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New Remedies for Discriminatory Discharges of Union Adherents During Organizing Campaigns

Jeffery A. Smisek†

Current remedies for discriminatory discharge of union supporters during organizing campaigns are inadequate. Such remedies are designed only to redress the harm done to the individual worker discharged; they do not rectify the injury to the organizational rights of the discharged employee's fellow workers occasioned by the intimidation inherent in discriminatory discharge. Commonly proposed reforms of section 8(a)(3) of the National Labor Relations Act are similarly inadequate: they seek to remedy prejudice to individual rights but not to group rights. Only temporary suspension of an employer's right to discharge its workers at will during an organizing campaign would effectively protect the individual and group rights of employees in a bargaining unit in which such a campaign is waged.

It is beyond dispute that current remedies for discriminatory discharges of union adherents during organizing campaigns1 are largely ineffective.2 The remedies that are available come too late, focus on the wrong party and fail to deter further violations of employees' rights

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1. Throughout this paper, discriminatory discharges of union adherents will often be referred to as “discharges” or “section 8(a)(3) violations,” even though both phrases normally connote a much broader realm of activity than discriminatory discharges of union adherents during organizing campaigns. When section 8(a)(3) is used in its broader sense, it will be so noted in the text or the footnotes.

to organize. I first will briefly survey these remedies and their shortcomings from the viewpoints of procedural delay, individual rights and group rights. I then will examine and critique traditionally recommended remedial reforms, principally from the viewpoint of group rights. Finally, I offer and discuss a new remedy—the temporary suspension of the employer's power to discharge.

I

The Problem

Employers know that it pays to discharge union adherents during organizing campaigns. In fact, in discharge cases, it is considerably more profitable to violate the National Labor Relations Act\(^3\) than to obey it. The relative profitability of NLRA violation is best understood by examining the set of incentives and disincentives an employer encounters when one of its employees first attempts to organize a union.

Assuming a 100 person unit,\(^4\) unionization will cost the employer $800 a day in higher wages if a wage increase of $1.00 an hour is negotiated after unionization. If firing a union supporter will thwart a unionization effort or the likelihood of union success at the representation election, the employer will save as much as $800 a day in future payroll costs. This sum is well worth high legal fees to preserve. Moreover, even if the union supporter is reinstated,\(^5\) the backpay award will be trivial\(^6\) and the likelihood that the union adherent will stay on, once reinstated, is extremely low.\(^7\) By firing the union organizer, the employer successfully demonstrates its economic power to the workers and its willingness to use that power when challenged. A discriminatory firing removes the union voice at the workplace exactly when that voice would be most effective, either aborting a union drive or helping win a representation election.\(^8\)

The costs that offset these benefits, i.e., current legal fees and a possible small and distant backpay award, are relatively insignificant. If he compares total costs and benefits, and, in particular, if he compares marginal costs and benefits as of the date of the discharge,\(^9\) a profit-maximizing employer will choose to fire the union adherent. This choice is repeated by increasing thousands of employers, each of

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3. 29 U.S.C. §§ 151-169 (1976) [hereinafter cited as NLRA or the Act].
4. In 1979, over 50% of all RC and RM elections were in units of less than 30 employees, and 83.9% of such elections were in units of less than 100 employees.
5. Reinstatement is a slow process: an employer can easily keep a union supporter out of the plant for months, if not years. See infra Section III.
6. $1,128 average in 1979, $2,062 average in 1980. These figures do not include legal fees. See infra Section V.B.1.
7. See infra Section III.D.
8. See infra Section IV.
9. See infra Section V.B.1.
whom fires union adherents during organizing campaigns. The volume of section 8(a)(3) cases grew at a compound rate of 5.7% during the period 1960 to 1980, as compared with a 2.3% compound growth rate of potential union membership from 1957 to 1976. Section 8(a)(3) cases have thus grown at a compound rate over twice that of potential union membership.

The law, having long recognized that employers have great incentives to fire union adherents during organizing campaigns, has sought to protect employees in the exercise of their right to organize. During the 1935 Senate debates over proposed section 8(3) of the Wagner Act, Congress noted that

[i]f the right to be free from employer interference in self-organization
or to join or refrain from joining a labor organization is to have any
practical meaning, it must be accompanied by assurance that its exer-
cise will not result in discriminatory treatment or loss of the opportu-
nity for work.12

Forty-three years later, a Senate report on the Labor Law Reform Act of 1978 stated:

Employees who wish to organize are free to do so only so long as
they are confident of protection from economic reprisals for engaging
in union activity . . . There is no more effective method of discourag-
ing self-organization than the discharge of a union adherent.13

 Nonetheless, since the passage of the Wagner Act, neither Congress, the National Labor Relations Board (the Board) nor the courts have been able to assure employees of their section 7 rights during the cru-
cial union organizing period. Employers remain free to use the sub-
stantial delays inherent in unfair labor practice proceedings to punish
union activists, to remove them from the employer’s property and to
frustrate the group rights of remaining employees. Remedies for sec-
tion 8(a)(3) violations remain woefully inadequate and continue to fo-
cus on the individual harm done the discharged employee, ignoring the
concept of group rights inherent in section 7 and the crucial nature of
both time and timing in the discharge of a union adherent during an
organizing campaign.

II

THE PUBLIC POLICY OF THE NLRA AND GROUP RIGHTS

The Board is "a public agency acting in the public interest,"14 and

10. Derived from Weiler Table I distributed at Harvard Law School. Of course, not all
8(a)(3) cases are discriminatory discharge cases.
11. Bain Table 3.1 distributed at Harvard Law School, potential union membership as de-
defined in note "a".
does not act merely to provide private remedies for private injuries. As the Supreme Court said in *Phelps Dodge*:

To deny the Board power to neutralize discrimination merely because workers have obtained compensatory employment would confine "the policies of the Act" to the correction of private injuries. The Board was not devised for such a limited function. It is the agency of Congress for translating into concreteness the purpose of safeguarding and encouraging the right of self-organization. The Board... does not exist for the "adjudication of private rights;" it "acts in a public capacity to give effect to the declared public policy of the Act to eliminate and prevent obstructions to interstate commerce by encouraging collective bargaining."

The procedure for filing, prosecuting and settling a claim aptly demonstrates the public nature of the Act. Anyone, not just the discharged employee, may file an 8(a)(3) claim. The General Counsel, and not the complainant or injured party, prosecutes the claim. Settlement of the claim requires the regional director's approval. A private settlement between the complainant and respondent thus does not bind the General Counsel, who is free to go forward with case. Moreover, the General Counsel may settle the case without the approval of the complainant. These procedures demonstrate that the public interest is foremost in an unfair labor practice case, with adjustment between the parties being only of secondary concern.

The guarantee of group rights to workers, set forth in section 7 of the NLRA, furthers the public policy informing the Act. The NLRA is designed to promote industrial peace through the encouragement of collective bargaining. By protecting concerted activities, that Act minimizes the disruption to commerce caused by industrial strife. The right afforded employees by section 7 to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection is the mechanism by which the public interest in industrial peace and maximum industrial output is realized. *The rights protected by section 7 are group rights.*

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17. Note the analogy to a State's espousal of a national's claim under international law, where the injury to the individual becomes an injury to the State. See also Amalgamated Utility Workers, 309 U.S. at 267-68.
20. K. McGuinness, supra note 18, at 244.
Individuals, but instead gives primary rights only to groups.

The firing of a union activist directly affects the rights of the group. A union voice disappears from the plant site restricting the flow of union information among workers. Meanwhile, the employer remains free to circulate its supervisors among the workforce, campaigning for the employer and against the union. Additionally, a climate of fear and intimidation spreads among the remaining workers. The employer makes it clear, either explicitly or sub rosa, that anyone who campaigns for the union or who even "talks union" will suffer the same fate as the discharged employee—two and a half years waiting for the procedural machinery to grind to a conclusion, unrecompensed consequential damages, frustration, and depression. Once fired, an employee has little likelihood of returning to the job, and even less likelihood of remaining if reinstated. As a Senate report on the Labor Law Reform Act stated, "There is no more effective method of discouraging self-organization than the discharge of a union adherent."23

Common sense and the very fact that employers continue to discharge union adherents by the thousands indicate that group rights are directly affected by an 8(a)(3) discharge. Employer behavior also shows that traditional remedies are wholly inadequate for the protection of these group rights.24 As I will discuss in Section III, current remedies have no preventive power—the employer's cost-benefit analysis overwhelmingly favors discharge of a union adherent. Current remedies have no remedial power, coming as they often do long after the election—the only important event as far as group rights are concerned.

Consonant with the current focus on harm done to the individual, some labor law scholars argue that discriminatory discharges or, more generally, the content of an employer's campaign, lack impact on the outcome of representation elections.25 Getman, Goldberg and Herman, in studying thirty-one representation campaigns in firms involving a broad range of labor force characteristics, reached that conclusion, noting:

there was no evidence that . . . [perceived discriminatory discharges]

22. Given a non-employee organizer's restricted access to the plant site, it is possible that the employer can effectively keep the union off-site by firing union adherents.
24. NLRB v. Gissel Packing Co., 395 U.S. 375 (1968) (Board may certify union and issue bargaining order where union obtained card majority but lost representation election if employer's unfair labor practices rendered fair election unlikely possibility), and United Dairy Farmers Coop. Ass'n. v. NLRB, 633 F.2d 1034 (3rd Cir. 1980) (Board may certify union and issue bargaining order absent showing of union majority status via either election or authorization cards where employer committed outrageous and unfair labor practices) indicate that the courts also recognize the seriousness of the impact upon group rights worked by 8(a)(3) discharges, as well as by other unfair labor practices, during organizational campaigns.
led to a loss of union support. Card-signers did not vote against the union in significantly greater numbers in discharge elections than in other elections. Employees who reported that the employer discriminatorily discharged union supporters were even more likely to have voted for the union than those who did not report such action. If employees are not coerced into voting against the union by discharges they view as unlawful, no reason exists to set aside the election because the Board finds the discharge to be unlawful. We recommend no change in existing law with regard to the rights of the employee who is discharged or against whom other action is taken. An employee discriminatorily discharged is entitled to reinstatement with back pay.

At the same time, the Getman study suggested a new remedy for egregious discriminatory discharges of the kind which otherwise would lead to a Gissel order. The authors suggested that during the block of time between card signing and election, the burden of proof in a discriminatory discharge case be placed on the employer to disprove discriminatory motive. They also advised the Board to institute injunctive proceedings (while delaying the election) to reinstate the discharged employees. At first glance, this remedy appears to be aimed substantially at vindicating group rights. It would appear to attempt restoration of the group status quo by reestablishing pro-union information flows and dissipating the employee intimidation caused by the unlawful discharges. Instead, the Getman study suggested this remedy, not to foster information flows or to dissipate intimidation, but rather to replace the use of Gissel orders. The authors did not believe that reinstatement would have any effect on the outcome of the election, but they knew that a Gissel order would. Within the Getman study's logic, this seemingly group-right oriented remedy makes sense. As nothing an employer does will influence an election outcome, Gissel orders would be inappropriate. The study reasoned that a remedy designed to deter discriminatory discharges by making them futile will prevent such discharges, thereby obviating the need for Gissel orders.

The Getman study, because of its counter-intuitive, counter-historical results, excited much attention and a great deal of criticism. Many of the critics focused on the fact that the authors purposely chose

26. Id. at 151-52.
27. Id. at 155.
to study elections with a high probability of illegal conduct. Commentators felt that no control group existed, and that voters in such hotly contested elections were more likely to have made up their minds *a priori* than were voters in elections where less vigorous campaigning took place. The Getman study was criticized for not successfully explaining why some voters changed their minds in the midst of an election, and for overlooking why such changes tended to favor employers rather than unions. One commentator even challenged the interpretation of the data itself. The authors skillfully and seemingly convincingly countered these and other criticisms in a later article, perplexing labor scholars with their counter-intuitive results and suggested radical deregulation of union organizing campaigns.

The most convincing means of refuting the Getman study would be to repeat it, in a statistically more sophisticated manner, and reach opposite results. William Dickens conducted such a study, and he reached opposite conclusions. The Dickens study is important, since accepting the validity of the Getman study would undermine (to the extent that the lack of statistically verifiable proof can do so) a concern for group rights-oriented remedial reforms.

Contrary to the Getman study, Dickens found that an employer's campaign in general, and unlawful conduct by an employer in particular, had a significant effect on the probability that an average voter would vote to unionize and on the actual outcome of simulated reruns of the thirty-one elections studied by Getman and his colleagues. Dickens, using the original Getman data on the individual backgrounds of each voter, the background of each election and the campaign measures taken, used a probit model to determine the effect various employer campaign tactics would have on the probability that an average voter would vote to unionize, given all the other explanatory variables. Dickens' point estimate of the effect of an employer's threat of action or actual action against pro-union employees was that such threat or action reduced the probability of an average voter voting union by fifteen percent. A confidence interval constructed by the author from Dickens' results shows that there was a 95% probability that such employer threats or action would reduce the probability of an in-

### Footnotes

33. A probit model in this setting is essentially a regression where the values of the independent variables must be either zero or one, and where the predicted value of the dependent variable gives the probability that the particular individual will vote union, given the values of the explanatory variables.
There was thus a 95% probability that the actual probability of an average voter voting union was decreased by at least 1.8%.

Although a reduction of one or two percent in the probability of an average voter voting union seems trivial, one must realize that most of the representation elections studied were won by a narrow margin. A one percent decrease in the probability of a voter voting union does not mean that one percent fewer elections will be won by unions. It means that the likelihood of any given voter voting union in an election has decreased one percent. The best way to translate these results into conclusions as to the effect of discriminatory discharges on the capacity of unions to win recognition elections is to imagine determining each voter's probability of voting union in an election, taking into account all the variables as they actually were in the elections. Each "election" can then be "run" by generating a random number between 0 and 1 and seeing whether this number is above the individual's probability (i.e., a vote against the union) or below the individual's probability (i.e., a vote for the union). The votes of all members of the unit may then be tallied for that "election." This process may be repeated a hundred times or so and the total number of union wins can be added up. Then, the likelihood of each voter voting union can be increased by one percent (or any other percentage), the simulated elections can be "run" a hundred more times and the union wins tallied up. The impact of a given percentage probability increase or decrease in the likelihood of voting union can then be determined by comparing the resulting union win rates.

Dickens, after performing these simulations, found that a one percent increase in the probability of voting union resulted in an increase in the union win rate from 36.1% to 38.4%. A five percent increase in the probability of voting union resulted in a union win rate of forty-five percent. Although these results depend on the thirty-one actual elections studied and therefore cannot be generalized to all elections, one must remember that Dickens' point estimate for the effect of employer threats or actions against pro-union employees was a fifteen percent decrease in the likelihood that an average person would vote union, with a 95% probability that the effect would be at least 1.8%. Simply put, employer threats or actions against union adherents can have a significant effect upon the outcome of representation elections.

Dickens' study thus directly contradicts Getman's and demonstrates that the effect of employer threats and actions against pro-union

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34. See Dickens, supra note 32, Table VII.2, at 80 and text at 90. There is thus a 95% probability that the actual probability of an average voter voting union is decreased between 1.8% and 29.2%.
employees during an organizing campaign is substantial. The Dickens study has not yet been examined by the full range of scholars who have scrutinized the Getman study. Yet it is a particularly sophisticated study which provides solid statistical evidence that group rights are implicated to a substantial degree by discriminatory discharges of union adherents during an organizing campaign. A unit member's likelihood of voting union is affected by the discharge of a pro-union co-worker, and the impact is likely to make a considerable difference, in the long run, in the number of elections won by unions. The Dickens study, in short, supports the traditional view that discriminatory discharge of union supporters during an organizing campaign directly damages the section 7 rights of the remaining members of the unit.

III
CURRENT REMEDIES

All remedies under the NLRA are governed by section 10(c) of the Act. Section 10(c) provides that the Board, upon finding that the person named in the complaint has engaged in or is engaging in any unfair labor practice, "shall issue and cause to be served on such person 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. . . ." Thus, although issuance of a cease and desist order is mandatory, the Board, in its discretion, has the power to withhold or grant affirmative action. In granting affirmative action, the Board has wide discretion under the language of section 10(c): the Board's power under section 10(c) exceeds the general equitable powers of a court.

However, the Supreme Court has narrowly construed the Board's discretionary powers, stressing that the purpose of the Act is remedial and not punitive, and that the Act aims at "a restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination." Of course, the judicial boundary between remedial action and punitive action is hazy—a "bog of logomachy" in the words of Justice Frankfurter.

Prohibition of punitive remedies is judicial gloss with grounding in

36. See infra section III(A).
37. Eichleay Corp. v. NLRB, 206 F.2d 799, 805 (3d Cir. 1953).
38. Phelps Dodge Corp. v. NLRB, 313 U.S. 177, 188 (1941).
39. Republic Steel Corp. v. NLRB, 311 U.S. 7, 10 (1940).
40. Phelps Dodge, supra 313 U.S. at 194.
41. NLRB v. Seven Up Bottling Co. of Miami, 344 U.S. 344, 348 (1953); Note, NLRB Power to Award Damages in Unfair Labor Practice Cases, 84 Harv. L. Rev. 1670, 1680 (1971).
neither the language of the Act nor the Act’s legislative history. The distinction between “remedial” and “punitive” is unclear and provides a fertile ground for reversing Board opinions with which the courts do not agree. The Supreme Court has long been concerned with containment of Board remedies and outlawing “punitive” remedies. Its failure to define “punitive” amply serves this containment policy.

Despite the Supreme Court’s narrow reading of section 10(c), its language is broad, and the remedies listed within it are only illustrative. The Board, admittedly restrained by Supreme Court interpretations, has proved nonetheless unimaginative in providing remedies for discriminatory discharges of union adherents during an organizing campaign. In general, it has employed the three remedies specifically mentioned in section 10(c) (cease and desist orders, reinstatement, and backpay) and, in token recognition of group rights, has also required notice to employees. This section will discuss the Board’s use of these four remedies.

A. Cease and Desist Orders

Unlike other remedies, a cease and desist order is automatically issued by the Board upon finding that an unfair labor practice has occurred. This remedy restrains the specific violation, any related act, and other violations where there is a finding of threat of recurrence. As with other Board orders, the cease and desist order is issued only after a Board decision and is not self-enforcing, but must be enforced by a court of appeals. A violator’s obligation under a cease and desist order is a continuous one. Initial compliance does not bar later judicial enforcement.

Although a cease and desist order is “the badge of official recognition by the NLRB . . . that an employer has been engaged in unfair labor practices,” it is a badge which the employer can wear lightly in the case of a discriminatory discharge of a union supporter. The cease and desist order is issued far too late to be of any consequence to either

42. See Consolidated Edison Co. v. NLRB, 305 U.S. 197, 235-6 (1938), where the Supreme Court first announced the punitive/remedial distinction, without referring to any statutory language or legislative history.
43. See Note, supra note 41, at 1682, n.79. See also Stephens, supra note 2, at 834.
44. See Republic Steel Co. v. NLRB, supra note 40, at 12, where the Supreme Court stated that Board remedies aimed at deterrence would allow the Board “to set up any system of penalties which it would deem adequate to that end.”
45. See generally Flannery, supra note 2, at 69.
46. See § 10(c), 29 U.S.C. § 160(c) (1976).
47. See McGuiness, supra note 18, at 295.
48. In 1979, the median time elapsed between the filing with the Board and the issuance of a board order was 483 days. See infra Section IV.
50. Meyer, supra note 2, at 608.
the discharged employee or the remaining employees whose section 7 rights have been abridged. The discharged employee, after a year and a half delay, is unlikely to care that the Board has told his employer not to further violate a law it never had a right to violate. The election which sparked the dismissal of the union supporter has long since been run and forgotten. Thus, the only remedy made mandatory by the NLRA is wholly useless for an 8(a)(3) violation.

B. Notice to Employees

The notice to employees is actually part of a Board cease and desist order. For an 8(a)(3) violation, the notice is usually posted prominently at the employer's place of business for sixty days and contains a signed statement by the employer that it will not "in any manner interfere with, restrain, or coerce...[its] employees in the exercise of their right to self-organization..." The notice includes a description of the remedy ordered by the Board for the discriminatory discharge in question.\(^5^1\) The standard notice, printed on an NLRB form with the Great Seal of the United States prominently displayed, is "an attempt to erase the appearance of employer domination by introducing evidence of a power stronger than the employer: the [NLRB]."\(^5^2\) The notice, depending upon the severity and extent of the unfair labor practices, may be posted at the site of the unfair labor practice or at all the employer's plants. It also may be sent to employees' home, or may be read aloud at the plant by a responsible official of the employer or of the NLRB.\(^5^3\)

Great Seal or not, the notice comes too late to do any good. An intransigent employer has been known to post its anti-union statement directly next to the NLRB notice.\(^5^4\) The symbolism of "a power stronger than the employer" is likely to be lost on workers who witness, on a daily basis, very real power of the employer.

C. Backpay

Backpay awarded to a discriminatorily discharged employee, in theory, is designed to insure that he will not be economically damaged by the employer's violation of the law.\(^5^5\)\(^5^6\) Backpay is not designed to be a disincentive to the employer, nor is it designed to be a financial

\(^5^1\) McGuiness, supra note 18, at 302.
\(^5^2\) Meyer, supra note 2, at 610.
\(^5^3\) See generally id.
\(^5^4\) Id. at 611.
\(^5^5\) Id. at 608-9.
\(^5^6\) Republic Steel Corp. v. NLRB, 311 U.S. at 12 (deduction from backpay of amounts earned by reinstated employee under work relief projects and payment of those amounts to governmental agencies not justified on grounds of deterrence).
windfall to the employee.\textsuperscript{57} The discharged employee is subject to the contract-based notion of mitigation.\textsuperscript{58} There is no single formula for computing backpay applicable to every situation; individual computations can become complex.\textsuperscript{59} Apart from the expense of finding a new job, consequential damages created by a discriminatory discharge are not compensated. Finally, in a contested case, backpay need not be paid until circuit court enforcement of the Board's order.\textsuperscript{60}

A discriminatorily discharged employee thus is clearly not made whole by backpay. Yet, in 1980, over 15,000 backpay awards were made, totalling over $32 million.\textsuperscript{61} The NLRB's reliance on backpay awards is doubly insidious. First, backpay does not make whole discriminatorily discharged employees. Second, reliance on backpay focuses on the harm done the discharged employee and ignores the harm done the remaining employees.\textsuperscript{62} Moreover, the Board tolerates “employee buyoffs,” or settlements where employees waive any claim to reinstatement in return for an immediate cash backpay award.\textsuperscript{63} Such a practice blatantly disregards the employee group rights guaranteed by section 7 and thus destroys the very rights which section 10(c) remedies were designed to protect.

\textbf{D. Reinstatement}

Reinstatement has long been considered the fundamental remedy for discriminatory discharge cases: “We, as well as the courts of review, have long regarded the remedy of reinstatement as one of the most effective measures expressly provided for by the Act for expunging the effects of unfair labor practices and maintaining industrial peace.”\textsuperscript{64} In 1980, over 10,000 employees were reinstated.\textsuperscript{65} Reinstatement is treated by the Board as a matter of right, except when the employer shows that reinstatement is no longer possible for legitimate business reasons.\textsuperscript{66} Reinstatement would constitute an effective remedy for discriminatory discharge of union supporters if it were immediate. Reinstatement, however, currently occurs months or even years after

\begin{itemize}
\item \textsuperscript{57} NLRB v. Stilley Plywood Co., Inc., 199 F.2d 319, 321 (4th Cir. 1952).
\item \textsuperscript{58} Phelps Dodge Co. v. NLRB, 313 U.S. at 198.
\item \textsuperscript{59} For an exhaustive treatment of backpay computations, including the forms used, see McGuiness, note 18 supra, at 311-320.
\item \textsuperscript{60} See infra Section IV.
\item \textsuperscript{61} See Weiler Table 1, supra note 10.
\item \textsuperscript{62} See infra Section IV.
\item \textsuperscript{63} See O'Hara & Pollitt, supra note 2, at 1115; Murphy, supra note 2, at 85; Letter from J. Irving and J. Fanning to N. Sweeney 16 (January 25, 1978) (where the General Counsel stated, “At present, many settlements involve waivers of reinstatement.”) [hereinafter cited as Letter].
\item \textsuperscript{64} F.W. Woolworth Co., 90 N.L.R.B. 289, 290 (1950).
\item \textsuperscript{65} See Weiler Table 1, supra note 10.
\item \textsuperscript{66} See Murphy, supra note 2, at 64, n.18. But employee buyoffs can destroy this “right” at the settlement stage.
\end{itemize}
discharge—long after organizational campaign momentum has been lost, and at a time when normal turnover renders the reinstated employee a stranger among his co-workers. Moreover, reinstatement may well be a futile procedure. A study of 217 discriminatorily discharged employees ordered reinstated or placed on preferential hiring lists showed that 129 or fifty-nine percent refused reinstatement, and that of the 88 remaining, 70 were finally reinstated. Of these 70, one-half left within two to four months, and two-thirds left within six months. Such figures do not inspire confidence in the ability of the reinstatement remedy to "[insure] . . . that [the discharged employee] will have a future of employment once the dispute has been settled." 68

IV
THE PROBLEM OF DELAY

Of the 28,770 CA cases processed by the Board in 1979, 95.8% were settled, withdrawn, or dismissed. 69 This high rate of settlement, withdrawal, or dismissal, however, does not indicate how rapidly those cases were resolved, nor does it address the remaining 4.2% (1,196 cases) which were disposed of by ALJ, Board or court order. Table A traces these 28,770 CA cases through various procedural phases, providing 1979 median times for all employer unfair labor practice cases in order to illustrate the time required for disposal of a case.

Table A shows that 80.6% of the cases processed by the Board in 1979 were disposed of in a median time of 45 days. It also demonstrates the incredible delay which an employer can create if it chooses to do so—a median of two and a half years was required to secure an enforceable Board order remedying an unfair labor practice. Table B shows how the cases disposed of before issuance of a complaint were resolved: of this 80.6% (23,162 cases), 9,575 were dismissed, 8,442 were withdrawn, and 5,145 were settled. In tracing the CA cases, close atten-

67. Stephens and Chaney, A Study of the Reinstatement Remedy Under the National Labor Relations Act, 25 LABOR L.J. 31 (1974). Although this study is statistically crude, it serves as a rough indicator of the current success of the reinstatement remedy.
69. Of the 41,259 allegations of violations of one or more subsections of section 8 of the NLRA received by the NLRB in 1979, 29,026 or 70.3% were "CA" cases—cases involving a charge that an employer had committed unfair labor practices in violation of sections 8(a)(1), (2), (3), (4), or (5), or any combination thereof. Fifty-nine percent of these CA cases, or 17,220, were allegations of 8(a)(3) violations. The 29,026 CA cases brought the total number of CA cases on the NLRB's docket to 41,983, and the Board was able to process 28,770 of them. 44 NLRB ANN. REP. (1979). Of course, not all 8(a)(3) cases are discriminatory discharges of union adherents during an organizing campaign, but NLRB data is not disaggregated enough to fine tune this figure. However, the NLRB estimated that 85% of the 8(a)(3) cases filed involved discriminatory discharges of union adherents either during an organizing campaign or prior to a first contract. Letter, supra note 63, at 15.
70. Weiler Table 2 distributed at Harvard Law School.
tion should be paid to the cases which are neither withdrawn nor dismissed, but rather are settled or resolved by Board or court order. These cases have been labelled "substance" cases, to distinguish them from the other cases.\(^7\)

Table C eliminates those cases which were withdrawn or dismissed; it is essentially Table A with dismissals and withdrawals eliminated. Reading Table A alone, without adjustment for withdrawn or dismissed cases, gives one the impression that over 80% of all the CA cases were resolved within a median time of 45 days. Table C, however, adjusts Table A and indicates that only just over half of the "substance" CA cases were actually disposed of during that period. Even after a median delay of 344 days, 12.2% of the "substance" CA cases (1,196 cases) waited a median time of an additional 123 days before a Board decision issued. Unfortunately, the data are aggregated so as to make it impossible to determine whether or not discriminatory discharge cases tend to be fought more than other CA cases, or to calculate the incidence of discriminatory discharge case settlement after an election has been held. If such data were available, one would expect to find that employers hold out until their elections are held, and then settle the case, since most of the benefits of discharge have been gained by then. The Chairman and General Counsel of the NLRB have agreed with this expectation, stating

Indeed there may be significant incentives for [employers] to delay settlement [in discriminatory discharge cases] . . . . If the election has not yet been conducted, there is little likelihood of obtaining a settlement which provides for reinstatement of the alleged discriminatee. Respondent employer will more likely seek to postpone the reinstatement until the election is concluded.\(^7\)

The picture these statistics paint is one of delay for cases which most require speedy resolution. Almost half of CA cases finally resolved by court or Board order (non-dismissal) or by settlement must wait over a median time of 45 days for disposition, while 15% must wait over a median time of 187 days and 12% must wait over a median time of a year. These delays occur in cases where the complainant either settles after Board approval of the settlement or prevails on the merits. Many of these delays probably occur in discriminatory discharge cases.\(^7\)

What is the impact of this delay? The obvious impact is on the

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71. Nineteen of these cases were in compliance with the ALJ's decision so they may not have had to wait the full 123 days between ALJ and Board decision. See note 1 to Table C.

72. Letter, supra note 63, at 15.

73. Fifty-nine percent of CA cases were section 8(a)(3) cases in 1979, and the Board has estimated that 85% of section 8(a)(3) cases are discriminatory discharges during organizing campaigns or prior to first contract. See supra note 69.
discharged employee, who is unemployed, pressured by creditors, bitterly disappointed by his situation, and thus tempted to settle by waiving reinstatement in return for immediate backpay. He has learned that union organizing comes at a high price—the price of his job. The worker realizes that the "assurances" of the right to organize, so carefully considered by the authors of the Wagner Act, are mostly paper promises. As a union organizer testified during hearings on the Labor Law Reform Act of 1978:

"It becomes very difficult as a union organizer, and very embarrassing, to sit with a group of workers when they ask questions about, "I have heard that there is a law that protects workers. What are my rights?" And you have to sit there and tell them that, quite simply, they have no rights, and that, yes there are laws that protect workers, but quite frankly, the boss is going to violate them, the boss is going to pay no attention to them, and the NLRB, through the delays in the tactics and the legal maneuvering, will make sure that it means nothing."

V

TRADITIONALLY SUGGESTED REFORMS

The inadequacy of remedies for discriminatory discharges has been so blatant for so long that one might safely say that there are now traditional suggestions for reform. These traditional suggestions have grouped themselves into three categories: procedural reform, employer disincentives, and employee aid and comfort. This section will survey the major reform suggestions, critiquing them principally from the viewpoint of group rights. A non-traditional suggestion will then be offered which is more responsive to the purposes of the NLRA and which is more protective of group rights than any previous proposal.

A. Traditional Suggestions: Procedural Reform

Most suggestions for procedural reform of 8(a)(3) charge processing are aimed at decreasing the amount of time consumed in reaching an enforceable order. These suggestions assume that decreasing procedural delay will mitigate the harm done a discharged employee. To an extent, this is true. Decreasing the median time a discriminatee must wait for an enforceable order from two and a half years to, say, six months would clearly decrease the consequential damage suffered by the employee. Procedural reforms, however, err by seeking to mitigate the injury to discriminatees, rather than the harm to group rights, caused by a discriminatory discharge. As most organizing campaigns

74. See supra note 12.
75. See S. REP. NO. 628, supra note 13, at 6.
76. Nevertheless, even after only six months, the employee would be unlikely to accept reinstatement. See supra note 67.
only last three months—from the signing of the authorization cards to the actual election\textsuperscript{77}—even a delay of six months will more than suit an employer’s purposes. Rather radical procedural reform, moreover, would be necessary to produce an enforceable order, on average, in under three months. Traditional procedural reforms thus focus on delay as an evil without noting the important difference between delay during the first few months after a discharge and all later delay. As long as an employer gains those crucial few months during an organizing campaign, it should be relatively indifferent about inflicting the later delay.\textsuperscript{78} Traditionally suggested procedural reforms do not decrease employers’ incentives to violate the NLRA and do not protect group rights.

Even accepting \textit{arguendo} that decreasing procedural delay is good in and of itself, the number of cases which would be accelerated by decreased procedural delay is rather small. Since only 1,455 “substance” CA cases required more than a median time of 187 days to be resolved in 1979, it is questionable whether massive procedural changes, with all their associated costs and uncertainties, would be worthwhile simply to aid 15% of the “substance” cases (and only 5% of the total CA cases).

\textbf{I. Self-Enforcing Board Orders}

One standard suggestion is that Board orders be self-enforcing.\textsuperscript{79} Both the OSHA and Federal Trade Commission statutes\textsuperscript{80} provide ample precedent for self-enforcing agency orders. Proponents state that the current procedure, in which the Board must wait to see whether its order is obeyed and seek an enforcement order in a circuit court if it is not, is an absurd waste of time which puts the burden of action on the Board instead of on the violator. The Labor Law Reform Act of 1978 would have required any party aggrieved by a Board decision to file an appeal with a circuit court within 30 days of the Board decision. After expiration of 30 days, in the absence of such an appeal, the Board could have filed a petition for enforcement and thereby obtained a final, judi-

\textsuperscript{77} This is only a rough estimate. Some campaigns may take less time, and others may last longer.

\textsuperscript{78} To some extent, this can be seen from the delay statistics discussed in Section IV \textit{supra}, where it was shown that approximately half of “substance” CA cases were disposed of within a median of 45 days and over 80% within a median of 187 days. Of course, not all these CA cases were \textit{8}(a)(3) cases, and not all \textit{8}(a)(3) cases are discriminatory discharges during an organizing campaign, so that the data are too aggregated to give any conclusive results. Nonetheless, it is curious that most employers are willing to settle within a few months—short enough not to do much harm to the discharged employee, but long enough to remove him for the crucial organizing period, i.e., long enough to have impact on the remaining workers’ section 7 rights.

\textsuperscript{79} \textit{See supra} note 2.

cially enforceable decree. Proponents of this reform claim that a decrease in the amount of time between a Board order and its enforcement would decrease employer incentives to litigate. It is far from clear, however, that this reform would result in a substantial time savings. Since the employers who would have taken the case to an appeals court before the reform presumably would do so after the reform, the only time saved would be the difference between 30 days and the average amount of time the Board now waits before it seeks enforcement. This insubstantial savings of time, moreover, would only affect those few cases which got beyond the Board level—1,521 in 1979. Finally, given the far greater importance of early delay compared with later delay in discharge cases, it is unlikely that an employer disincentive to discriminatory discharge would be changed.

2. Greater Finality to ALJ Decisions

Another traditional approach to reducing procedural delay, and thereby aiding the discriminatee, is to attempt to bypass Board review of ALJ decisions whenever possible. Most proposals along this line would delegate greater finality to ALJ decisions, making decisions not reviewable by the Board except in cases involving novel policy implications. Appeal to the Board could only be had by a form of certiorari. If the Board denied certiorari, the ALJ’s decision would become the Board’s order and normal judicial review would be possible. A typical proposal would amend section 3(b) of the NLRA to authorize the Board to delegate its section 10 powers over section 8(a)(3) violations to the ALJs, subject to certiorari.

This proposal could effectively cut out Board review of the vast majority of section 8(a)(3) cases, which tend to be highly fact specific and which are best suited for determination by the trier of fact with access to witness demeanor. Certiorari would presumably be granted only infrequently. It is likely, however, that a sizeable number of cases would continue to be appealed to the courts, whether or not Board review existed. Moreover, ALJ decisions in 1979 took a median of 344 days, which, even if every case were resolved of within that period, would still be far too long to restore group rights.

The Labor Law Reform Act of 1978 would have amended section

82. Nolan & Lehr, supra note 2, at 61 n.65.
83. See discussion of various proposals at O’Hara & Pollitt, supra note 2, at 1121.
84. Presumably, certiorari would be granted according to standards analogous to NLRB Rules and Regulations § 102.67(c), currently used to determine whether to review a regional director’s decisions as to appropriate unit determinations, etc., under section 3(b).
85. At present, about 90% of ALJ CA decisions are upheld in full or with minor modifications by the Board. See Pinkston, Administrative Law Judges and the National Labor Relations Board, at Table 3 (1980) (unpublished manuscript, Harvard Law School).
3(b) to allow the Board to establish a procedure for summary judgment upon the motion of the prevailing party before the ALJ. Such a procedure would differ little from current Board practice and would differ from a denial of certiorari only in the difference in weight an appeals court might give the opinion. A denial of certiorari could presumably prevent agency “expertise” from attaching and therefore raise questions as to the scope of review at the circuit court level. It could be argued, however, that circuit court review of an ALJ decision denied certiorari should not differ from review of an ALJ decision afforded summary judgment by the Board.

3. Expanded Use of Section 10(j) Injunctions

Expanded use of the Board’s discretionary power under section 10(j) has often been suggested. Section 10(j) empowers the Board to petition a federal district court for appropriate temporary relief or a restraining order, upon issuance of a complaint charging that any person has engaged in an unfair labor practice. The Board has placed self-imposed limits on its use of section 10(j) dating back over thirty years. The Board considers section 10(j) to afford an extraordinary remedy, only to be applied in “instances where the activities sought to be restrained have wide repercussions.”

Thus, in 1979, the Board only invoked section 10(j) in 67 instances. Expanded use of section 10(j) is appealing for a number of reasons. It is within the Board’s discretion to use section 10(j); no statutory amendment would be necessary. This discretionary power, moreover, would allow the Board to seek immediate reinstatement only in those cases in which the Board was confident that the employer fired the charging party during an organizing campaign to remove an effective union voice and to spread fear among the remaining workers. Such selectivity would cause less of a load on the federal district courts.

86. S. REP. No. 628, supra note 13, at 46.
87. See Nolan & Lehr, supra note 2, at 56; Labor Law Reform Act Report at 72; K. McGuiness, supra note 18, at 294-95.
88. 29 U.S.C. § 160(j) (1976) states:

The Board shall have power, upon issuance of a complaint charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

89. See Murphy, supra note 2, at 64 n.21; Note, Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act, 44 N.Y.U. L. REV. 181, 182 n.9 (1969).
90. 44 NLRB ANN. REP. 227 (1979). See also Note, Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy, 18 SANTA CLARA L. REV. 1021, 1027 n.29 (1978) (historical table of section 10(j) use).
than an amendment to section 10(1).  

Several factors stand in the way of increased use of section 10(j). Invocation of section 10(j) is more time consuming than pursuit of relief under section 10(1). As shown above, time is of the essence in discriminatory discharge cases. Unlikely the procedure for securing a section 10(1) injunction, a complaint must first issue before a 10(j) proceeding may begin, and a conscious decision must be made by the regional director to institute a section 10(j) petition. Under current procedure, the regional director submits a recommendation to the General Counsel, who reviews it. If the General Counsel approves, he submits a memo to the Board. If the Board assents, the regional director is notified and proceeds with the section 10(j) petition. This cumbersome approval process is far too slow for the limited “window of opportunity” for reinstatement of a discriminatorily discharged union supporter during an organizing campaign. Of course, were more use of section 10(j) to take place, the process could be expedited by delegating to the regional director the final responsibility for deciding to initiate proceedings.

Another obstacle to increased use of section 10(j) lies in the lack of agreement among the circuits as to when temporary relief under section 10(j) should issue and the restrictive reading given section 10(j) by some of the circuits. The Eighth Circuit, for example, decided that section 10(j) relief should be “reserved for a more serious and extraordinary set of circumstances where the unfair labor practices, unless contained, would have an adverse and deleterious effect on the rights of the aggrieved party which could not be remedied through the normal Board channels.” The court wavered between the traditional equity test of preservation of the status quo and prevention of irreparable harm and a broader test of “conservation of the public interest.”

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91. See infra Section V(A)(4). Section 10(1) provided for expedited investigation of certain unfair labor practices and for a mandatory petition by the Board seeking injunctive relief from a federal district court.

92. See supra Section V(A).

93. See Note, supra note 91, at 1031-32.

94. For example, in Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967), discriminatory discharges took place on September 20, section 8(a)(3) charges were filed on September 21, a petition under section 10(j) was filed on December 22, and a temporary injunction was granted April 5, some six and a half months after the discharge.

95. See 4 LAB. L. REP. ¶ 9209 for steps currently taken to speed up the process, including the drafting of a model 10(j) brief.

96. Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d 265, 270 (8th Cir. 1967); see also Solien v. Merchants Home Delivery Serv., Inc., 557 F.2d 622, 626 (8th Cir. 1977).

97. Minnesota Mining & Mfg. Co. v. Meter, 385 F.2d at 272-73. See also Squillacote v. Local 248, Meat & Allied Food Workers, 534 F.2d 735, 744 (7th Cir. 1976), where the court adopted a “frustration of the basic remedial purpose of the act and the degree to which the public interest is affected” test in addition to the traditional equity test.

98. See infra Section IV.
The vagueness and restrictiveness of this standard is apparent as applied to a typical 8(a)(3) case. Discriminatory discharges are hardly "extraordinary,"99 the status quo may be restored through "normal Board channels," and backpay eliminates "irreparable harm"—at least as viewed by a court not considering group rights.100

The Second Circuit, using a test even narrower than that of the Eighth Circuit, refuses section 10(j) relief unless "... necessary to preserve the status quo or to prevent any irreparable harm."101 This test, the standard one for equitable relief, forces a section 10(j) petition to pass the normal rigorous hurdles of extraordinary relief, which tends to "... establish a presumption against the granting of a section 10(j) petition."102 A court concerned solely with individual rights, moreover, will be unable to find irreparable harm resulting from an 8(a)(3) violation: such a violation works irreparable injury primarily to employee group rights.

The Tenth Circuit's standard103 is more conducive to granting section 10(j) relief in discriminatory discharge cases. In Angle v. Sacks that court stated that a section 10(j) injunction would be granted when "[t]he circumstances of the case ... demonstrate that there exists a probability that the purposes of the Act will be frustrated unless temporary relief is granted."104 The Angle case itself involved large scale discriminatory discharges during an organizing campaign and affirmed a section 10(j) injunction reinstating the discriminatees and restraining the employer from violating his employees' section 7 rights. The court found its test satisfied, quoting the district court's findings that

It is clear that the acts described are such as operate predictably to destroy or severely inhibit employee interest in union representation, and activity towards that end . . . .

[Any order of the Board will be an empty formality if, when finally issued, respondent ... has succeeded in destroying any employee interest or initiative in union representation and collective bargaining. It may be that he has already done so. He discharged nearly one-third of the approximately twenty employees at the plant, and has

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99. Yet, curiously, the court found itself in "general agreement" with Angle v. Sacks, 382 F.2d 655 (10th Cir. 1967), which appears to posit an entirely different standard for section 10(j) relief. Minnesota Mining, 385 F.2d at 271. This "agreement" demonstrates how vague the standards are, since they can be all things to all people.


101. Note, supra note 90, at 186. There seems to be no reason why a statutory injunction should be granted according to the same standards as traditional non-statutory equitable relief.

102. Angle, 382 F.2d 655; see also UAW v. NLRB, 449 F.2d 1046, 1051 (D.C. Cir. 1971), rejecting an irreparable injury test for one which looked to whether the remedial purpose of the statute would be served by injunctive relief.

103. Angle, 382 F.2d at 660.

104. Id. at 660-61 (emphasis added).
since nearly doubled the size of the staff. There may be no effective union spokesman at the plant, and no residue of the sentiments which gave rise to these difficulties . . . . Reinstatement of the illegally discharged employees is the best visible means of rectifying this.105

Since the facts of a number of discriminatory discharges are similar to the Angle facts, such a "frustration of the purposes" test could be useful in obtaining early reinstatement of discriminatees.106 If more use were made of section 10(j), the Supreme Court would no doubt be forced to define the proper test for granting 10(j) relief.107 Nonetheless, the efficacy of reinstatement after several months108 is questionable. As the court stated itself in Angle

It would appear that much of the problem presented to the trial court, and the difficulty caused by the mandatory nature of the order arose from the delay by the Board in seeking the remedy. The more time that elapses between the time the incidents occur the less effective injunctive relief becomes, and it becomes increasingly difficult to show it to be a "just and proper" remedy. This could, of course, reach a point where relief should be denied on that ground alone.109

4. Amendment of Section 10(1)

Another traditional reform entails amending section 10(1)110 to require the General Counsel to seek an immediate preliminary injunction directing reinstatement of an employee discriminatorily discharged during an organizing campaign, before a first contract was signed, or during a campaign to deauthorize or decertify a union.111 This approach is clearly superior to the first two procedural reforms discussed above, since it focuses on the crucial three month time period between the signing of authorization cards and the holding of an election.

Ironically, such an amendment would be in keeping with the original purpose of section 10(1), if one forgets that section 10(1) currently

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105. However, the General Counsel has stated that the Board faces problems where:
   . . . courts have been reluctant to order reinstatement of allegedly discriminatorily discharged employees where replacement employees have been hired, on the theory that the Board can repair the injury to the discriminatees by ordering reinstatement and backpay, whereas the employees who would be replaced to make room for the reinstated employees would have no recourse if the Board subsequently dismissed the underlying complaint, citing as an example Eisenberg v. S.E. Nichols, Inc., No. 78-2613 (D.N.J. Jan. 15, 1979).
106. The Supreme Court had the opportunity to decide the proper test in McLeod v. General Elec. Co., 366 F.2d 847 (2d Cir. 1966), vacated as moot, 385 U.S. 533 (1967).
107. See supra note 67.
109. See supra note 92.
applies only against unions. During the Senate debate on the Taft-Hartley Act, proponents stated that section 10(1) was to deal with situations where:

Time is usually of the essence in these matters, and consequently the relatively slow procedure of the Board hearing and order, followed many months later by an enforcing decree of the circuit court of appeals, falls short of achieving the desired objectives—the prompt elimination of the obstructions to the free flow of commerce and encouragement of the practice and procedure of free and private collective bargaining.\(^{112}\)

Obtaining an injunction under section 10(1) takes time. It takes approximately a month just for the regional office to conduct its investigation and make informal settlement overtures.\(^{113}\) Only after this month is a petition for a preliminary injunction filed. Although section 10(1) makes provision for an ex parte temporary restraining order, it is rarely used\(^ {114}\) and its five-day limit would be of little use in ordering reinstatement.

Since thousands of section 10(1) petitions have been filed with federal district courts over the years, the standard of proof necessary for issuance of an injunction is well settled:

the district court need not decide that an unfair labor practice has actually occurred but merely must decide whether the Board has reasonable cause to believe there has been a violation of the Act.\(^ {115}\)

Several major objections can be raised to amending section 10(1). The first objection is that the amendment would increase the workload of already overloaded federal district courts.\(^ {116}\) According to an estimate derived from NLRB assumptions, if section 10(1) had been amended in 1978, the NLRB would have had to have litigated 2,788

\(^{112}\) S. REP. NO. 105, 80th Cong., 1st Sess. 8 (1947).

\(^{113}\) Kennedy, Toward Expediting Labor Injunctions Under Section 10(1) of the Taft-Hartley Act, 18 STAN. L. REV. 843, 850-852 (1966); K. McGUINESS, supra note 18, at 236, Murphy, supra note 2, at 82 n.160. However, the General Counsel once estimated that "A reasonable time would seem to be to investigate and reach a decision within 10 days from the filing of the charge," given an adequate increase in manpower. See Letter, supra note 63, at 17.

\(^{114}\) Kennedy, supra note 113, at 853.


\(^{116}\) In fiscal year 1979, there were 516 federal district judges with an average caseload of 300 cases per year, and an average civil trial caseload of 23 trials per year (all data are from AD. OFF. U.S. CTS. ANN. REP. (1979)). In order to determine the impact of amendment of § 10(1) on the federal district court caseload, we must compare an estimate of the number of discriminatory discharge cases for which the Board would seek a § 10(1) injunction with the number of trials which the federal district courts must currently handle. It is appropriate to use the trial figure instead of the broader "caseload" or "cases acted on" figure, since a § 10(1) proceeding is truly a trial. Testimony is taken from both sides with opportunity for cross-examination of witnesses. The General Counsel has estimated that "it will take about 9.2 attorney-days per 10(1) trial . . ."—an indication that a § 10(1) proceeding is not a simple affair. Letter, supra note 63, at 16.
discriminatory discharge 10(1) cases in 1979.\textsuperscript{117} Since the total federal
district court trial caseload was 11,764 cases in fiscal year 1979, amend-
ment of section 10(1) would have increased by 24% the number of trials
that the federal district courts would have had to have conducted. Amendment of the section would thus create a massive increase in the
workload of the federal district courts and would constitute a continu-
ally growing burden, since the growth rate of section (8)(a)(3) charges
has constantly outstripped the overall growth rate of civil trials.\textsuperscript{118} Moreover, section 10(1) trials would not merely take their place in line, but would demand the immediate attention of the federal district
courts.\textsuperscript{119}

Some would question this estimate, arguing that the very presence
of section 10(1) relief would decrease the number of discriminatory dis-
charges, and therefore that the estimated increase in the numbers of
section 10(1) trials is too great. This would only be true if injunctions
were granted rapidly enough to reinstate the discriminatee before the
election was held "for 10(1) affirmative relief to be meaningful, the af-
fected employee should be reinstated prior to the election."\textsuperscript{120} Re-
gional offices, however, currently take about a month simply to conduct
an investigation and decide that there are reasonable grounds to be-
lieve that an unfair labor practice has been committed. Any decrease
in investigation time for section 8(a)(3) cases would require a massive
increase in staff. If all section 8(a)(3) cases became section 10(1) prior-
ity cases, moreover, there would hardly be any low priority cases left.\textsuperscript{121} Finally, although there are no statistics on the length of time it cur-
cently takes to secure an injunction once it has been requested, it would
certainly become much longer once thousands of section 8(a)(3) cases
flooded the federal district courts.

Even if amendment of section 10(1) were to work, deterring some
employers entirely and causing those against whom injunctions were

\textsuperscript{117} In fiscal year 1979, there were 11,764 trials in federal district courts. In an estimate of the
impact of H.R. 8410 on the General Counsel's Office, the NLRB estimated the number of discrim-
inatory discharge cases which it would have to litigate in § 10(1) proceedings if § 10(1) were
amended. This estimate, made in 1978, can be derived for 1979 by the following calculation,
using the same assumptions as the General Counsel used in 1978: 17,220 alleged § 8(a)(3) viola-
tions filed in 1979, of which 94.7% or 16,307 are estimated to involve deprivation of employment.
Of these 16,307 cases, 90% are estimated to occur in organizing campaigns or prior to first con-
tract, yielding 14,676. The 38% "merit" rate for all unfair labor practices is applied to this figure,
yielding 5,577 cases. Using the conservative Board estimate that 50% of these cases would settle
prior to trial leaves 2,788 § 10(1) trials in 1979.

\textsuperscript{118} A compound growth rate of 5.7% for § 8(a)(3) charges over the period 1960-1980 com-
pared with a compound growth rate of 4.2% for civil trials over the period 1962-1977.


\textsuperscript{120} Letter, supra note 63, at 17.

\textsuperscript{121} The regional offices ignore the priority language of § 10(1) as it is. See Kennedy, supra
secured not to litigate further\textsuperscript{122} (since the union adherent is reinstated when it is most crucial to the employer to have him off the premises), another objection can be raised to such amendment. If a 10(1) proceeding (by reinstating the employee) causes the employer not to litigate further, then the entire elaborate mechanism of the NLRA for deciding, with expertise, whether or not an unfair labor practice has been committed will be reduced to a hasty decision (or threat thereof) made by an overworked federal district judge with no expertise in NLRA administration.\textsuperscript{123}

Finally, amendment of section 10(1) can be objected to on cost grounds. Again, using the NLRB's own estimates, 2,788 10(1) trials in 1979 would have required 9.2 attorney/days per 10(1) trial or a total of 25,650 new attorney workdays. Assuming 250 attorney workdays per attorney per year, the NLRB would have required 102 new attorneys just to handle the new 10(1) trials, and would continue to require one new attorney for every 27 new trials over and above these 2,788 trials. Furthermore, more regional office agents\textsuperscript{124} would have been required due to the "expedited nature" of section 8(a)(3) investigations, and new clerical employees would have to have been hired. The total cost would thus have been several million dollars, translating into several thousand dollars for each 10(1) trial, and even more for each employee reinstated.\textsuperscript{125}

5. Delegation of Reinstatement Power to the Regional Director

Finally, it has been suggested\textsuperscript{126} that the regional director be given the power to order reinstatement of the discharged employee, pending agency and judicial review. This proposal would be analogous to amending section 10(1), but would sidestep the need to go to a federal court for an injunction. It would, in effect, give the regional director limited injunctive powers. This proposal, however, is not a delegation of NLRB powers, since the Board itself currently has no power to grant or enforce an order for temporary relief. Nor can the proposal prop-

\textsuperscript{122} However, some feel that "Respondents litigating a 10(1) case may be less inclined to settle the underlying ULP proceeding. . ." \textit{See} Letter, supra note 63, at 18.

\textsuperscript{123} To some extent, this fear is borne out by a study of 10(j) proceedings recently published by the General Counsel: "In our view, the most striking thing about these statistics is the high settlement rate following Board authorization of 10(j) proceedings. [175 total cases authorized resulted in 82 settlements and 60 injunctions]. It should be borne in mind that, in these cases, the respondent had previously shunned the Regional Office's settlement overtures.

\textsuperscript{124} The NLRB estimates approximately a 33% increase in the number of agents due to "expedited treatment." Letter, supra note 63, at 17.

\textsuperscript{125} Some offsetting reduction in staff might result from the deterrent effect, if any, of amending § 10(1), since fewer 8(a)(3) charges would be filed.

\textsuperscript{126} This suggestion was discussed in a labor law seminar given by Professor Paul Weiler at the Harvard Law School in 1982 and could have many variations. The author has picked the scheme presented below as illustrative.
erly be seen as a delegation of current judicial power. Current judicial standards for granting temporary relief in discriminatory discharge cases are far stricter\(^{127}\) than a standard allowing the regional director to reinstate a discharged employee upon a finding that there are reasonable grounds to believe that a violation of the Act has occurred. The proposal is *sui generis*, far exceeding the present authority of the Board or current judicial interpretation of section 10(j).

Under the proposal, a regional director would conduct the normal\(^{128}\) preliminary investigation of a discriminatory discharge claim. If, after conducting this investigation, the regional director had reasonable cause to believe the charge were true, he would order immediate reinstatement of the discharged employee, pending settlement negotiations.\(^{129}\) If attempts at settlement failed, he would issue a complaint and initiate the normal procedure for adjudication. Since investigations currently take approximately thirty days,\(^{130}\) an alleged discriminatee would be back at work only a month after his discharge, and would remain at work (barring some legitimate reason for firing him) during both the election campaign and the procedural morass which currently disposes of a case.

The obvious advantage of such a proposal is that it provides rapid reinstatement, at least in some cases, during the organizing campaign, without burdening the federal district courts. The discharged employee is reinstated in such a short time that he can, at least in some cases, continue to participate in the organizing campaign. His rapid reinstatement demonstrates to the employees that their right to organize is respected and protected by a force stronger than their employer. The reinstated employee is out only a small sum of money (at most, one month’s wages) which may be recovered in a later backpay award. The employer is unharmed financially, since he continues to receive the employee’s services during the adjudication of the charge on the merits. The employer, who has affirmatively acted and (presumably) has been reasonably accused of violating the NLRA, bears the burden of his action. If he has been rightly accused, he has borne no unwarranted burden. If he has been unjustly accused, his burden is light, since he has received the employee’s services in the interim, and he “... [had] considerable power to protect his interests by taking care in advance to establish the reasons for the discharge with sufficient clarity to forestall

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127. *See infra* section V.A.3.

128. Presumably, § 10(m) would be amended to give equal priority to § 8(a)(3) cases vis-a-vis those cases currently listed in § 10(1).


130. K. McGUINESS, *supra* note 18, at 236.
allegations under the Act."\textsuperscript{131}

The problems associated with the proposal are both practical and philosophical. On the practical side, even a thirty-day delay between discharge and reinstatement can be used to an employer's advantage in a particularly close election or against a particularly effective union adherent. Most importantly, any discriminatory discharge of a union adherent affects the likelihood that other voters will vote union in the election.\textsuperscript{132} By timing a discharge, an employer could temporarily rid himself of a prospective catalyst for unionization, and little would prevent seriatum discharges of the same or different union adherents.

Moreover, an investigation which resulted in reinstatement would have to be carried out in a more careful and painstaking manner than an investigation which merely resulted in the issuance of a complaint. It is thus unlikely that investigations could be completed within thirty days and that reinstatement would occur within the crucial period prior to the election.

On the philosophical side, the suggested delegation blurs the distinction between prosecutorial and judicial functions. The investigating agent at the regional level is a prosecutor. The grantor of interim relief traditionally is a judge. The proposal places a traditionally judicial decision—whether particular actions warrant interim relief—into the hands of the prosecutor, who is best viewed as the representative of the charging party. The proposal is an undue delegation of judicial power to a non-neutral party. Despite the "neutral" role of the investigating agent during the investigation, the charged party clearly sees the agent as the opponent—the prosecutor.\textsuperscript{133} Reinstatement pending decision on the merits is not even analogous to interim enforcement of an ALJ's decision: such enforcement is based on a formal hearing of evidence presented by both parties and a decision by a neutral third party. Regional director reinstatement occurs before any formal evidence is heard and before any neutral decision is made, and is ordered by the prosecutor, not by a judge. Although an employer can hardly raise due process objections to temporary relief awarded by a court exercising its equity powers, an entirely different question arises when equitable powers are entrusted to the prosecutor.\textsuperscript{134}

It would be hard to limit such a delegation to cases involving dis-

\textsuperscript{131} Bok, \textit{The Regulation of Campaign Tactics in Representation Elections Under the National Labor Relations Act}, 78 \textit{Harv. L. Rev.} 38, 131 (1964).
\textsuperscript{132} See text at note 32 (although the effect on voters would likely change if reinstatement occurred during the organizing campaign).
\textsuperscript{133} See K. McGuinness, \textit{supra} note 18, at 238.
\textsuperscript{134} See American Cyanamid Co. v. FTC, 363 F.2d 757 (6th Cir. 1966), disqualifying an FTC member from hearing a case where he had been involved in the investigation and had formed an opinion as to facts. \textit{See also} 5 U.S.C. § 554(d). Of course, there is a distinction between the granting of temporary, rather than final, relief.
discriminatory discharges during organizing campaigns. Those unfair labor practices currently covered by section 10(1), such as secondary boycotts and organizational picketing, have at least an equal claim to the bounty of prosecutorial injunctions. Congress has decided that those unfair labor practices warrant mandatory petitions for injunctive relief; it has never authorized such treatment for section 8(a)(3) violations, despite several attempts to secure it. Granting the regional director the power of prosecutorial injunctions for 8(a)(3) violations, while denying him similar power for unfair labor practices of greater perceived importance, would be hard to justify.

B. Employer Disincentives

1. Increased Backpay

The second group of traditional remedies focuses on creating disincentives to discriminatory discharges. Employers are profit maximizers: they commit section 8(a)(3) violations because the marginal benefits of violation outweigh the marginal costs. Employers, therefore, will be less likely to violate the Act if the costs of doing so are increased.\(^\text{135}\)

One frequently proposed reform is the imposition of one-and-a-half times,\(^\text{136}\) double, or triple backpay awards.\(^\text{137}\) The 150% backpay award, in particular, has the benefit of liquidating consequential damages which are currently uncompensated. The multiple backpay award proposal, in general, has appeal as it would give a discharged employee, through the regional office agent, a “bargaining chip,” the size of which would vary with whether or not the proposal continued the discriminatee’s current duty to mitigate and with the length of time elapsed before the employee secures reinstatement. Employee possession of such a bargaining chip might induce the employer to settle ear-

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135. To an extent, procedural reforms also act as employer disincentives. For example, amendment of § 10(1) could deter an employer from discriminatorily discharging an employee, if an injunction could be obtained rapidly enough to reinstate a discriminatee during the organizing campaign. See supra note 124, and Murphy, supra note 2, at 83 n.164.

136. See S. REP. No. 628, supra note 13, at 13.

lier than he would otherwise and might even deter the employer from discharging the employee in the first place.

Such results are unlikely. In 1980, the average backpay award was $2,062.\textsuperscript{138} Triple that figure is still an insubstantial sum, the possible loss of which is unlikely to deter a section 8(a)(3) violation. Of course, if the duty to mitigate were removed, the figure would grow by tens and thousands of dollars. Even so, given the benefits an employer stands to gain by discharging union adherents, that sum is insufficient to act as a deterrent. To take a simple example, in a unit with 50 employees and an average wage of $4.00/hour, an employer who successfully prevents unionization can save himself a roughly 20% increase in wages.\textsuperscript{139} Prevention of a 20% increase translates into $0.80/hour, or $320/day. Thus, the average backpay award can be recouped in 7 days, and increasing the award by a factor of ten merely means that the award can be recouped in a couple of months. Adding legal fees merely stretches out the recoupment period. As one commentator noted:

These economic “squeeze” remedies make an accountant of the employer. The weighing of the short term costs and the long term potential profits for the violations may often lead to the mathematical conclusion that it pays to violate . . . For example, all of the backpay awards which the Stevens Company has had to pay notwithstanding ($1,006,617.83 since 1963) [as of 1969] paying its workers 10 cents below union wages for a single year would make up the deficit and leave a profit.\textsuperscript{140}

Furthermore, the impact of increased backpay would be discriminatory, since larger firms with more at stake would be wholly unaffected, while very small employers would feel the pinch. Increased backpay awards, moreover, would probably not deter discharges in any firm, large or small; they would instead decrease the duration of the discriminatee’s absence. In an organizing setting, most of the incentive for a discharge comes up front.\textsuperscript{141} The employer wants the union adherent out of the plant and wants to frighten the remaining employees. The employer must keep the discriminatee out at least until the election. Most of the benefit from discharge thus is gained in the first few months, while the cost of discharge (in the form of backpay and legal fees) builds up over time. The marginal benefit of keeping the employee out will be less than the marginal cost of settling, in most instances, only after the election. Higher backpay awards, therefore, will act as disincentives only after group rights have been harmed.

\textsuperscript{138} Weiler Table 1.

\textsuperscript{139} See Freeman, and Medoff, \textit{The Two Faces of Unionism}, 57 \textit{The Public Interest} 69 (1979), and sources cited therein.

\textsuperscript{140} Meyer, supra note 2, at 610 n.51.

\textsuperscript{141} That is, the marginal benefit of the discharge is extremely high during the organizing campaign, and decreases rapidly thereafter.
The only person likely to gain by increased backpay is the discharged employee. Although 150% backpay can be seen as liquidated damages, treble backpay has a distinctly punitive flavor. Of course, the "remedial" nature of the NLRA is of judicial creation and could be changed by statutory amendment. But one must question the justice of awarding a windfall gain to a discharged employee while granting nothing at all to the remaining employees with whose section 7 rights the employer has directly and usually successfully interfered. Moreover, it seems a perversion of the Act to provide an incentive for more risk-loving employees to become open union adherents in the hope of being fired and receiving a treble backpay pot of gold.

2. Federal Contract Debarment

A second proposed employer disincentive is the debarment from future federal contracts of any employer who willfully violates an enforceable Board order. The version of contract debarment proposed by the Labor Law Reform Act of 1978 would have continued debarment for three years. One rationale for contract debarment is that of deterrence, since debarment can in no way benefit the discharged or remaining employees. Another rationale is the deprivation of the employer's ill-gotten gains:

The theory of the debarment provisions is that an unfair employer is not an island unto himself. An employer's illegal actions which depress his labor costs give him an unfair advantage over his competitors, who obey the law. When the federal government utilizes its enormous purchasing power in a competitive bidding system, it exacerbates that problem, and defeats the purposes of its own laws, by rewarding such employers.

Unless contract debarment serves as a deterrent, it is of no value as a remedy in section 8(a)(3) cases. Yet it is improbable that contract debarment would act as a deterrent. A large group of employers—those without federal contracts—would be wholly unaffected. Debarment would apply (at least under the Labor Law Reform Act version) apply to employers who willfully refuse to obey an enforceable Board order, i.e., only to those employers who are also in contempt of court. Contemnors are hardly likely to be deterred by contract debarment. Debarment would occur only after an enforceable Board order has been entered and an employer has refused to obey it. Debarment would last

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142. Although Overnight Motor Co. v. Missel, 316 U.S. 572, 583 (1942) held that the double unpaid wages provision of § 16(b) of the FLSA was "compensation, not a penalty or punishment by the Government."
143. See supra Section III.
144. See, e.g., S. REP. NO. 628, supra note 13, at 30-32, 54-55.
145. Id. at 30.
146. Id. at 31.
for only a limited time and would be subject to numerous exceptions (e.g., national security, sole product source, etc.). Thus, contract debarment would be unlikely to have any deterrent effect, even on those employers within its scope. It would merely create new procedural morasses. Even a more comprehensive contract debarment scheme (e.g., one applying to any employer found guilty of committing an unfair labor practice) would perversely harm the very workers it was designed to protect: debarment would cause layoffs among employers suffering production cutbacks as a result of debarment from federal contracts. Federal contract debarment is clearly unwieldly, ineffective and counterproductive.

3. Criminal Penalties

A final suggested deterrent to employer violations is making willful violation of the NLRA a crime, analogous to section 16(a) of the Fair Labor Standards Act. That section provides:

Any person who willfully violates any of the provisions of section 215 of this title shall upon conviction thereof be subject to a fine of not more than $10,000, or to imprisonment for not more than six months, or both. No person shall be imprisoned under this subsection except for an offense committed after the conviction of such person for a prior offense under this subsection.

The sole rationale for such a criminal sanction is deterrence. For a criminal sanction to act as a deterrent, threat of its use must be credible. In the labor setting, making a threat of criminal sanction credible is problematic. It would be difficult to decide who to prosecute—the supervisor who discharged the employee, the supervisor's supervisor, the plant manager, the vice president for production, the president, the board of directors, the subsidiary or the parent. The defendant's guilt would have to be proved beyond a reasonable doubt—a very high standard in cases as prone to "mixed motive" claims and as undeniably subjective as discriminatory discharge cases. All the procedural protections afforded a criminal defendant would attach, including that of jury trial. Moreover, "[a]s a practical matter, it seems most unlikely that jail sentences would be imposed in more than a few, extremely flagrant cases." Thus, criminal prosecutions would become cases of criminal fines, which have all the deterrent problems of treble backpay discussed above, coupled with the improbability of conviction due to the

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147. Id. at 32.
149. See discussion of criminal sanctions for labor law violations in Bok, supra note 131, at 125-26.
150. Id.
151. See supra Section V(B)(1).
higher standard of proof. Additionally, criminal prosecutions would presumably take the matter out of the Board's hands; under the FLSA, criminal charges may only be brought by the Secretary of Labor. As one commentator has stated, "... both reason and experience suggest that criminal proceedings could never be the sole means for remedying discriminatory discharges. In fact, the difficulties involved seem sufficient to discourage the use of such sanctions in any form until alternative methods have clearly proved ineffective."

C. Employee Aid and Comfort

The final category of traditionally recommended remedies centers on the discharged employee's aid and comfort. These remedies accept current section 8(a)(3) procedures and simply try to cushion the blow of discharge. As such, none of these proposals even purports to remedy the violation of group rights inherent in a discriminatory discharge during an organizing campaign. Three common suggestions will be briefly discussed here.

Expansion of the concept of backpay is often recommended. As discussed above, backpay does not cover consequential damages arising out of the discriminatory discharge, such as losses of property purchased on the installment plan, additional financing fees incurred, etc. The idea behind expansion of backpay is to attempt to make the employee "truly whole." Of course, new problems of causation and proof of damages would spring up as the ripple effects of a discharge were traced over months and years. Since extensive record keeping would be required, it is likely that some liquidated damage figure would be more administratively feasible. It is hard, however, to argue with the notion that an employer should be made to pay for the full damage it unlawfully causes.

A second suggestion is the creation of a federal revolving loan fund, from which a discharged employee could borrow his after-tax weekly wages during the disposition of his case. These loans would tide the discharged employee over until he received his backpay award. Initial capitalization of the fund would be provided at taxpayer expense, as would administrative costs. Ironically, the creation of the fund would allow an employer, in effect, to borrow from the govern-

152. Meyer, supra note 2, at 618 n.78.
153. Bok, supra note 131, at 126.
154. See supra Section III(C).
155. 150% of backpay is a likely candidate. See supra Section V(B)(1).
157. Although a special funding tax on employers covered by the NLRA would be more legitimate.
ment during the course of litigation, instead of from the discharged employee, as it currently does.158 The inclusion of a duty to mitigate in calculating backpay awards would result in borrowing in excess of likely backpay awards on the part of some employees, forcing the taxpayer to shoulder any resulting defaults. If an employee were found not to have been discriminatorily discharged, moreover, he would have no source of funds for loan repayment, other than his future earnings. Even a 10% default rate would cost millions of dollars, given the size and number of backpay awards today.159 This cost would be likely to grow. The loan fund proposal, however, does have the advantage of spreading some of the risk of losses flowing from an alleged discriminatory discharge among the U.S. taxpayers, instead of concentrating that risk on the discharged employee.160

A third suggestion is the encouragement of employee buyoffs. The NLRB would encourage a discharged employee to accept a financial settlement from the employer soon after discharge, in return for the employee's waiver of reinstatement. Thus, the employee would have immediate cash in hand on which to live while seeking a job elsewhere. Employee buyoffs, however, are antithetical to the very essence of section 7 group rights and should not be encouraged.

VI
TEMPORARY SUSPENSION OF EMPLOYER'S POWER TO DISCHARGE

An employer receives the maximum benefit from a discriminatory discharge in the first few months after the discharge, while costs to the employer resulting from such a discharge build up slowly over time. Costs to group rights occur during those same few early months; benefits to the group from a delayed reinstatement are doubtful at best. A discharged individual, facing mounting financial costs, is unlikely to accept delayed reinstatement. He is furthermore unlikely to remain if reinstated. Procedural reform, even to the greatest extent practicable, either results in continued delay during the vital organizing period or involves the questionable use of prosecutorial injunctions. Employer disincentives are likely to decrease the time an employer spends fighting the Board, but are unlikely to prevent discharges. Finally, em-

158. Since the employer, in effect, currently borrows from the discharged employee, an employer would be indifferent as to whether or not the fund existed, unless the fund were financed by an employer tax. Then, employers would be borrowing from each other.
159. $32.1 million in 1980.
160. Assuming that such arbitrary risk spreading is considered legitimate. Funding via an employer tax would place the burden of loss on employers, their factors of production and consumers.
ployee aid and comfort merely skirt the problem, redressing individual rights violations at a fairly high cost.

All currently suggested reforms implicitly assume that an employer has the right to discharge an employee during an organizing campaign. Such a premise finds its roots in the American tradition of at-will employment contracts. It simply is granted that an employer may discharge for good, bad, or no reason. If an employer, in firing a worker, commits an unfair labor practice, then it may be forced to rehire that worker and to agree not to discharge other workers similarly situated. But it is the act of firing which triggers the enforcement machinery. Absent an unfair labor practice, the Board has no power to act.

This ability to make the first move—to fire a union adherent—lies at the heart of the discriminatory discharge problem. An employer, comparing the benefits of a discharge to the costs, simply has too tempting a weapon in its hands. All the remedies for a discriminatory discharge focus on minimizing the effect of the fired bullet, reassuring the startled bystanders and taking away the remaining ammunition. None of them focuses on temporary disarmament. None of the remedies calls into question an employer's right to fire an employee.

What would such disarmament look like? First, it would be temporary. A temporary suspension of an employer's right to discharge would last only during a “protected time,” i.e., only until the election was held, or a maximum of 120 days from the filing of an “intent to organize” statement by the employees or the organizing union. Second, the scope of employees so protected would be limited to a “protected unit,” as unreviewably determined by the regional director at the time the organizing union or employees filed an “intent to organize” statement with the regional office and the employer. Third, suspension of an employer's right to discharge would not be absolute—an employer would be allowed to discharge an employee in the “protected unit” during the “protected time” by filing a “certificate of theft, violence, or gross misconduct” with the regional office prior to the discharge.

Any employee discharged pursuant to a certificate could file a charge with the regional office, which would reinstate the employee if, after an expedited investigation, it had reasonable cause to believe that no theft, violence, or gross misconduct had been committed by the employee. In order to prevent abuse of the “certificate of theft, violence, or gross misconduct,” it would be sworn under penalty of perjury. Any employee within the “protected unit” discharged without his employer having filed a certificate would be reinstated by the regional director within two business days of notice to the regional director. Appeals
from either of these two types of reinstatement could be pursued by the employer through the normal ALJ, Board, and appeals court process, but such appeal would not stay the reinstatement.

Such a temporary suspension of an employer's right to discharge, limited to the relatively short time period of the organizing campaign, would protect employees' section 7 rights at little cost to the employer. The employer would still be free to discharge a thief, a violent employee, or an employee who took gross advantage of his immunity from discharge. Employees' section 7 rights would be safeguarded, since an employer could not discharge an employee in the hope of affecting a representation election. Individual employees, moreover, would be protected from discharge, not only during the campaign, but afterwards. Once the campaign had ended and the votes had been cast, the employer would have little incentive to fire a union adherent. Although a particularly vindictive employer might discharge a union adherent after an election, the number of such discharges would likely be small in comparison with current discriminatory discharge figures. Section 10(1), therefore, could be amended to provide injunctive relief in such limited cases without unduly overloading the federal district courts.

The seemingly vast power of the regional director in this suspension scheme can be reconciled with the arguments advanced in section V(A)(5) against giving a regional director injunctive powers. The regional director's power in the suspension scheme is more apparent than real. The major change in power worked by the scheme is the suspension of an employer's power to discharge employees during an organizing campaign. The regional director in the suspension scheme acts merely as a clerk. If an employee is discharged during the "protected time" without the employer having filed the proper certificate, the regional director merely determines that the complainant is an employee, that he is within the "protected unit," and that no certificate was filed. If all these conditions obtain, the regional director reinstates the employee within two business days of receipt of the complaint.

If the employee is discharged pursuant to a certificate of theft, violence, or gross misconduct, the regional director's tasks are hardly more complicated. Again, he determines that the complainant is an employee within the "protected unit" who was discharged during the "protected time" and whose discharge was preceded by the filing of a certificate. The regional director reads the employer's sworn affidavit describing the instance of theft, violence, or gross misconduct and the employee's involvement in the incident. The regional director should readily be able to determine whether or not there is reasonable cause to believe that such gross and objectively verifiable conduct occurred by
interviewing both the employer and the employee. This determination is a far cry from any power to reinstate an employee which might be granted the regional director by traditional remedial proposals. Under the scheme discussed in section V(A)(5), the regional director would have to decide whether or not there was reasonable cause to believe that an employer had committed an unfair labor practice, a particularly subtle factual determination given the usual mixed motive case. Moreover, the regional director would become the prosecutor in the same case in which he exercised his injunctive powers by reinstating the employee.

Under the suspension scheme, the regional director ignores the employer’s motive entirely, and makes the purely factual determination as to whether or not there is reasonable cause to believe that the discharged employee committed theft, an act of violence, or gross misconduct. Moreover, it is unlikely that the regional director would ever serve as the prosecutor in a case in which he reinstated the employee. Evidence of the occurrence of theft, violence, or gross misconduct would either be so absent as to preclude an employer challenge to the regional director’s decision to reinstate, or so clear that the regional director would decline to reinstate. Close calls would be eliminated. The probability of an employee being wrongly reinstated is much lower under the suspension scheme than under the scheme discussed in section V(A)(5), since it should be easy for an employer to persuade the regional director of instances of such magnitude as theft, violence, or gross misconduct. During the limited period of an organizing campaign, an employer is scarcely harmed by being forced to employ persons who are not guilty of theft, violence, or gross misconduct. An employer, moreover, remains free to discharge a reinstated employee once the “protected time” expires. Furthermore, there is little likelihood that an employer would later fight reinstatement by the regional director, since no benefit would accrue in terms of affecting election results.

This suspension scheme would have a substantial preventive effect. A discriminatory discharge would be futile; immediate reinstatement during an organizing campaign would be embarrassing to the employer and likely to aid the union drive. It is true that an employer would temporarily lose its power to fire an employee for a trivial, non-union related reason, or for no reason at all, during an organizing campaign. The loss of the right to discharge, however, would only be temporary, and management would retain the right to discharge for serious offenses.

161. Gross misconduct is vague and would have to evolve into a more specific guide, either through adjudication or, preferably, through rulemaking.
One must remember that passage of the Wagner Act was, for its
day, a major intrusion on management prerogatives. As the concept of
employer and employee rights has evolved under the NLRA, many
traditional rights of management have had to accommodate the section
7 rights granted to employees by the NLRA. Such traditional property
rights as the right to exclude non-licensees from private property have
had to give way, in certain circumstances, to employees' section 7 rights
to organize. Proprietary lists of employees and other information
now must be turned over to an organizing union. An employer's
speech and actions are highly regulated during an organizing cam-
paign, and an employer, under certain circumstances, may not even
unilaterally close part of his business. Many other examples may be
found where, in the interest of promoting industrial peace and max-
imizing industrial output, traditional employer prerogatives have been
drastically limited by the need to guarantee employees the right to or-
organize a union.

An employer's power to discharge a union adherent illegally is a
clear burden on commerce and on industrial peace. Temporary, lim-
ited suspension of an employer's power to discharge places a small bur-
den on traditional management prerogatives, preserving "just cause"
discharges and limiting the concept of at-will employment for a mere
120-day period. The burden to an employer is thus less than the loss of
the many other traditional employer prerogatives which have been
eliminated by Board or court interpretation. The burden is considera-
ably less than the burden placed on section 7 rights by an employer's
current power to discharge union adherents discriminatorily during an
organizing campaign with relative impunity.

This suspension scheme is offered as a practical alternative to
traditional remedial schemes. It purposely focuses on the organizing
campaign and guarantees workers the full exercise of their section 7
rights. It intrudes on traditional management prerogatives only so far
as is necessary to remove any incentive for employers to discharge
union adherents discriminatorily during an organizing campaign. It
preserves management's legitimate power to protect itself from those
who would take advantage of temporary suspension of an employer's
power to discharge. By temporarily and in a limited fashion removing
the power to discharge, the suspension scheme ironically removes the
incentive to fire union adherents. In fact, insofar as rapid reinstatement
is an embarrassment to the employer and a rallying point for union
forces, the employer has a disincentive to discharge a union adherent

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149 (1956).
discriminatorily. No other suggested reform is as simple, objective, and potent as temporary suspension of an employer's power to discharge.

### TABLE A “CA” CASES

<table>
<thead>
<tr>
<th>STAGE</th>
<th>MEDIAN TIME (days)</th>
<th>NUMBER</th>
<th>% CASES CLOSED</th>
<th>% CASES REMAINING</th>
<th>NUMBER CASES REMAINING</th>
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<td>305</td>
<td>1.1</td>
<td>5.3</td>
<td>1,555</td>
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<tr>
<td>After ALJ decision, before Board decision</td>
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<td>34</td>
<td>0.1</td>
<td>5.2</td>
<td>1,521</td>
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<td>After Board adopts ALJ decision, without exceptions</td>
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<td>175</td>
<td>0.6</td>
<td>4.6</td>
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<tr>
<td>After Board decision, before circuit court</td>
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<td>493</td>
<td>2.9</td>
<td>1.7</td>
<td>500</td>
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<tr>
<td>After circuit court, before Supreme Court</td>
<td>N/A</td>
<td>7</td>
<td>1.7</td>
<td>—</td>
<td>7</td>
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<tr>
<td>After Supreme Court</td>
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  a.  Time to close of hearing.
  b.  Time between Board decision and circuit court decision, so some cases took less than the 423 median days.
### Table B

<table>
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<th>STAGE</th>
<th>NUMBER</th>
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<td>After Board adopts ALJ decision, without exceptions</td>
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<td>84&lt;sup&gt;c&lt;/sup&gt;</td>
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<tr>
<td>After Supreme Court</td>
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<sup>a</sup> Compliance with ALJ decision.
<sup>b</sup> By Board decision, so did not have to wait the median 423 days between Board and circuit court.
<sup>c</sup> Compliance with Board order, so may not have had to wait the full 423 days between Board and circuit court.
<sup>d</sup> After Board or court decision.
<sup>e</sup> By circuit court.
<sup>f</sup> Compliance with circuit court decision.
<sup>g</sup> Compliance with Supreme Court decision.
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<th>STAGE</th>
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<th>NUMBER</th>
<th>% CASES CLOSED</th>
<th>% CASES REMAINING</th>
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<td>Before ALJ hearing</td>
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<td>3,202</td>
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<td>259</td>
<td>2.6</td>
<td>12.2</td>
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<td>After Board adopts ALJ decision, without exceptions</td>
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<td>191</td>
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1. Compliance with ALJ decision, so may not have had to wait the full 123 days between ALJ decision and Board decision.
2. Compliance with Board order, so may not have had to wait the full 423 days between Board and circuit court.
3. Compliance with circuit court decision.
4. Compliance with Supreme Court decision.

*Time to close of hearing.
**Time between Board decision and circuit court decision, so some cases took less than the median 423 days.