 310 (1979). In such elections dismissal of a few pro-union employees may actually tip the balance of the vote against unionization.
84. Wilful Violator, supra note 6, at 612-13. Institutional delay is both a cause and a symptom of the Board’s caseload. The delay inherent in Board procedures invites delay-minded employers to contest liability; this in turn congests Board dockets, further increasing delay. The result is an expanding caseload/delay cycle. See Bok, supra note 35, at 60-61; Bartosic, supra note 6, at 652-53; Morris, Labor Court: A New Perspective, 24 N.Y.U. Conf. Lab. 27, 39-40 (1972) [hereinafter cited as Morris].
85. See discussion supra at notes 57-60 and accompanying text.
86. See discussion supra at notes 63-64 and accompanying text.
87. See discussion infra at notes 94-98 and accompanying text.
88. In NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), the Supreme Court held that the Board may order an employer to bargain with a union which, previously having demonstrated an authorization card majority, loses an election tainted by unfair campaign practices by the employer. Threats of discriminatory discharges during a campaign may provide the basis for a bargaining order. See General Stencils, Inc., 195 N.L.R.B. 1109 (1972).
89. See The Developing Labor Law, supra note 16, at 254-55. The lower court in Gissel noted in dicta that a bargaining order may issue without inquiry into majority status in exceptional cases marked by outrageous and pervasive unfair labor practices. 395 U.S. at 613-14.
from achieving the requisite majority.\textsuperscript{90} Where the union has established majority support, the employer has little to fear from a bargaining order. Thus, the more the employer is convinced that unionization is imminent, the less the prospect of a bargaining order deters unfair campaign practices.

\textit{b. Costs of Violation}

An employer who chooses to discharge an employee unlawfully will face two major costs.\textsuperscript{91} First, he can anticipate litigation expenses if the discriminatee contests the discharge. These costs will be determined in large part by the stage at which the litigation ceases and the price of his chosen legal counsel—both factors within his control. A wealthy employer may absorb even substantial litigation expenses with little difficulty.\textsuperscript{92}

Second, the employer can anticipate eventual back pay orders. Straight back pay with interest, minus interim earnings, constitutes the limit of potential liability in most cases.\textsuperscript{93} While back pay over a term of years may be substantial, again the employer can limit this cost by ceasing to litigate. Thus the costs of violation pose little deterrent under the current remedial scheme.

In summary, “an employer in a representation campaign can often profit from violating the law even if he is eventually brought to book.”\textsuperscript{94} The employer who considers discriminatory discharge as a campaign tactic is hindered primarily by moral considerations and gratuitous respect for the law.\textsuperscript{95} Fortunately, most employers appear to recognize such values.\textsuperscript{96} Unfortunately, the small percentage who do not create a large number of section 8(a)(3) cases; the loopholes in present remedies have not gone unexploited.

\section*{2. The Interests of Discriminatees}

The discriminatee’s immediate problem is simple: unemployment. Under current laws he has a legal right to reinstatement with back pay, but little chance of receiving interim relief pending determination of

\textsuperscript{91} \textit{LRA Hearings}, supra note 79, Pt. II, at 225 (statement of B.R. Skelton).
\textsuperscript{92} See Ordman, supra note 90, at 119:
A litigant hailed before the Agency who is ready to undertake the burden and pay the legal costs can, in most cases and with comparatively little effort, delay an effective decision for three, four, or more years. And the legal costs are often minor compared to the savings that can be effected by resisting the application of the law.
\textsuperscript{93} See discussion supra at notes 23-35 and accompanying text.
\textsuperscript{94} Bok, supra note 35, at 64-65.
\textsuperscript{95} \textit{LRA Hearings}, supra note 79, Pt. II, at 225.
\textsuperscript{96} \textit{Survey of Labor Remedies}, supra note 19, at 95.
his charge.\textsuperscript{97} The lapse of time between the wrong and the remedy exacerbates the discriminatee's plight and undermines the adequacy of any relief ultimately afforded.

Delay long has been recognized as a cause of remedial inadequacy. In 1960, an advisory panel reported to the Senate Labor Committee:

\begin{quote}
[A] major weakness in the . . . law is the long delay in contested NLRB proceedings. . . . In labor-management relations justice delayed is often justice denied. A remedy granted more than two years after the event will bear little relation to the human situation which gave rise to the need for Government intervention.\textsuperscript{98}
\end{quote}

Nearly two decades later, the Senate Committee on Human Resources found the situation unchanged: "The weakness of the present law is that the procedures it mandates and the remedies it provides have led to needless delays and endless litigation which have frustrated its original intent."\textsuperscript{99}

\textbf{a. Effectiveness of Reinstatement}

Delay seriously erodes the chances for successful reinstatement. Studies have shown that acceptance of an offer of reinstatement is directly related to the promptness of the offer.\textsuperscript{100} In one study, ninety-three percent of discriminatees accepted reinstatement offered within two weeks of discharge, while only five percent accepted when the offer came six months after discharge.\textsuperscript{101} Reasons given for refusing rein-

\textsuperscript{97} See discussion \textit{supra} at notes 19-21 and accompanying text.

\textsuperscript{98} Cox \textit{Panel Report}, \textit{supra} note 21, at 17.

\textsuperscript{99} LLRA \textit{Report}, \textit{supra} note 7, at 3. \textit{See also} Bartosic, \textit{supra} note 6, at 650-55 (delay the major obstacle to enforcement of the Act); \textit{Wilful Violator}, \textit{supra} note 6, at 612: "The overwhelming defect in these remedies is their failure to deal quickly with problems."; Figueroa, \textit{Development of the Remedial Power of the NLRB in Unfair Labor Practice Cases}, 23 \textit{Mercer L. Rev.} 453, 471: "The growing feeling of the ineffectiveness of the Board's remedies has its origin really in the procedural delays experienced in the Board and in the courts' handling of unfair labor practice cases. . . ."

\textsuperscript{100} \textit{See To Amend the National Labor Relations Act To Increase Effectiveness of Remedies, Hearings on H.R. 11725 Before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 90th Cong., 1st Sess. 3-12 (1967) [hereinafter cited as Aspin summary];} Stephens & Chaney, \textit{A Study of the Reinstatement Remedy under the National Labor Relations Act}, 25 \textit{Lab. L.J.} 31, 41 (1974) [hereinafter cited as Stephens & Chaney]: "There is a definite correlation between the number of people that accept reinstatement and the length of time it takes to reach a decision."

\textsuperscript{101} Stephens & Chaney, \textit{supra} note 100. Similarly, Aspin found: "[A] settlement time of more than four months meant that the discriminatee was less likely to go back. But the truly remarkable factor is that nobody refused reinstatement when the case was settled in less than a month." Aspin summary, \textit{supra} note 100, at 5.

These figures are particularly shocking relative to Board procedural timetables. Given the lapse of ten to eleven months which currently attends issuance of an ALJ decision (see note 56 \textit{supra} and accompanying text), the violator need merely contest the section 8(a)(3) charge through hearing to frustrate reinstatement in most cases.
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statement—fear of further employer reprisals, other job offers, and waiver of reinstatement in exchange for expeditious back pay settlements—become more compelling as time passes.

b. Effectiveness of Back Pay

Current back pay awards often fail to restore the discriminatee to the status quo. Initial blame rests on the narrow interpretation under present law of the Board’s authority to award monetary damages. Delay seriously compounds the problem.

Current back pay policies generally preclude the Board’s awarding the discriminatee consequential damages. As time passes, the discriminatee is progressively more likely to incur noncompensable consequential damages. The discriminatee may draw on savings, suffering loss of investment earnings. He may purchase on credit or take out loans, incurring interest expenses. He may defer purchases, reducing the buying power of back pay by the inflation rate. In severe cases, he may forfeit continuing financial interests (e.g., mortgages), or he may be forced into bankruptcy.

Such extreme consequential damages are in fact unlikely. When a discriminatee becomes desperate for income, he may settle his case by waiving his right to reinstatement and accepting prompt payment of back pay. While this mitigates financial damages, it does so at the expense of a legal right which the discriminatee should not be compelled to forego.

102. Stephens & Chaney, supra note 100, at 34.
103. Id.
104. Id.
105. See discussion supra at notes 34-35 and accompanying text.
106. LLRA Hearings, supra note 68, Pt. II, at 1594 (letter from Lane Kirkland); F.W. Woolworth Co., 90 N.L.R.B. 289 (1950).
108. LLRA Hearings, supra note 68, at 1594 (letter from Lane Kirkland); Thompson Comm., supra note 107, at 71; Ordman, supra note 90, at 127. The discriminatee’s financial harm is complicated by the possibility of state unemployment benefits during the pendency of litigation. While state laws vary, employees dismissed for cause are generally ineligible. This is precisely the issue in a case of discriminatory discharge. Thus the employee’s claim that he was unfairly dismissed prompts an independent investigation by the state agency prior to disbursement of benefits, and employees found by the Board to have been discriminatorily dismissed often are denied benefits completely by the state agency. See Aspin summary, supra note 100.
110. Violators who wish to prevent reinstatement intentionally may delay resolution of the case in order to coerce acceptance of back pay alone as a remedy for discharge: “[E]conomic pressures force these discharged employees to forego their right to reinstatement in exchange for a partial ‘back-pay’ award. . . . Some employers are willing to pay even more than the ‘back-pay’ to rid their plants of union leaders . . .” NATIONAL LABOR RELATIONS ACT REMEDIES: THE
Alternatively, the discriminatee’s increasingly acute need for income, coupled with his duty to mitigate damages, may compel him to seek and accept alternate employment. This may entail substantial expenses which, although ultimately recoverable, deprive the discriminatee of cash when he most needs it. While this solution mitigates his financial losses, it likely will also entail a sacrifice of his right to reinstatement.

Back pay awards thus are too little and too late; in part, they are too little because they are too late.

c. The Interests of the Remaining Employees

The law recognizes as a distinct interest the right of employees who remain on the job after a colleague has been discriminatorily dismissed to choose freely whether to unionize. Board policies protecting remaining employees rest on the assumption that discriminatory discharges during an organizing campaign have a substantial chilling effect on the exercise of employee free choice. The requirement of posting notice of the violating employer’s willingness to comply with the law is meant to check this effect.

The assumption that discriminatory dismissals create a “climate of fear” has been called into question by some commentators. A celebrated empirical study by Professors Getman, Goldberg and Herman, compiled in UNION REPRESENTATION ELECTIONS: LAW AND REALITY (1976), poses a sweeping challenge to Board assumptions regarding the impact of unfair campaign tactics on voter behavior.
ness of reprisals on the part of other employees cannot be presumed.\textsuperscript{118} Employees may interpret the employer’s intent in accordance with predeter-
determined attitudes toward unionization.\textsuperscript{119} When recognized as such by employees, discriminatory dismissals may serve to convince those remaining of the need for a union, rallying them in opposition to the employer.\textsuperscript{120}

Nonetheless, discriminatory discharge may impinge on the free choice interest of remaining employees. In the short run, dismissing in-
plant organizers may both limit the exposure of employees to union information and remove opinion leaders.\textsuperscript{121} In the long run, an elemental awareness of employer reprisals may set in among employees, predisposing them against ever giving unionization serious consider-
ation.\textsuperscript{122}

On balance, evidence indicates that current Board policies over-
rate the influence of discriminatory dismissal on the free choice of re-
main ing employees. Nonetheless, quick and adequate remedies for the discriminatee can simultaneously ease any climate of fear generated by the discriminatory dismissal. This suggests that remedial protection in discriminatory discharge cases should focus on the discriminatee, whose interests are clearly and substantially harmed.\textsuperscript{123}

4. The Interests of the Unions

The interests of unions in the context of organizing campaigns are not identical to those of the employees; the employee often stands “in

The assumptions on which the Board regulates campaigning are not supported by the data. Contrary to the Board’s assumption, the campaign plays a limited role in the employees’ decision to vote for or against union representation. Similarly inaccurate is the assumption that certain types of campaigning are likely to have a coercive impact. Voting behavior in elections involving campaign tactics believed to be coercive is not significantly different from voting behavior in campaigns that conform to the Board’s standard of “laboratory conditions.”

\textsuperscript{118} Getman & Goldberg, \textit{The Behavioral Assumptions Underlying NLRB Regulation of Cam-

\textsuperscript{119} getman, \textit{Goldberg \& Herman}, supra note 81, at 52-73.


\textsuperscript{121} See discussion supra at note 81 and accompanying text; \textit{Wilful Violator}, supra note 6, at

\textsuperscript{122} Bok, supra note 35, at 125; \textit{LLRA Hearings}, supra note 65, Pt. II, at 1851 (testimony of
Stephen Goldberg): “[W]e think it entirely likely that such efforts contribute to the creation of a climate of fear that discourages other employees from ever giving serious consideration to unioni-

\textsuperscript{123} Getman, Goldberg \& Herman, supra note 81, at 161.
and the employer competing for his allegiance, trade, and support."\textsuperscript{124} The union has an independent interest in engaging the support of employees and expanding its power base.

Discriminatory dismissal of union adherents may impinge on this interest in several respects. Eliminating in-plant organizers may squelch a union drive by closing a key route of access to employees.\textsuperscript{125} The impetus for organization thus may be stifled.\textsuperscript{126} Dismissals may be used by the employer to delay the election, because the issuance of an unfair labor practice complaint may postpone the election until adjudication has run its course.\textsuperscript{127} In the meantime, employee interest in unionization may wither.\textsuperscript{128} Finally, discriminatory dismissals may shape the actual outcome of the election.\textsuperscript{129}

Discriminatory discharge also may cause the union financial injury. Additional organizing expenses may be incurred in reviving a stalled campaign or conducting a new one.\textsuperscript{130} Should the employees ultimately choose to unionize, election delay costs the union interim fees and dues.\textsuperscript{131}

The Act does not compel employees to bargain collectively; rather, it seeks to provide circumstances conducive to free and informed choice by the employees.\textsuperscript{132} The union's legitimate interest in garnering support is harmed by discriminatory dismissal to the extent that it interferes with employee free choice.\textsuperscript{133} This interest is inadequately


\textsuperscript{125.} A union's prospects for gathering support depend largely on enlisting a committee of employees within the plant. Bok, \textit{supra} note 35, at 130.

\textsuperscript{126.} Wilful Violator, \textit{supra} note 6, at 637.

\textsuperscript{127.} The Board generally declines to direct an election while unfair labor practice charges that affect the election unit are pending; the rationale is that the charges, if true, would destroy the "laboratory conditions" necessary to free choice. \textit{The Developing Labor Law}, \textit{supra} note 16, at 165. Nevertheless, the Board will proceed with an election where the charging party consents, and consent will be deemed a waiver of neither the union's right to have the election set aside nor of its right to seek a bargaining order on the basis of the unfair labor practice charges. See Bernel Foam Products Co., 146 N.L.R.B. 1277 (1964); \textit{The Developing Labor Law}, \textit{supra} note 16, at 266-67; R. Gorman, \textit{Labor Law} 106-07 (1976).

\textsuperscript{128.} Seigel, \textit{supra} note 21, at 466.

\textsuperscript{129.} See discussion \textit{supra} at note 83 and accompanying text.

\textsuperscript{130.} See Note, \textit{The Need for Creative Orders Under Section 10(c) of the National Labor Relations Act}, 112 U. Pa. L. Rev. 69, 82 (1963).

\textsuperscript{131.} See \textit{NLRB Remedies—Moving Into the Jet Age}, 27 Baylor L. Rev. 292, 298 (1975). The Board does not compensate unions for damages flowing from discriminatory discharge, though such awards conceivably are within its broad authority to undertake "affirmative action." See Bok, \textit{supra} note 35, at 127-28; Parker, \textit{Monetary Recovery under the Federal Labor Statutes}, 45 Tex. L. Rev. 881, 883 (1967).

\textsuperscript{132.} General Shoe Corp., 77 N.L.R.B. 124 (1948). The Board stated that its duty was to provide "a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees." See generally R. Williams, P. Janus & K. Huhn, \textit{NLRB Regulation of Election Conduct} 19-23 (1974).

\textsuperscript{133.} See discussion \textit{supra} at notes 114-22 and accompanying text.
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protected by legal remedies to the extent that the law affords employers the opportunity to use discriminatory discharge to forestall unionization.\(^{134}\)

5. **The Interests of the Public**

That federal labor legislation exists signifies that the public has an interest in preventing unfair labor practices and providing remedies when they do occur.\(^{135}\) The public also has an interest in government which operates in an efficient manner.\(^{136}\) These several interests are best served by a system which induces voluntary compliance with the law. As noted by the Senate Committee on Human Resources: "The ultimate purpose of the unfair labor practice provisions of the NLRA is to create a climate which will encourage voluntary compliance with the prohibitions stated in the Act."\(^{137}\)

This purpose is little realized under current law, as the prevalence of discriminatory discharge cases attests.\(^{138}\) The "dreary parade" of section 8(a)(3) cases consistently composes sixty to seventy percent of the Board's unfair labor practice caseload,\(^{139}\) and their rate of increase is not matched in other unfair labor practice categories.\(^{140}\) The contributory role of inadequate remedies here has long been recognized: "[A] partial reason for the caseload and hence the delay in unfair labor practice cases lies in the inadequate remedies of the Labor Board. Labor Board orders constitute in many situations no more than a 'slap on the wrist.'"\(^{141}\)

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134. See discussion *supra* at notes 79-87 and accompanying text.

135. As expressed in National Licorice Co. v. NLRB, 309 U.S. 350, 362 (1939), the Board "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce. . . ."


137. LLRA REPORT, *supra* note 7, at 3. The preference for voluntary compliance may be viewed as resting both on philosophical and pragmatic considerations. On the one hand, unfortunate experiences with the labor injunction prior to the Norris-LaGuardia Act gave rise to the philosophy that labor-management relations are best adjusted without government intervention. See Cox, *The Right to Engage in Concerted Activities*, 26 Ind. L.J. 319, 322-23 (1951); Bioff, "Capitulate or Litigate"—The Labor Board's Settlement Policy and the Objectives of the National Labor Relations Act, 47 U.M.K.C. L. Rev. 289, 304 (1979). On the other hand, the need for voluntary compliance is dictated by the practical concern that the Board cannot police the whole of labor relations. St. Antoine, *supra* note 5, at 1057; LLRA REPORT, *supra* note 66, at 18 (quoting Board Chairman Fanning).


140. *Id.*, Pt. II, at 865 (statement of Prof. Morris).

Another reason for the burgeoning section 8(a)(3) caseload is that the current scheme encourages the violating employer to litigate spurious defenses.\textsuperscript{142} The strategic advantages of discriminatory discharge flow largely from procedural delay.\textsuperscript{143} Board dockets are swollen with cases contested solely to frustrate Board remedies.

The result is misallocation of Board resources. Disproportionate effort spent resolving section 8(a)(3) cases diminishes unduly the available resources for other aspects of the Board's duties. This flood of section 8(a)(3) litigation threatens, "through the burden [imposed] upon our machinery, the meaningfulness of the rights provided all those covered by the statute."\textsuperscript{144}

III

SUGGESTED REFORMS

Current remedies for discriminatory discharge during union organizing campaigns fail to deter violations in the first instance, and fail to compel prompt compliance once violations have occurred.\textsuperscript{145} Statutory reform is needed to rectify these shortcomings.\textsuperscript{146} Though many of the problems associated with unfair labor practice remedies stem from Board or court interpretations,\textsuperscript{147} a comprehensive reevaluation of the remedial scheme is more properly the function of the legislature. Moreover, only Congress is capable of initiating and coordinating a thorough response to remedial inadequacies.

To meet these concerns, however, we need not abandon the present legislative format.\textsuperscript{148} Current law rests on the sound theory that all interests affected by discriminatory discharge are best served by restor-

\textsuperscript{142} See discussion \textit{supra} at notes 84-87 and accompanying text.
\textsuperscript{143} See discussion \textit{supra} at note 4 and accompanying text.
\textsuperscript{144} LRA REPORT, \textit{supra} note 66, at 19 (quoting Board Chairman Fanning); see also Ordman, \textit{supra} note 90, at 126: "The very weight of the increasing caseload threatens to engulf the Agency at the expense of those who need and seek the Agency's services."
\textsuperscript{145} Thompson Comm., \textit{supra} note 107, at 1: "Employers who violate the law are encouraged to do so as the penalties come too late for effective enforcement, and in any event have little or no deterrent force." See discussion \textit{supra} at notes 97-113 and accompanying text, and at notes 138-41 and accompanying text.
\textsuperscript{146} See Morris, \textit{supra} note 84, at 32.
\textsuperscript{147} See discussion of the Board's inability to award punitive damages \textit{supra} at note 15 and accompanying text; of the Board's restricted ability to award consequential damages \textit{supra} at notes 34-35 and accompanying text; and of the Board's restricted use of Section 10(j) injunctions \textit{supra} at notes 20-21 and accompanying text.
\textsuperscript{148} Critics of current law regarding discriminatory discharge have noted that, regardless of its weaknesses, the Board nonetheless functions quite well relative to other federal agencies. See E. MILLER, AN ADMINISTRATIVE APPRAISAL OF THE NLRB 42 (1977); Fanning, \textit{New and Novel Remedies for Unfair Labor Practices}, 3 GA. L. REV. 256, 256 (1969); Bartosic, \textit{supra} note 6, at 661: "In sum, it is submitted that over the years the Labor Board has performed exceptionally well in regulating the field of labor-management relations. . . ."
ing the discriminatee to the status quo. The unified program of amendments proposed below thus builds on traditional remedies—reinstatement and back pay—in an attempt to effectuate in practice the theory of the Act.

A. Injunctive Reinstatement

Reinstatement, the sine qua non of a status quo-oriented remedial scheme, is a viable remedy only if afforded soon after discharge. Above all, reforms must guarantee prompt reinstatement.

One possible method of expediting reinstatement is to accelerate final determination of the discriminatee's charge on the merits and enforcement of the ordered remedy. Given how quickly reinstatement becomes impracticable, however, it is difficult to imagine procedural reforms which would both satisfy the requirements of due process and compel reinstatement swiftly enough for the remedy to be effective.

This situation dictates reliance on interim reinstatement. Sec-
tion 10(l) of the Act should be amended to include charges of discriminatory discharge during an organizing campaign among the unfair labor practices requiring injunctive relief. Section 10(l) thus would mandate that the Regional Director give priority to investigation of such claims, and petition a federal district court for injunctive relief immediately upon determining that a complaint should issue. Court decisions have established that relief under section 10(l) is appropriate upon a showing that reasonable cause exists to believe that violation of the Act has occurred. Upon such a showing, section 10(l) presently authorizes the court to order such relief as it deems “just and proper.” In a case of discriminatory discharge, interim reinstatement and prohibition of further discrimination against the charging party would constitute appropriate relief.

1. Advantages of Injunctive Reinstatement

The most appealing feature of injunctive reinstatement is its promptness. It is difficult to estimate the time necessary to secure an injunction, but a median period of a month after the filing of a charge should not prove unattainable. The benefits of prompt relief would extend to all interest groups adversely affected by discriminatory discharge.

The discriminatee would be the primary beneficiary. He would be returned to his position promptly and protected against further harassment by an enforceable decree. Re-employment would both provide wages during adjudication of the charge and increase the chances that a permanent offer of reinstatement would be accepted. Injunctive reinstatement also would protect the free choice interests of other employ-

156. The period of the organizing campaign would be broadly defined to begin with the first concerted efforts on the part of employees to organize and to end either when a valid election has been lost by the union or when, in the event of a vote to unionize, the first collective bargaining agreement between the union and the employer has been entered into.
160. The Board does not publish statistics regarding the length of time necessary to secure injunctive relief under either section 10(j) or section 10(l) of the Act. Board officials have estimated informally, however, that reinstatement under the relatively cumbersome procedures attending section 10(j) injunctions can be obtained within a month to six weeks of filing. See Bok, supra note 35, at 129. Reinstatement under section 10(l) should be more prompt; a conservative estimate of a month will be used here.
161. Board cease-and-desist orders are not self-enforcing, and may be ignored by the charged party with impunity until enforced by the circuit court. See discussion at notes 39-40 supra and accompanying text. A temporary restraining order, however, prohibiting further discrimination against the charging party could result in a relatively prompt contempt action in the event of further harrassment.
ees. Even if the reinstated employee no longer participated in organizing, his quick return would illustrate concretely that the law protects the right to organize. Union interests in organizing would accordingly be safeguarded.

Finally, the deterrent effect of injunctive reinstatement would serve the public interest in securing voluntary compliance. Presumably the Board would achieve a high rate of success in injunction proceedings, creating the expectation among potential violators that discharge would be countered by swift remedial action. The attractiveness of discriminatory discharge as a campaign tactic thus would diminish substantially. Indeed, management may come to view discriminatory discharge as counterproductive in light of the adverse publicity reinstatement may generate.

2. Disadvantages of Injunctive Reinstatement

These benefits must be weighed against potential drawbacks to routine injunctive relief.

One apparent difficulty is possible interference with the management prerogatives of complying employers. Some employees, ultimately found by the Board to have been dismissed for cause, would be

162. As Congressman Aspin noted in recommending increased use of injunctive reinstatement under section 10(j): "The advantage to using the 10(j) provision is that it would reinstate the Discriminatee before pressures against his accepting reinstatement persuade him to change his mind. Also he would be going back at a time when the company would not be likely to mistreat him." Aspin summary, supra note 100, at 11.

163. Evidence suggests that reinstatees are likely to forego subsequent union organizing as a result of discharge. As one reinstatee explained, "I'm not going to take a chance on getting fired again either, not for the union, not for anybody." Stephens & Chaney, supra note 100, at 39; see also The Need for Creative Section 10(c) Orders, supra note 130, at 80.

164. A study by Prof. Charles Morris compared caseload increases under sections 8(a) and (b) of the Act generally to concurrent increases under NLRA sections for which section 10(i) injunctive relief is mandatory. The Deterrent Effect of Quick, Certain and Strong Remedies on Unfair Labor Practices under the NLRA, ILR Groat Award Conference Address by Prof. Charles Morris, Wash. D.C. (Nov. 9, 1977), reprinted in LRA Hearings, supra note 79, Pt. II, at 849-66. He found that the dramatic increase in the general section 8 caseload far exceeded the increase in areas subject to section 10(i) injunctions, and concluded: "There is strong empirical evidence which does indicate that section 10(i) . . . [has] substantially reduced the incidence of violations of the employer protective provisions for which these remedies are applicable." Id. at 861. See also discussion supra at notes 124-34 and accompanying text.

165. The General Counsel prevails in over eighty percent of unfair labor practice hearings, establishing violations by a preponderance of the evidence. LRA Hearings, supra note 79, at 286 (statement of Douglas Fraser); Stephens & Chaney, supra note 100, at 32. The Board should be able to establish reasonable cause to believe that a violation has occurred in an even higher percentage of injunction proceedings.

166. Morris, supra note 84, at 38.

167. LLRA Hearings, supra note 68, Pt. I, at 1071 (statement of Peter Nash): "It is clear to anyone who has experienced organizing campaigns that the single biggest boost to such a campaign comes from the union's ability to claim that it caused an employer to reinstate a discharged employee." See also Morris, supra note 84, at 38.
reinstated by the court during the pendency of litigation, impinging on the employer's legitimate interest in maintaining shop discipline. Such interference, however, should prove to be minor. Since serious misconduct as a rule negates the inference of antiunion animus necessary to establish reasonable cause, employees reinstated despite good faith dismissal normally would be guilty of relatively minor infractions and capable of satisfactory job performance. In exceptional cases, the restraining order could be tailored to prevent abuse.

More compelling reservations center on administrative costs. Under an injunctive reinstatement scheme, the Board would increase its reliance on court proceedings to provide initial relief in a large body of unfair dismissal cases. Injunction hearings would demand prompt scheduling on already overburdened district court calendars; while lengthy presentations are not anticipated, the sheer numbers involved may require appointment of more judges. Moreover, duplication of litigation would occur to a certain extent—two formal proceedings, one before the court and one before the Board, would be necessary to achieve determination on the merits. Finally, injunctive reinstatement might decrease the percentage of merit cases which settle without any formal proceedings. Under current law many employ-

168. This follows in that the General Counsel would sometimes be able to establish reasonable cause to believe that a violation has occurred before the district court but not be able to meet the stricter statutory burden of proof—a preponderance of the evidence—before the Board. See Thompson & Klein, Prospects for Labor Law Reform: Implications for Management, 31 N.Y.U. CONF. LAB. 227, 253 (1978).

169. See generally McDowell & Huhn, supra note 18, at 106-08; Christensen and Svaneoe, Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality, 77 YALE L.J. 1269 (1968).

170. The argument is summarized nicely by Professor Bok:

From the employer's standpoint, it will clearly be unfortunate to compel reinstatement of a man who has actually been terminated for legitimate reasons. But it may be equally unfair to the employee and the union if reinstatement is not promptly ordered after a discriminatory discharge has taken place. As a result, since all the parties have a stake in an accurate determination by the district court, there is no apparent reason why the employer should receive special safeguards. And this seems particularly true since the employer, unlike the other interested parties, has considerable power to protect its interests by taking care in advance to establish the reasons for discharge with sufficient clarity to forestall allegations under the act.

Bok, supra note 35, at 131.

171. For instance, the restraining order could allow the charged party the option to suspend the employee with pay during the pendency of Board litigation, or could condition the injunctive protection on satisfactory job performance by the charging party.


173. See Bok, supra note 35, at 132; Nolan & Lehr, supra note 6, at 60; LRA Hearings, supra note 79, Pt. II, at 753 (testimony of Edward Miller).

174. LLRA REPORT, supra note 7, at 70; LRA Hearings, supra note 79, Pt. II, at 752 (testimony of Edward Miller).

175. LLRA Hearings, supra note 68, Pt. II, at 1536 (testimony of Peter Nash); Nolan & Lehr, supra note 6, at 57.
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ers simply “buy off” charges of discrimination in exchange for the
discriminatee’s waiver of reinstatement. By lessening discriminatees’
dependence on this questionable settlement option, injunctive relief
might trigger an appreciable increase in litigation.

These effects should be offset to some extent by the deterrent im-
pact of injunctive reinstatement. The prospect of injunctive relief
would deter some violations in the first instance; in those cases, litiga-
tion would be avoided altogether. Next, injunctive reinstatement
would deter spurious litigation meant to delay remedial action, a major
factor in the Board caseload under current law. Employers who would
have contested merely to impede reinstatement presumably would set-
tle once injunctive reinstatement is ordered by the court. In such
cases, Board litigation efforts would simply be shifted to a judicial fo-
rum at an earlier stage in the controversy.

The overall effect that injunctive reinstatement would have on
Board costs is difficult to predict; a conservative estimate must presume
an initial increase in discriminatory discharge litigation. In light of
the manifold benefits which would flow from injunctive reinstatement,
however, cost increases may be justified. A remedial scheme based on
injunctive reinstatement would serve the purposes of the Act and the
interests of the parties better than would alternative remedies, such as
giving discriminatees greater rights to recover consequential and puni-
tive damages.

B. Graduated Back Pay

Injunctive reinstatement would diminish the role of back pay in
restoring discriminatees to the status quo. Where interim reinstatement
is ordered, the salient back pay period would be short—the time be-
tween discharge and the issuance of an injunction, presumably a month
or less. Straight back pay as currently provided probably would suf-
fice to make the reinstated employee whole.

176. See discussion supra at notes 96-97 and accompanying text.
177. See Nolan & Lehr, supra note 6, at 59; Study by NLRB General Counsel Irving Estimating
Cost Impact on Operations Under His Supervision of Passage of H.R. 8410, 24 DAILY LAB. REP.
(BNA) G-1, G-5 (Feb. 3, 1978) [hereinafter cited as Irving]: “If employers are required to litiga-
te to avoid reinstatement they will likely do so.”
178. See discussion supra at note 164 and accompanying text.
179. This is supported by the higher unfair labor practice settlement rate relative to charges
for which the Board must currently seek injunctive relief under section 10(l). LRA Hearings,
180. LRA Hearings, supra note 68, Pt. I, at 124 (letter from Chairman Fanning).
181. General Counsel Irving has claimed that increased litigation resulting from injunctive
reinstatement might require the addition of some 230 attorneys to the Board staff. Irving, supra
note 177.
182. See discussion supra at note 160.
183. Since the incidence of damages not compensable under the current scheme is largely a
Reforms of the back pay remedy are crucial nonetheless. Some discriminatees, found by the Board to have been dismissed unfairly, might be refused interim reinstatement by the court. Absent reform, they would continue to feel the full impact of present back pay inadequacies. Furthermore, the need to check spurious litigation persists in such cases, and to a lesser extent in cases where injunctions have issued. This problem would be compounded by any increase in litigation attending the introduction of injunctive reinstatement. Properly crafted back pay remedies could address both concerns.

As noted above, current back pay awards are inadequate because they are too little and too late. These shortcomings are interrelated: the presence and degree of noncompensable consequential damages corresponds to the lapse of time between injury and remedy. This suggests two avenues for reform: increase the Board's authority to award consequential damages, or decrease the amount of time necessary to secure back pay.

Proposals to grant the Board statutory authority to determine and award consequential damages emphasize the first approach. This reform, however, may be imprudent in a scheme which depends primarily upon injunctive reinstatement. Assessing consequential damages would require a damages hearing; Board litigation resources, already taxed by injunction proceedings, would be stretched further.

A solution more compatible with an injunction-based scheme is to provide for statutory liquidation of presumed consequential damages. Amendments to the Act should mandate that in every award for discriminatory discharge the Board would multiply back pay, calculated pursuant to present policies, according to a graduated schedule. The multiplier would increase in line with the stage of proceedings at which the case is settled and back pay surrendered to the discriminatee.

(1) If the dispute is settled prior to the injunction proceeding, only straight back pay should be ordered. Given the delay of perhaps a month, current back pay policies will likely provide adequate com-

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184. See discussion supra at notes 105-08 and accompanying text.
185. See discussion supra at notes 172-81 and accompanying text.
186. See discussion supra at notes 105-13 and accompanying text.
187. See discussion supra at notes 105-08 and accompanying text.
188. See NLRB Damage Awards, supra note 24, at 1683-87.
189. H.R. 8410, § 8(3), 95th Cong., 1st Sess. (1977) proposed that victims of discriminatory discharge during an organizing campaign receive double back pay awards from the Board. The Senate version, S. 2467, § 9(3), 95th Cong., 2d Sess. (1978) proposed a discretionary award by the Board of one and one-half times back pay. In both bills the additional increment represented liquidated consequential damages.
190. See discussion supra at note 160.
pensation.\textsuperscript{191}

(2) If it is settled prior to an ALJ hearing, one and one-half times back pay should be ordered. A median time of up to six months will have passed,\textsuperscript{192} costing the already reinstated discriminatees the use of their money for an appreciable period and imposing significant hardships on nonreinstated discriminatees.

(3) If back pay is surrendered at any time after hearing, double back pay should be ordered. A period stretching into years may elapse before the discriminatee is made whole.\textsuperscript{193}

This graduated scale would both increase compensation and decrease the time necessary to secure it. Discriminatees would receive fair reparations, roughly commensurate to their actual losses. The automatic escalation in potential liability imposed on contesting violators would encourage timely settlement.\textsuperscript{194} The settlement incentive inherent in graduated back pay also would address the problem of spurious litigation,\textsuperscript{195} since employers asserting specious defenses would be most likely to forego continued litigation.

Nonetheless, the graduated scale poses a potential threat to the due process rights of charged employers. Contesting employers may lose on the merits despite sincere belief in their innocence; hence, some employers who deserve a forum may forego litigation simply to avoid the possibility of multiplied back pay.

On balance, however, due process concerns do not undermine the appeal of graduated back pay. At issue is not whether charged employers will find litigation less convenient, but whether their right to a forum is unduly sacrificed. Such should not be the case here. First, the chilling effect flowing from multiplied back pay would be minor in a scheme based on injunctive reinstatement; given the abbreviated back pay period, few employers would find the prospect of double back pay a significant factor in their decision to litigate. Next, some sacrifice of charged employers' litigation posture is justifiable. The proposed graduated scale is primarily a means of approximating discriminatees' incremental consequential damages. Any scheme which recognizes such

\textsuperscript{191} See discussion \textit{supra} at note 183 and accompanying text.
\textsuperscript{192} See discussion \textit{supra} at note 48 and accompanying text.
\textsuperscript{193} See discussion \textit{supra} at note 64 and accompanying text.
\textsuperscript{194} Increases in the back pay multiplier would be triggered by the occurrence of formal proceedings—first the hearing on the injunction, and next the hearing before an ALJ. This would reasonably approximate discriminatee consequential damages in that procedural timetables would correlate with the passage of time. This also serves the public interest by encouraging the violator to settle before the taxpayer's money is spent on an unnecessary proceeding.
\textsuperscript{195} It is not anticipated that a graduated scale of back pay by itself would substantially deter spurious litigation. Where reinstatement had previously been ordered by injunction, however, increasing back pay liability might provide sufficient reason for the violator to forego spurious litigation and settle promptly.
damage will increase settlement pressure on charged employers by increasing the amount at risk in litigation. This pressure is unwarranted only to the extent that the graduated scale does not reasonably approximate actual damages incurred.

C. Attorney's Fees

Though injunctive reinstatement and graduated back pay awards would remove the motivation for most spurious litigation, the violator who did contest liability through hearing would face no disincentive to spurious appeals to the Board. Moreover, the value of Board review in discriminatory discharge cases is minimal—most cases turn on the facts, and an ALJ's findings are rarely disturbed. Since most discriminatees presumably would have been reinstated by this point, the burden of unnecessary Board review falls primarily on the public, which bears the costs of representation and decision. These concerns indicate that cost disincentives to discourage bad faith appeals to the Board are appropriate.

Amendments to the Act should grant the Board discretionary authority to charge the appellant Board costs and attorney's fees where it finds the exceptions filed to be frivolous. The burden of proof regarding the need for review should be placed on the Board; costs would not be charged, regardless of the outcome, where the appeal presented a colorable claim or novel issue. Where this burden is met, a figure calculated by reference to hours expended in opposing the appeal would be charged. A separate hearing on costs would not be necessary, as appellate briefs could simply be supplemented by cost affidavits.

It is not anticipated that statutory authority to award Board costs would deter frivolous appeals—parties pursuing review to delay final judgment would likely view cost awards as an incidental expense. Nor is it anticipated that the possibility of cost awards would have a chilling effect on the due process rights of good faith appellants—the burden of proof would fall on the General Counsel, and Board awards would be subject to review by the circuit courts. The proposal rather rests on

196. See Thompson Comm., supra note 107, at 73 (supplemental statement of Chairman Frank Thompson); Thompson & Pollitt, Oversight Hearings on the NLRB: A Preliminary Report, 27 LAB. L.J. 539, 545 (1976); O'Hara & Pollitt, supra note 6, at 1119.
197. The General Counsel represents the discriminatee as respondent to the appeal; the Board and its staff decide the appeal.
198. The Board's authority to award attorney's fees to private charging parties was established in Tiidee Products Co., 194 N.L.R.B. 1234 (1972). The Board there awarded fees to the General Counsel as well; on appeal the circuit court overturned the Board's award to the General Counsel, but affirmed the award of attorney's fees to the private charging party. Tiidee Products Co. v. NLRB, 502 F.2d 349 (1974). For criticism of this decision, see NLRB Remedies—Moving Into The Jet Age, 27 BAYLOR L. REV. 292 (1975).
fundamental notions of fairness: where an appellant abuses his right of access to the Board, the public should not bear his expenses.

IV

Conclusion

These amendments in combination would do much to plug loopholes in present law. Their impact may be depicted in terms of Professor Skelton's cost/benefit analysis of employer behavior. On the benefit side, the prospect of injunctive reinstatement would reduce if not eliminate the perceived benefits of discharge as a campaign tactic. On the cost side, the contesting violator would face doubled back pay liability and increased litigation expenses, due to the requisite injunction proceeding and to the assessment of Board expenses against the violator.

The violator's loss would be the discriminatee's gain. Where probable cause could be shown, the discriminatee would be returned to work promptly by an enforceable court order. Graduated back pay awards would increase the likelihood that interim damages would be compensated fully, and would discourage strategic delay by charged employers. By preventing or effectively remedying discriminatory discharge, the law would finally ensure what Congress has intended it to provide since the passage of the Wagner Act: employee self-determination untainted by coercion.

Yet the proposed amendments would not benefit discriminatees alone; they would ultimately redound to the benefit of all who turn to the Board for relief. Under current law, discriminatory discharge litigation represents an untoward percentage of the Board's caseload. The proposed amendments would all serve to end the spiraling caseload/delay cycle by discouraging unnecessary discriminatory discharge litigation, freeing the Board to address other claims worthy of a forum. Employers, employees, unions, and the public at large would be better served. Just as the problems generated by discriminatory discharge reach far beyond the discriminatee, so their resolution would extend to all whose interests are affected.

199. See discussion supra at note 76 and accompanying text.