The Practicality of Increasing the Use of NLRA Section 10(j) Injunctions

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Under section 10(j) of the National Labor Relations Act, the Labor Board may ask a federal district court to issue an interim injunction against an alleged unfair labor practice before the administrative adjudication process commences. At least in theory, therefore, increased use of section 10(j) might address the oft-lamented problem of delay in NLRB proceedings, a potential noted by many commentators. This Comment addresses the practicality of increasing the use of such injunctions. After discussing recent attempts to increase section 10(j) usage, it examines the effects of current employment of the interim injunction. The Comment concludes that although obstacles to increased use of the remedy are substantial, the Board can significantly increase the issuance of section 10(j) injunctions through a modest reform of current practices.

INTRODUCTION

An employer or a union official who violates the National Labor Relations Act1 (NLRA) can rest easy in the knowledge that he can, if he chooses, avert punishment for a very long time. In 1980 the median time between the filing of an unfair labor practice charge and the circuit court’s decision on the charge was 969 days, more than two and a half years.2 Most violators settle their cases early in the administrative adjudication process, but they are entitled to push a case to the bitter end of the procedures Congress has granted them.3

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3. In fiscal year 1981, 87% of the unfair labor practice charges filed with regional offices were settled or withdrawn before a complaint issued. 46 NLRB ANN. REP. 176-77 (Tables 2 & 3A) (1981).

The unfair labor practice proceeding begins when the aggrieved party files a charge with a regional office of the National Labor Relations Board. An agent of the office investigates the charge and issues a complaint if he finds a violation and the parties refuse to settle. The case then moves on to a hearing before an administrative law judge (ALJ). The ALJ sends his opinion to the Board, which adopts it if neither party files timely exceptions. If a party does file exceptions, the Board
Since 1960, labor experts have peppered the pages of journals and Board reports with proposals to reduce the delay in unfair labor practice proceedings. Some commentators who have focused on alleviating the harms that delay causes rather than on reducing the delay itself have advocated that the Board increase its use of the interim injunction. Under section 10(j) of the NLRA, the Board can ask a court to enjoin an alleged unfair labor practice before the adjudication process begins. If the Board requests section 10(j) relief immediately after an unlawful discharge, for example, the worker is back on the job in two or three months instead of two or three years. He or she does not have to look for another job or wait for back pay. Other employees are quickly reassured that their own jobs will be protected under the Act. Thus the alleged violator still can exercise its 969 days’ worth of procedural rights, but the discharged employee and his fellows need not suffer for it.

The Labor Law Reform Act of 1977, narrowly defeated by a filibuster in the summer of 1978, would have forced Board officials to seek section 10(j) injunctions in almost all discriminatory discharge cases. In...
the wake of the bill's defeat, some commentators have urged the Board to enact the same reform even in the absence of legislative action.\(^9\)

But few of the commentators have discussed how such reforms would work in practice. John S. Irving, General Counsel to the NLRB from 1976 to 1979, calculated that the Labor Law Reform Act's injunction provision would have required the General Counsel of the NLRB to bring almost 3500 discriminatory discharge cases to the district courts each year,\(^10\) an intimidating prospect considering that in fiscal year 1981 the Board took only forty-three such cases to the courts.\(^11\) In addition, a thorough reform might require injunctive treatment of violations other than discrimination discharges,\(^12\) imposing a burden on the agency and the courts even heavier than that predicted by Irving.\(^13\)

This paper analyzes the practicality of increasing the use of the section 10(j) injunction. The first section describes briefly how delay cripples present remedies. Section 10(j) relief, coming as it does within a few months of a violation, seems at first glance to be a perfect cure for this infirmity. Board officials have indeed tried to administer the section 10(j) cure more frequently in the last two decades, as the second section of the paper describes. But only rarely have they examined how the remedy actually works. Section 10(j) relief, as the third section explains, does not issue as promptly as one might assume. The fourth section focuses on the roadblocks in the way of section 10(j) reform. The NLRB should not heed calls for section 10(j) expansion if crushing workloads or district judges' reluctance to use the section would stymie the reform. But while the obstacles to section 10(j) reform are substantial, hope of reform is not

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11. 46 NLRB ANN. REP. 225 (Table 20) (1981).


13. In fiscal year 1981, the regions made only fifteen requests for injunctive relief against unions and employers who allegedly violated sections other than §§8(a)(3) and 8(b)(2). 46 NLRB ANN. REP. 225 (Table 20) (1981). The regions handled hundreds of times that many charges under those other sections. Id. at 176 (Table 2).
lost. As the final section explains, the Board can attempt a modest reform and can, through conscious and careful strategy, make it work.

I

THE CASE FOR INCREASING THE USE OF SECTION 10(j): THE PROBLEM OF DELAY

For more than twenty years, labor lawyers, general counsels, Board members, Congressmen, and law review authors have bemoaned the delays that attend the adjudication of unfair labor practice charges. They echo Archibald Cox's early statement that "[n]o change in the substantive provisions of the Taft-Hartley Act is more important than speeding up the processes of decisions in unfair labor practice cases."14 Professor Weiler has documented the serious increases in the delays since 1960. In 1960 an unfair labor practice charge's journey from filing to Board decision took a median of 426 days.15 The median fluctuated during the 1960's and 1970's, dipping to 332 days in 1975 and reaching 484 days in 1980.16 The trip from Board decision to circuit decision, which took a median of 359 days in 1975, rose to 485 days by 1980.17 Thus, the median total from start to finish increased from 691 days in 1975 to 969 days in 1980.18

A. Delay and Employer Unfair Labor Practices

1. Section 8(a)(3) Cases

These lengthy delays cripple the Board's remedies in all unfair labor practice cases. Of special concern are the remedies for discriminatory discharge violations. Employers who violate section 8(a)(3)19 are usually

14. ORGANIZATION AND PROCEDURE OF THE NATIONAL LABOR RELATIONS BOARD, S. DOC. No. 81, 86th Cong., 2nd Sess. 10 (1960) (statement by Archibald Cox, chairman of a Senate Advisory panel that studied the organization and procedure of the NLRB). Those who have agreed with Cox in the last two decades have included former Board Chairman Frank W. McCulloch, in New Problems in the Administration of the Labor-Management Relations Act: The Taft-Hartley Injunction, 16 SW. L.J. 82, 100 (1962) (calling delay "perhaps our single greatest problem"); former General Counsel Peter G. Nash, in a speech, reprinted in Report on Meeting of ABA's Labor-Law Section, 1972 LAB. REL. Y.B. 49, 55; former Board Chairman and Member John H. Fanning, in We are Forty—Where Do We Go?, 27 LAB. L.J. 3, 7 (1976) ("I remain convinced that the real key to the problem of adequate remedies is accelerating the Board's processes"); a special task force set up to study Board procedure, which reported its proposals in Final Report of the Chairman's Task Force on the NLRB, reprinted in 1977 LAB. REL. Y.B. 329; and former General Counsel John S. Irving, in Use of Section 10(j) Injunction Proceedings, reprinted in 4a LAB. L. REP. (CCH) ¶ 9209, at 15,958 (Oct. 15, 1979).

15. Weiler, supra note 2, at 1796 (Table III).

16. Id.

17. Id.

18. Id.

19. 29 U.S.C. §158(a)(3) (1982). While a union can also be found guilty of a discriminatory discharge violation under §8(b)(2), such charges are rare compared with charges against employers. Section 8(a)(3) charges numbered 17,571 in 1981, while §8(b)(2) charges numbered 1513. 46 NLRB
ordered to post a notice admitting the unfair labor practice, to reinstate the employee, and to pay the employee back wages from the time of the violation to the time of the final order. The back pay award is subject to mitigation.

The inadequacies of these discharge remedies are legion and are exacerbated by the delays in adjudication. The posted notice probably does little to reassure employees that the Board is looking out for them, especially if the workers cannot remember the circumstances of a discharge that took place two years ago. Back wages fail to compensate for economic hardships such as foreclosure on the house of an employee who cannot make mortgage payments, or for non-economic loses such as the trauma and stigma of being unfairly fired and the burden of having to look for a new job. These uncompensated losses mount as the remedial process drags on.

Delay frustrates the reinstatement remedy as well. Two studies have examined reinstatement in detail. Congressman Les Aspin examined the results of reinstatements of employees in section 8(a)(3) cases settled in the New England region between 1962 and 1964. Professors Elvis Stephens and Warren Chaney examined the section 8(a)(3) cases that the Fort Worth regional office processed in 1971 and 1972. Both studies found grave problems with the reinstatement remedy.

In each study, fewer than half the employees ordered reinstated actually accepted reinstatement. The two main reasons employees gave for refusing reinstatement were that they feared company retaliation and that they had already found other jobs. Of those who did accept reinstatement, seventy-five percent or more left the company again within

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22. The employer need not even admit fault in the notice. He must only say that the NLRB has found him in violation and that it has ordered certain remedies, D. McDowell & K. Huhn, NLRB Remedies for Unfair Labor Practices 73 (1976).
25. In the Aspin study, of 194 discharged workers, 85 accepted immediate reinstatement, 86 refused it, and 23 were placed on preferential hiring lists. Aspin Testimony, supra note 23, at 266. (Employers place on preferential hiring lists those employees whose old jobs are no longer open.) In the Stephens and Chaney study, of 217 employees ordered reinstated, 57 accepted immediate reinstatement, 129 refused reinstatement, and 31 were put on preferential hiring lists. Chaney, supra note 24, at 359. Fifteen from the hiring lists were eventually reinstated. Id. at 360.
26. Aspin Testimony, supra note 23, at 266; Stephens & Chaney, supra note 24, at 34.
one or two years, most citing employer mistreatment as the main cause of their departures.

The Aspin and the Stephens-Chaney studies found that the more promptly an employer was ordered to reinstate a worker, the more likely the worker was to accept reinstatement. Representative Aspin testified that "a settlement time of more than four months meant that the Discriminatee was less likely to go back. But the truly remarkable factor is that nobody refused reinstatement when the case was settled in less than a month." Professor Chaney stated:

Beyond any doubt, there is a direct correlation between the number of people who accept reinstatement and the length of time it takes to reach a decision. In this study where reinstatement was ordered within two weeks, success was 93 percent. As the length of time increased, the number of employees accepting reinstatement declined dramatically to a low of five percent acceptance over six months. Acceptance after one or two years was extremely small.

A reinstatement order after the 1980 median time of two and a half years, then, will rarely restore an employee's job. A prompt reinstatement order pursuant to section 10(j) is much more likely to do so. Aspin explained, "The advantage of using the 10(j) provision is that it would reinstate the Discriminatee before pressures against his accepting reinstatement persuade him to change his mind." Delay appears to sap the employee's willingness to bear his employer's ill will. The employee may perceive that, as Aspin suggests, an employer is less likely to retaliate against an employee who is reinstated promptly. Prompt reinstatement may increase the reinstated employee's visibility at a time when the union organizing campaign presumably is still strong. Overt mistreatment after court-ordered reinstatement could backfire, enhancing union support among employees who remember that their reinstated fellow was fired for union adherence. After two years of delay, however, the original reason for the firing is likely to have faded from memory.

A prompt section 10(j) reinstatement order also will decrease the likelihood that the fired employee will have found another job and consequently will refuse the remedy. One might argue that that fact does not

27. Of the 85 employees in the Aspin study who accepted reinstatement, 60 left the company within two years. Aspin Testimony, supra note 23, at 267. Of the 72 employees in the Stephens and Chaney study who were actually reinstated, 60 were gone within a year. Chaney, supra note 24, at 360.

28. Aspin Testimony, supra note 23, at 268; Chaney, supra note 24, at 360.


30. Chaney, supra note 24, at 264.

31. Representative Aspin advocated increasing the use of §10(j) and strengthening other remedies for discharge violations. Aspin Testimony, supra note 23, at 272. Professors Stephens and Chaney made similar recommendations for reform, although they did not mention §10(j) in particular. Stephens & Chaney, supra note 24, at 40-41.

support an argument for prompt reinstatement, because the employee is indifferent between his old and his new jobs. That argument breaks down not only because the employee himself may not be indifferent between the two jobs (for example, at his new job he will lose the advantages of the seniority he had accrued at his old job), but also because his fellow employees may be injured if he is not reinstated. His failure to return to the workplace may chill the exercise of their section 7 rights. The other workers will see that a union adherent has disappeared and may conclude that supporting a union is too risky to be worthwhile.

An immediate order of reinstatement, through a procedural device such as the interim injunction, will help to safeguard the rights of the individual employee and his co-workers.

2. Refusal-to-Bargain Cases

A second major area in which long delays enfeeble Board remedies is that of section 8(a)(5) refusal-to-bargain cases. An employer who has refused to bargain either has tried to undermine a union that has a card majority but not a certified election victory, or has refused to bargain with a duly certified union. In the latter case, the employer's refusal could take one of many forms: the employer might stop bargaining with an incumbent union although the employer has no objective reason to believe the union has lost support; the employer might undermine the union representative's authority or position, though not actually ceasing altogether to bargain; the employer might begin bargaining with a minority union; or a successor employer might refuse to bargain with its prede-

33. Section 7, 29 U.S.C. §157 (1982), is the basic grant of employee rights under the NLRA. It reads:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3).

Id.

34. See Aspin Testimony, supra note 23, at 271.

35. The fact that many reinstated employees do not long remain on the job, as Aspin and Stephens and Chaney found, implies that reinstatement does not restore the status quo as it existed before the discharge. The studies do not show whether employees reinstated more promptly were less likely to leave again after reinstatement. Prompt reinstatement might very well reduce post-reinstatement departures. Some factors that Aspin found affected an employee's staying power—the employee's seniority, the size of the company, changes in management personnel, the growth rate of the company (Aspin Testimony, supra note 23, at 269)—would not be affected by the promptness of the reinstatement. But the major reason employees left after reinstatement was company mistreatment. As described supra in text accompanying note 32, prompt reinstatement may increase the employee's visibility and therefore decrease the amount of mistreatment. An employee who is reinstated quickly will probably be more easily reintegrated into the company than will one who has been off the job for years; this fact might also decrease the likelihood that the employee will leave again.
In any of these situations, the injured union may seek a bargaining order. If the employer exercises all of his procedural rights, the final bargaining order will issue two and one-half years after the unfair labor practice occurred. The long remedial delay will prevent the order from restoring the parties to the positions they would have occupied had no unfair labor practice taken place. Union support may well wither between the original drive or election and the bargaining order. The order may therefore force on the employees a union they no longer want. The union, knowing employees will not vote to strike, will have little bargaining power, so the ordered bargaining may be futile. If the union would have prevailed absent the employer’s unfair labor practice, the employees are deprived of the fruits of collective bargaining for two and one-half years. The Board cannot restore those lost benefits.

A section 10(j) interim bargaining order would keep an employer from profiting by his attempts to undermine the union. Under an interim order, the employees could enjoy the benefits of bargaining immediately, and union support would not die while the parties pursued the long administrative process.

3. Other Employer Unfair Labor Practice Cases

Although the case for section 10(j) is clearest in discriminatory discharge and refusal-to-bargain cases, the injunction could be a more effective remedy than an ultimate Board order in other employer unfair labor practice cases as well. When an employer supports a company union, for example, the employee-supported union may lose its hold while administrative proceedings drag on. If an employer harasses a worker for filing charges under the Act, other workers will be afraid to pursue their rights if they see that the Board is hamstrung by its own lengthy delay.

36. Section 8(a)(5), 29 U.S.C. §158(a)(5) (1982), reads in relevant part, “It shall be an unfair labor practice for an employer—(5) to refuse to bargain collectively with the representatives of his employees.” An interim bargaining order for a union that has not won an election is the more controversial remedy. NLRB v. Gissel Packing Co., 395 U.S. 575 (1969), authorizes the Board to order an employer to bargain with a union that had a clear card majority at one time but that is now unable to win an election because the employer improperly undermined the union’s support.


40. This would violate §8(a)(4), id. §158(a)(4).
procedures. If an employer wrongfully refuses to allow employees to dis-

tribute or to receive organizational material on company property, quick relief granting access is necessary to keep the employer’s unlawful conduct from killing an organizational campaign. If an employer sells or closes a part of its operations for anti-union reasons, a remedial order many months later will not remedy the violation: by then, the plant will be gone and the former employees scattered. In all these instances, delay will undermine the effectiveness of the administrative remedy, and an interim order might well provide better relief.

B. Delay and Union Unfair Labor Practices

Prompt relief also is critical when the union has violated section 8 of the NLRA. If a union commits violence at a picketing site, an immediate order to stop the violence will effectively protect people and property from injury; an order after two years cannot repair damage already done and cannot remove the coercive effects of the union’s actions. Likewise, if a union fails to comply with the cooling-off period and notice provisions in section 8(d) of the Act, an order that comes two years later fails to prevent the circumvention of the mediation provisions of the Act. Similarly, if a union fails to give a health care institution due notice of its intent to strike, an immediate order will help the institution arrange for the continuity of patient care. Also, a union’s violation of the duty to bargain under section 8(b)(3) requires prompt relief for the same reasons that an employer’s similar violation under section 8(a)(5) requires it. If a union attempts to cause an employer to discriminate against an employee, and the employer does so and thereby violates section 8(a)(3), quick relief will be just as necessary as it is when the employer commits a section 8(a)(3) violation independently.

Thus, the case for section 10(j) relief—no matter what the viola-
tion—is a strong one. As an Associate General Counsel of the NLRB put it:

Time is of the essence in labor proceedings, more than maybe in any
other proceeding in the law. In many of these cases, if you seek and
obtain injunctive relief, you will effectively remedy the situation. If you
don’t, then two years or three years up the road, it will be too late. . . .
In many senses of the word, I think [section 10(j)] is the most important
weapon in the Board’s remedial arsenal.47

41. This would be an unfair labor practice under §8(a)(1), id. §158(a)(1).
42. This conduct would violate §8(b)(1)(A), id. §158(b)(1)(A).
43. Id. §158(d).
44. A violation of §8(g), id. §158(g).
45. Id. §158(b)(3).
46. A violation of §8(b)(2), id. §158(b)(2).
47. Interview with Harold J. Datz, Associate General Counsel of the NLRB, in Washington, D.C. (Jan. 5, 1983).
II
SECTION 10(j): PROCEDURE, PRACTICE, AND PROPOSALS FOR REFORM

A. The Procedures for Gaining Injunctive Relief

The NLRA provides for three types of injunctive relief.48 Under the first type, prescribed in sections 10(e)49 and 10(f),50 a circuit court can grant temporary relief to the Board while the court’s review of the Board order is pending. Such injunctions are rarely granted.51

The other types of injunctive relief, provided for in sections 10(I)52 and 10(j), are available much earlier in the process. Section 10(I) injunctions apply almost exclusively to unions, as they cover only three unfair labor practices: secondary boycotts, jurisdictional picketing, and hot cargo clause violations. Under section 10(I), the regional office must give top priority to investigating charges of these violations. Once the regional officer finds reasonable cause to believe the charge is true, he must petition a district court for an injunction. He need not issue a complaint first.

Section 10(j) injunctions can issue against anyone—union or employer—who engages in unfair labor practices.53 Unlike investigation of section 10(I) charges, investigation of these charges need not be given top priority in the regional office. The region must issue a complaint before

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48. In Muniz v. Hoffman, 422 U.S. 454 (1975), the Supreme Court held that the Norris-La Guardia Act’s prohibition against federal court injunctions, 29 U.S.C. §§101-115 (1982), does not apply to injunctions issued under §10 of the NLRA.
49. 29 U.S.C. §160(e) (1982). Under §10(e), the Board can get injunctive relief when it files for enforcement of its order.
50. Id. §160(f). Under §10(f), the Board can have its order temporarily enforced if an aggrieved party files for review.
51. In 1976, the Board filed two 10(e) petitions; in 1977 it filed four; in 1978, nine; in 1979, five; in 1980, ten; and in 1981, eight. The courts generally grant only about half the petitions. 41-46 NLRB ANN. REPS. (Table 20) (1976-81). The Board has sought §10(e) relief so rarely mainly because courts have traditionally been very reluctant to grant it. Memorandum on Section 10(e) Relief from NLRB General Counsel John S. Irving to Task Force Committee III, reprinted in 1976 LAB. REL. Y.B. 378, 379-80. Accord Interview with John C. Truesdale, Executive Secretary of the NLRB, in Washington, D.C. (Jan. 3, 1983). The Irving memorandum advocates greater use of the section.
52. 29 U.S.C. §160(l) (1982). The section reads in part:
Whenever it is charged that any person has engaged in an unfair labor practice within the meaning of paragraph (4)(A), (B), or (C) of section 8(b), or section 8(e)or section 8(b)(7) the preliminary investigation of such charge shall be made forthwith and given priority over all other cases except cases of like character in the office where it is filed or to which it is referred. If, after such investigation, the officer or regional attorney . . . has reasonable cause to believe such charge is true and that a complaint should issue, he shall on behalf of the Board, petition any United States district court . . . for appropriate injunctive relief pending the final adjudication of the Board with respect to such matter. Upon the filing of any such petition the district court shall have jurisdiction to grant such injunctive relief or temporary restraining order as it deems just and proper.
Id.
53. Id. §160(j).
it may seek a section 10(j) injunction, and seeking the injunction is not mandatory. If the region does decide that a complaint should issue and that injunctive relief might be appropriate, it sends its section 10(j) recommendation to the Board offices in Washington for approval. There the General Counsel’s office review the case, and if the General Counsel thinks injunctive relief is warranted, he or she sends the case on to the Board for authorization. All five Board members review the case and then decide whether to authorize a petition. If a majority authorizes the section 10(j) petition, the General Counsel notifies the regional director so the region can file a petition in district court.

54. Although regional directors may choose any complaint-worthy case for §10(j) treatment, they usually seek §10(j) only at the request of the charging party. Interview with Peter B. Mirsky, Deputy Assistant General Counsel of the NLRB, in Washington, D.C. (Nov. 9, 1982). When the regional director decides that the need for an injunction appears likely, the region will expedite its processing of the case, including its attempts to settle the case. Use of Section 10(j) Relief by the National Labor Relations Board: Hearings Before the Manpower and Housing Subcomm. of the House Comm. on Government Operations, 98th Cong., 2d Sess. 46 (1984) (statement of former General Counsel William A. Lubbers) [hereinafter cited as March 1984 §10(j) Hearing].

The region generally will not proceed in a representation case while an unfair labor practice charge is pending. It will usually hold an election, however, if the party charging the unfair labor practice so requests. NLRB v. Tri-City Linen Supply, 579 F.2d 51, 57 (9th Cir. 1978).

55. A staff attorney in the Division of Advice first reviews the case. His immediate supervisor, a managing attorney, the Deputy General Counsel, and finally the General Counsel will look at the case as well. In a very high percentage of cases, the General Counsel agrees with the staff’s recommendations. March 1984 §10(j) Hearing, supra note 54, at 62 (statement of William A. Lubbers). In 80% of the 1980-1984 §10(j) submissions from the regions, the General Counsel agreed with the region’s §10(j) recommendation. Id. at 65. In an urgent case the process will be telescoped, with recommendations perhaps being given orally. Id. at 47.

56. The General Counsel circulates his or her memorandum—and sometimes the region’s memorandum—to the Board members and to the Board Solicitor’s Office. The Solicitor writes a separate memorandum commenting on the case and on the General Counsel’s memorandum. The Solicitor sends his document to the Board members and to the General Counsel. Interview with Berton B. Subrin, former Acting Solicitor of the NLRB, in Washington, D.C. (Jan. 3, 1983).

The parties sometimes request an opportunity for oral argument. If the General Counsel’s office thinks oral argument may be helpful, the office grants the request and invites both parties to meet with the General Counsel and his staff. The parties do not argue before the Board. March 1984 §10(j) Hearing, supra note 54, at 47 (statement of former General Counsel William A. Lubbers).

The parties frequently submit written memoranda arguing for or against the injunction. The General Counsel considers these memoranda and includes their substance in the memorandum to the Board. The General Counsel does not send the memoranda themselves to the Board, because the memoranda frequently discuss the merits of the underlying complaint, and the Board wishes to avoid prejudging at the 10(j) stage a case that it may eventually have to review in the regular administrative process, after the ALJ has ruled. Id. at 47 & n.6. There is an inherent tension in the Board’s role in the §10(j) proceeding: the Board is required to decide whether an alleged violation is grave enough to warrant immediate §10(j) relief, and yet must preserve its impartiality so it will not have prejudged the case against the alleged violator when the case comes before the Board for adjudicative review later. For discussion of this tension, see id. at 35-37 (statement of Laurence Gold).

57. The Board generally does not meet as a group to make §10(j) authorization decisions. Members consult with their Chief Counsels and make individual decisions from the documents. March 1984 §10(j) Hearing, supra note 54, at 77-78 (statement of Chairman Dotson). In unusually difficult or urgent cases the Board may meet and discuss the case. Interview with Berton B. Subrin, supra note 56.
B. Past Use of Injunctive Relief

Section 10(l) has always been invoked more frequently than section 10(j). Between 1960 and 1969, for example, Board agents filed an average of 221 section 10(l) petitions and twelve section 10(j) petitions. Section 10(l) use has remained steady and high, averaging 247 section 10(l) petitions between 1970 and 1974 and 229 section 10(l) petitions between 1975 and 1980.

Although the number of section 10(j) petitions filed has never approached the number of section 10(l) petitions, section 10(j) use has increased significantly over the almost four decades since the two sections were added to the NLRA. During the first fourteen years of the section's life, the regions never filed more than seven petitions in a year and often filed only one. The number of petitions jumped to eleven in 1962, and then hovered at about the fifteen to twenty per year for another fifteen years. In 1977, section 10(j) use doubled to forty-five filings, and since then has remained between about forty-five and sixty filings per year.

58. Calculated from 25-38 NLRB ANN. REPS. (Table 18) (1960-63) and 29-34 NLRB ANN. REPS. (Table 20) (1964-69).
60. Calculated from 40-45 NLRB ANN. REPS. (Table 20) (1975-80).
62. The following table shows the numbers of §10(j) petitions filed in district courts each fiscal year since the section's birth. The number of Board authorizations probably exceeded the number of filings in most years, because charges may settle after the Board authorizes a petition and before the region files in court. The figures are drawn from the following tables in the statistical appendices to the NLRB's Annual Reports: 1948, Appendix G; 1949, Table 24A; 1950, Table 26; 1951, Table 21; 1952, Table 17; 1953-63, Table 18; 1964-81, Table 20.

TABLE 1

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</tr>
<tr>
<td>1961</td>
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<td>1</td>
<td>—</td>
<td>—</td>
</tr>
<tr>
<td>1962</td>
<td>11</td>
<td>2</td>
<td>8</td>
<td>1</td>
</tr>
</tbody>
</table>
The history of the Board's increase of its use of section 10(j) has been well-chronicled in journal articles. In brief, the impetus came initially from Archibald Cox, the chairman of a Senate advisory panel that studied the organization and procedure of the NLRB. The panel report noted the problem of remedial delay and the Board's infrequent use of injunctions against employers, and recommended increased use of section 10(j). A House subcommittee chaired by Representative Pucinski also urged expanded section 10(j) use.

Frank W. McCulloch, Chairman of the Board from 1961 to 1970, began to follow Representative Pucinski's and Professor Cox's recommendations. General Counsel Peter G. Nash continued Chairman McCulloch's work in the 1970's, focusing attention on section 10(j) in a 1975 report on its use during his tenure. In 1976 a task force established by Board Chairman Betty S. Murphy continued the trend when it suggested ways to speed the section 10(j) procedure. Finally, General Counsel John S. Irving, who served from 1976 to 1979, made increasing section

<table>
<thead>
<tr>
<th>Year</th>
<th>Requests</th>
<th>Authorizations</th>
<th>Denials</th>
<th>Total</th>
</tr>
</thead>
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<td>1963</td>
<td>15</td>
<td>7</td>
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<td>6</td>
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<td>4</td>
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<td>17</td>
<td>4</td>
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<td>50</td>
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<tr>
<td>1981</td>
<td>58</td>
<td>6</td>
<td>52</td>
<td>—</td>
</tr>
</tbody>
</table>


63. E.g., Note, supra note 12, at 420-26; Comment, 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, 1034-40 (1978).

64. ORGANIZATION AND PROCEDURE OF THE NLRB, supra note 14, at 12.


66. Chairman McCulloch explained his plans for § 10(j) in McCulloch, supra note 14.

67. Report by General Counsel Peter G. Nash on 10(j) Proceedings, August 1971-July 1, 1975, reprinted in 1975 LAB. REL. Y.B. 310. The report summarized the Board's standards for authorizing § 10(j) petitions. It also described the cases in which § 10(j) injunctions had been sought between August 1971, when Nash became General Counsel, and the end of fiscal year 1975.

68. Final Report of the Chairman's Task Force, supra note 14, at 347. The Board did not adopt the task force's suggestions.
10(j) use one of his central goals. He spurred a jump in the number of Board-authorized section 10(j) petitions from an average of 16.5 in the four years before he took office to 43.3 in the four years after.

C. Standards for Decision on a Section 10(j) Petition

The task of setting standards for choosing cases suitable to section 10(j) relief has fallen mainly to the district and circuit courts. The internal standards of the regional officials, General Counsel's office attorneys, and Board members vary widely. In most cases, agency officials consider first whether the facts of the case warrant section 10(j) relief, and second whether such relief is likely to be granted if it does seem warranted. In considering the second issue, officials focus on the standards and attitudes of the Board, of district and circuit courts in general, or of the specific district court or circuit in which the section 10(j) case would be brought.

The district judge must make two determinations in every section 10(j) case. He must decide first whether there is reasonable cause to believe the Act has been violated. In so doing, he construes all issues of fact and law in the regional director's favor. The reasonable cause threshold is low and usually easily met.

Courts have concentrated their analysis on the second determination, whether granting relief is just and proper. The factors that courts consider generally include whether the unfair labor practice is flagrant and damaging to the public interest, whether the purposes of the Act will be frustrated if interim relief is not granted, and whether the parties will suffer irreparable harm unless the court steps in.

D. Proposals for Reform

Commentators have identified many problems with the Board's and

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70. Calculated from figures for fiscal years 1972-79, Table 1, supra note 62.
71. Interview with Peter B. Mirsky, supra note 54 (Mar. 17, 1983). Executive Secretary John C. Truesdale, supra note 51, suggested that courts' §10(j) standards are especially crucial to the evaluation of whether to seek §10(j) relief.
72. See, e.g., Hoffman v. Cross Sound Ferry Serv., Inc., 109 L.R.R.M. (BNA) 2884, 2886 (D. Conn. 1982) (stating that the court will give the Board the benefit of the doubt on disputed facts, and will decide issues of law in the Board's favor unless the Board's arguments are clearly wrong).
73. See, e.g., Wilson v. Liberty Homes, Inc., 500 F. Supp. 1120, 1125 (W.D. Wis. 1980), aff'd in part and rev'd in part, 664 F.2d 620 (7th Cir. 1981) (stating that the burden of proof on the petitioning Regional Director is insubstantial).
74. Section 10(j) explicitly directs the court to make this determination. 29 U.S.C. §160(j) (1982). See text accompanying note 5.
75. Several commentators discuss and classify the courts' §10(j) standards. See, e.g., Comment, supra note 63; Note, supra note 38; Note, supra note 12; Note, supra note 9. See infra notes 153-96 and accompanying text for a further discussion of the courts' standards.
the courts' current use of section 10(j). While the possibility of the most far-reaching reform—an amendment to the Act, making the seeking of a section 10(j) injunction mandatory—was probably buried with the Labor Law Reform Act, commentators have continued to outline less drastic ways that section 10(j) use could be increased. Some have concentrated on the courts, pointing out flaws in the standards by which the courts decide whether to grant an injunction. Others have focused on the Board, calling on it simply to start using section 10(j) more frequently, and often describing devices and changes in procedures that could help the Board reach that goal.

Many authors have focused on one specific type of employer violation, the discriminatory discharge. For example, Bernard Samoff, former Regional Director of the Philadelphia region, proposed that the Board use section 10(m) in conjunction with section 10(j) to provide more injunctive relief. Section 10(m) requires the Board and the regions to give discriminatory discharge cases priority over all cases except cases subject to section 10(l) and discriminatory discharge cases previously filed. Under Samoff's plan, the Board and regions would have to give less attention than before to refusal-to-bargain cases. Samoff admits that his proposal is "no grand panacea," but concludes that it could help strengthen the remedies against discharges immediately and under the current Act.

Another commentator has suggested a few less practical procedural devices that injured parties could use to make the Board seek more injunctions in discriminatory discharge cases. Employees could seek an injunction ordering the NLRB to change its section 10(j) procedures and to review automatically every section 8(a)(3) charge. Or an individual employee who believed his discharge was unlawful could petition a district court for an injunction ordering the Board to evaluate his complaint for section 10(j) action. Plaintiffs could even perhaps use a class action

76. Professor Weiler notes that labor law reform is a rare event and that momentum for it will probably not soon gather again. Weiler, supra note 2.
77. See, e.g., Comment, supra note 63; Note, supra note 38.
78. See, e.g., Note, supra note 9.
81. Samoff says that the regions and Board should not petition for §10(j) injunctions to remedy bargaining violations in organized units. Id. at 57.
82. Id. at 61.
83. Note, supra note 9, at 528.
84. Id.
85. The author would have employees use the Mandamus and Venue Act of 1962, 28 U.S.C. §1361 (1982), as the basis for their petitions. Id. This statutory provision is considered in Byse & Fiocca, Section 1361 of the Mandamus and Venue Act of 1962 and "Nonstatutory" Judicial Review of Federal Administrative Action, 81 HARV. L. REV. 308 (1967).
to prevent their petitions for review of a court's section 10(j) decision from being dismissed for mootness.\textsuperscript{86} Any of these devices, it is argued, could help increase the Board's use of section 10(j).

Most commentators have concentrated their analysis on the need for increased use of section 10(j) in cases of alleged violations by employers rather than unions. One justification for that focus is that the seeking of section 10(l) injunctions is already mandatory. Certain serious types of union unfair labor practices—secondary boycotts and jurisdictional picketing—are thus already enjoined whenever there is even reasonable cause to believe a complaint should issue. That fact has led one author to conclude that section 10(j) should be used more frequently against employers:

The theory behind section 10(l) is that a union must be immediately restrained from using self-help to force recognition by an employer, because such "top-down organizing" obviously threatens employee self-determination. But if the law acts quickly to protect employees from illegal coercion by the union—as, in my view, it should—should it not respond with the same alacrity when the coercion is by the employer?\textsuperscript{87}

A second reason that the reformers focus on increasing section 10(j) use against employers is that employer violations occur much more frequently than union violations. Of the 5400 complaints issued in fiscal year 1981 for types of violations that were potentially subject to section 10(j) injunctions, 4775, or 88 percent, were complaints against employers, and 625, or 12 percent, were complaints against unions.\textsuperscript{88} Thus, in terms of sheer numbers, employer violations pose a more serious problem for the administrative system than do union violations.

In any event, all the commentators' reform proposals, if adopted as the authors envision them, would produce a flood of new section 10(j) cases at every level of the section 10(j) process. Even more limited reforms might overload the regions or the Board or the courts. The rest of this article will evaluate the practicality of expanding section 10(j) use. After examining in detail a few of the characteristics of section 10(j) in action, the article will explore whether decisionmakers could handle a new load of petitions, and whether section 10(j) reform is a realistic prospect.

\textsuperscript{86} \textit{Id.} The author cites Sosna v. Iowa, 419 U.S. 393, 397-403 (1975), in support of this proposition. There the Court held a class action was not mooted by the mootness of the plaintiff representative's own divorce case.

\textsuperscript{87} \textit{Weiler, supra} note 2, at 1799.

\textsuperscript{88} 46 NLRB ANN. REP. 177 (Table 3A) (1981). Figures from the columns labeled "CC," "CE" and "CP" are excluded because those violations are subject to 10(1); those from the last two columns are excluded because one cannot tell whether union or employer committed the violation.
III

TWO ASPECTS OF SECTION 10(j) USE IN PRACTICE

Policy-makers must know how section 10(j) works in practice before they can decide whether to advise the Board to increase use of the section. The timeliness of the remedy and the remedy's effect on settlement are both important considerations in evaluating the case for increasing the section's use. If section 10(j) injunctions issue much more promptly than administrative decisions do, then the injunctive remedy will effectively shorten the delays of which so many commentators complain. Also, if the threat or the issuance of a section 10(j) injunction encourages settlement, then increased use of the section might actually reduce the overall caseload of the agency.

To explore these two issues, this paper draws data from approximately 300 section 10(j) cases that the NLRB and the courts considered between 1978 and 1984. The sample includes cases in which the Board denied authorization, cases in which it granted authorization, cases in which the district court published an opinion, cases in which the court decided the case but did not publish an opinion, cases that went to an Administrative Law Judge (ALJ) for decision after leaving the district court, and cases that settled at various times along the way. The cases cover both union and employer unfair labor practices.89

The data show that section 10(j) decisions often come too late to give effective relief, and that rates of settlement in cases in which the NLRB seeks section 10(j) injunctions are lower than rates of settlement in cases in which it does not.

A. The Length of the 10(j) Process

The case study yielded figures for the median number of days that each stage of the section 10(j) process consumes. The figures are summarized in the following table.

89 The cases came from three sources: Appendix B to the March 1984 §10(j) Hearing, supra note 54; Appendix B to the Lubbers Memorandum, supra note 38; and the published district court §10(j) decisions from 1978 and 1979. The sources give case names and types of violations, dates on which some of the steps of the §10(j) procedure took place, and some settlement information. District court docket clerks, the published reports of district court decisions, the Freedom of Information Office of the NLRB, NLRB Deputy Assistant General Counsel Peter B. Mirsky, and attorneys who tried the cases provided certain other data. The size of the sample varies for the different timing figures, partly because many of the cases settled before reaching the later stages of the §10(j) procedure, and partly because every date was not available in every case that did reach the stage being discussed. Settlement statistics were also unavailable for some of the cases, so the settlement figures are based on a sample smaller than 300 cases, as further detailed below.
TABLE 2

MEDIAN NUMBER OF DAYS EACH STAGE OF THE SECTION 10(J) PROCESS CONSUMED

<table>
<thead>
<tr>
<th>Stage</th>
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</tr>
</thead>
<tbody>
<tr>
<td>Charging party's request for section 10(j) relief to General Counsel's receipt of region's request for authorization</td>
<td>38 days</td>
</tr>
<tr>
<td>General Counsel's receipt of region's request to General Counsel's memorandum to Board</td>
<td>22 days</td>
</tr>
<tr>
<td>General Counsel's memorandum to Board to Solicitor's memorandum to Board</td>
<td>3 days</td>
</tr>
<tr>
<td>Solicitor's memorandum to Board to Board decision to grant or deny authorization</td>
<td>8 days</td>
</tr>
<tr>
<td>Board's authorization to filing of petition in district court</td>
<td>5 days</td>
</tr>
<tr>
<td>Filing of petition to district court hearing</td>
<td>16 days</td>
</tr>
<tr>
<td>District court hearing to district court decision</td>
<td>11 days</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>103 days</strong></td>
</tr>
</tbody>
</table>

The median time between the charging party's request for section 10(j) authorization and the General Counsel's receipt of the regional director's request for section 10(j) relief was thirty-eight days. The charging party may request section 10(j) at the same time that it files the charge and requests that a complaint be issued. In 1982, in unfair labor practice cases in general, a median of forty-five days passed between the charging party's filing and the region's decision to issue a complaint. The period between charge and regional section 10(j) decision is shorter than the period between charge and regional complaint decision because the regions expedite investigation of charges when the need for an injunction seems pressing.

A median twenty-two days elapsed between the General Counsel's receipt of the region's memorandum and the completion of the General Council's own memorandum to the Board. The General Counsel's...
memorandum goes to the Board and to the Solicitor at the same time.\textsuperscript{94} The median period between the General Counsel’s submission and the Solicitor’s memorandum was three days.\textsuperscript{95} During that time, the Solicitor may have sought, through the General Counsel, further information from the region, and may have consulted with Board members or their staffs.\textsuperscript{96} Once the Board received all materials, it made its decision whether to authorize a petition in a median of eight days.\textsuperscript{97}

The region is supposed to file the section 10(j) petition with the district court within forty-eight hours after it receives word of the Board’s authorization.\textsuperscript{98} The actual median time span for the cases examined was five days.\textsuperscript{99} During this period, regional attorneys may once again be trying to settle the case.\textsuperscript{100}

After the region’s filing, a median of sixteen days passed before the district judges held hearings,\textsuperscript{101} and another eleven days passed before the judges issued their opinions.\textsuperscript{102} The total median number of days from the section 10(j) request by the charging party to the issuance of a section 10(j) decision in the studied cases was 103 days, about fifteen weeks.\textsuperscript{103}

\begin{footnotes}
\textsuperscript{94} \textit{March 1984 $10(j)$ Hearing}, supra note 54, at 77 (statement of Chairman Dotson).
\textsuperscript{95} This figure is calculated from 140 cases. Again, the range of times within the sample was wide: two cases took more than eight months, five others more than two months, and eleven took less than one day. The vast majority took between zero and seven days.
\textsuperscript{96} \textit{See March 1984 $10(j)$ Hearing}, supra note 54, at 77-78 (statement of Chairman Dotson).
\textsuperscript{97} This figure comes from 139 cases. The congressional subcommittee that held the recent hearing on $10(j)$ was concerned that this time span has increased in recent months. \textit{March 1984 $10(j)$ Hearing}, supra note 54, \textit{passim}. \textit{See infra} notes 197-212 and accompanying text for a further discussion of this point.
\textsuperscript{98} \textit{Irving}, \textit{Use of Section 10(j)}, supra note 14, at 15,958.
\textsuperscript{99} This figure is calculated from 48 decisions. The dates that the regions filed in district courts were supplied by court clerks at the relevant district courts. Docket sheets were not available for all of the 100 petitions that reached the stage of being filed, so the sample size is smaller here.
\textsuperscript{100} In one case the region filed a petition 89 days after the authorization. In five cases the region filed just one day after the Board’s approval.
\textsuperscript{101} These settlement efforts were effective in 41\% of the cases in 1980: of 81 authorizations, 33 settled before a filing in a district court. \textit{Quarterly Reports of the General Counsel}, FY 1979 and FY 1980, furnished by the Division of Information of the NLRB [hereinafter cited as \textit{Quarterly Reports}]; interview with Peter B. Mirsky, \textit{supra} note 54 (Mar. 17, 1982); 45 \textit{NLRB Ann. Rep.} 175 (Table 20) (1980).
\textsuperscript{102} This figure is calculated from 66 cases. Court clerks supplied the dates. The three longest time spans were 67 days, 52 days and 51 days. The three shortest were three days, one day, and one day.
\textsuperscript{103} This median is from 71 cases. Court clerks and published decisions supplied the dates. The three longest time periods in this category were 248 days, 224 days, and 113 days. In 13 cases the judge issued the decision the day of the hearing.
\textsuperscript{104} The General Counsel and the Board try to move certain types of cases especially quickly through the authorization procedure. One such class of cases is strike violence cases that the local police are unable or unwilling to control. The Division of Advice expedites its evaluation of the case, and the General Counsel or his staff may present a recommendation to the Board orally rather than
Thus section 10(j) relief will often come about three and one-half months after the alleged injury. A few scholars, focusing on section 8(a)(3) cases, have explored how quickly relief must come to remedy unfair labor practices effectively. In particular, Congressman Les Aspin and Professors Stephens and Chaney studied the relationship between the length of time after discharge that reinstatement was offered and the rate at which employees accepted the offered remedy. Representative Aspin found that if reinstatement was ordered within one month after the injury, all employees accepted it, but if the remedy came more than four months after the discharge, employees' rates of acceptance of the remedy were very much reduced. Professors Stephens and Chaney discovered that almost all employees accepted a remedy offered within two weeks of the injury, but that, as the time before redress lengthened, acceptance rates dropped dramatically. The rate was only five percent for employees offered reinstatement six months after the discharge.

If other employees faced with a representation election are to benefit from the reinstatement of a union adherent, the reinstatement must come before the election is held. Only if it does would the employees be able to support the union without fear of losing their jobs. Elections normally

in the normal written form. The whole procedure may take one or two days. Interview with John C. Truesdale, Executive Secretary of the NLRB, in Washington, D.C. (Jan. 3, 1983). Two other classes of cases that the General Counsel and the Board usually expedite are protective order cases and entrepreneurial cases. Interview with Peter B. Mirsky, supra note 28. A protective order case is one in which the employer is selling the assets of his company so quickly that he will soon make himself unable to satisfy an eventual back pay judgment. Without a prompt injunction, the ultimate remedy will be useless. The Board does not request that a court enjoin the liquidation, which is itself legal, but asks the court to order the employer to set aside enough money to satisfy a future Board judgment. An example of a protective order case is Maram v. Alle Arecibo Corp., 110 L.R.R.M. (BNA) 2495 (D.P.R. 1982).

An entrepreneurial case is also one in which the employer is selling or closing his business. In this type of case, however, his actions are illegal, usually because he has not bargained with the union over the closing or subcontracting. An example of such a case is Zipp v. Bohn Heat Transfer Group, 110 L.R.R.M. (BNA) 3013 (C.D. Ill. 1982). In entrepreneurial cases, the ultimate remedy against the employer would be a restoration order, forcing him to reopen the business or department he had closed. An order enjoining the move first would be much more efficient and satisfactory.

The case study's overall median from charging party request to Board decision was 63 days. Of the 10 strike violence cases in the case study for which the relevant dates are available, five moved to authorization in less than 63 days, and one took 69 days. The others took longer. In strike violence cases the violence often stops intermittently, diminishing the urgency of the need for an injunction.

Of the 17 protective order cases in the case study, 15 moved to authorization in less than 63 days. One took as little as four days, another nine. The entrepreneurial cases in the study did not move as fast. Of 20 such cases, only five were at or below the median. Several were still pending when the Board collected dates in March 1984 §10(j) Hearing, supra note 54; those cases, as well as few others, had been many months in the pipeline. The most recent cases generally took the longest. That may have been because the Board was reconsidering the substantive law in the entrepreneurial area.

104. See text accompanying notes 23-24.
106. Stephens & Chaney, supra note 24, at 40.
107. Weiler, supra note 2, at 1793.
are held about two months after the election petition is filed,\textsuperscript{108} so if a discharge violating section 8(a)(3) occurs when the election petition is filed, or after, the reinstatement must come within two months if it is to prevent the chilling of the section 7 rights of the employees. Naturally, if the discharge occurred before the petition was filed, the time constraints would be less pressing.

There are no detailed studies like Aspin's or Stephens and Chaney's on how quickly a bargaining order must issue to ensure that the employer's anti-union acts do not eviscerate the union's support. Professor Weiler estimated that "[i]f a bargaining order is granted within a few weeks (or even months) of the organizing drive, while the attraction of collective bargaining remains strong among the employees, it might still be effective."\textsuperscript{109} He discussed the harmful effects of delay:

\begin{flushleft}
As time passes, employee interest wanes. Normal turnover will deprive the union of some key supporters, and to many of the replacements the union will seem a remote outsider that caused some trouble in the distant past. It is highly unlikely therefore, that an order issued by the NLRB after protracted legal proceedings will actually produce a viable and enduring collective bargaining relationship.\textsuperscript{110}
\end{flushleft}

For almost all employees to accept reinstatement, then, the order to reinstate must issue within a month of the discharge; for the discharged employee's fellow employees' section 7 rights to be well-protected, the reinstatement order should come before the election, probably within two months; and for the union's support to remain relatively unaffected by an employer's illegal refusal to bargain, the bargaining order should come within a few weeks or months of the organizing drive. Extensive figures are not available for how many section 10(j) injunctions came to district court decision within those short periods. Complete figures are available for only thirty case-study cases, probably too small a sample to provide reliable data. Of the thirty cases, only three, or ten percent, came to decision in less than thirty days. Five more, or 16.7 percent, were fully resolved within sixty days. Thus, for a majority of those thirty cases, section 10(j) relief came later than would have been ideal.

But Aspin's and Stephens and Chaney's studies showed that acceptance rates decreased as time increased: the sooner the reinstatement order came, the more likely the employee was to accept the remedy. In every case in this article's case study, section 10(j) relief came in less than one-third of the median 969 days that the regular proceedings take. Thus, even if the section 10(j) injunction does not often come quickly enough to encourage every discharged employee to accept reinstatement, it doubtless does come quickly enough to encourage more employees to

\textsuperscript{108} Roomkin & Block, \textit{supra} note 38, at 85.
\textsuperscript{109} Weiler, \textit{supra} note 2, at 1795.
\textsuperscript{110} \textit{Id.}
accept than would accept after the median 969 day span. Similarly, the earlier a section 8(a)(5) dispute ends, the more likely the parties will be able to coexist in the way that they would have absent the employer's illegal conduct. A section 10(j) order, issued within a median of 103 days, is more likely to result in successful bargaining than is an order that issues after 969 days.

The statistics on the length of the section 10(j) process show, then, that the injunction generally will come fast enough to provide a remedy that is more likely to work—more likely to result in actual reinstatement, more likely to result in successful bargaining—than the remedy that the normal administrative process provides. Section 10(j) injunctions would be even more effective if they issued in a median time of two weeks or a month rather than the median of 103 days. But while section 10(j) will not always satisfy the ideal that Aspin and Stephens and Chaney describe, using section 10(j) will generally be better than leaving urgent cases to the administrative process.

B. Settlement Rates in Section 10(j) Cases

1. Settlement Rates in Case Study Cases

A second important question about section 10(j) use in practice is whether the injunction affects settlement of underlying unfair labor practices. Contrary to what one might expect, the issuance of an injunction does not often effectively end the proceedings.

Of the ninety-six case study cases for which information is available,111 fifty-eight, or sixty percent, continued to the ALJ stage or beyond after the district court's injunction decision issued. The other thirty-eight cases were settled at an earlier stage, making the pre-ALJ-stage settlement rate only forty percent.

The forty percent rate of settlement is about one-half the rate of settlement in unfair labor practice cases in general. Of all the cases in which complaints issued in 1981—cases in which the Board could have sought section 10(j) injunctions112—approximately eighty percent settled before reaching the ALJ stage.113

The forty percent settlement rate for section 10(j) cases in which court decisions issue does not tell the whole story. First, some cases may settle because the Board decides not to authorize a section 10(j) peti-

111. Information on subsequent history of the cases came from letters from Standau E. Weinbrecht, Freedom of Information officer of the NLRB (Jan. 29, 1985; Feb. 15, 1983), and from regional and private attorneys who tried the cases at the 10(j) stage.
112. Indeed, these numbers include the cases in which the Board did seek the §10(j) remedy.
113. In 1981 the regions issued 5801 complaints for violations that could have been subject to §10(j). 46 NLRB ANN. REP. 177 (Table 3A) (1981) (drawing from columns labeled CA, CB, CD-Unfair labor practices, CG, and CA combined with CB). Of those, 1095 cases, about 20%, went through complete ALJ hearings. Id.
This effect would be exceedingly difficult to quantify. Second, many cases settle after the Board authorizes section 10(j) but before the district court rules on the petitions. Between 1980 and 1983, approximately forty-nine percent of the cases in which the Board authorized section 10(j) petitions settled before final court decision. In sum, the settlement rates were as follows:

Rate of settlement after complaint and before ALJ stage in all cases, including section 10(j) and potential section 10(j) cases: 80%

Rate of settlement, before district court decisions, of cases that receive section 10(j) authorization: 49%

Rate of settlement, before district court decisions, of cases 49% that receive section 10(j) authorization: 16%

Rate of settlement, before district court decisions, of cases 49% that receive section 10(j) authorization and survive through court decision: 33%

Rate of settlement, before ALJ decision, of cases that receive authorization and survive through court decision: 40%

Thus, rates of settlement of underlying unfair labor practice charges are lower in cases in which injunctions are sought than they are in the average case.

One can speculate on the reasons the rates of settlement are lower in section 10(j) cases. It is not surprising that the rate is low after authorization and before the region files the petition in district court. That time span was a median of only five days in the case study. Regional Directors are supposed to file in court within 48 hours—and actually do file in a median of five days in the case study—so they are concentrating their time during this period.

An example of such a case was that of the football strike in fall 1982. The strike began September 20, 1982. N.Y. Times, Sept. 21, 1982, at 1, col. 1. On October 27, the New York City Regional Director issued a complaint against the NFL Management Council. The complaint charged that the league had failed to bargain in good faith. N.Y. Times, Oct. 28, 1982, at B17, col. 3. Talks continued sporadically during the next several weeks. On November 7, Ed Garvey, the chief negotiator for the players' union, said that he planned to urge NLRB General Counsel William A. Lubbers to seek a §10(j) injunction. N.Y. Times, Nov. 8, 1982, at C1, col. 6. Lubbers recommended §10(j) authorization, Washington Post, Nov. 16, 1982, at D4, col. 1, but on Monday, November 15, the Board denied the authorization. N.Y. Times, Nov. 16, 1982, at A22, col. 5. The denial of authorization was apparently the crucial factor that led to settlement of the strike on November 16. The denial of authorization was a “significant blow” to the union, and a “breakthrough in the negotiations,” Washington Post, Nov. 16, 1982, at D4, col. 1, and D1, col. 5-6. The union had hoped to force management to present new wage proposals once the Board ordered the league to bargain immediately in good faith. Id. at D4, col. 1. As soon as he learned of the Board's decision, Ed Garvey invited Paul Martha, a former Pittsburgh Steelers player and NFL grievance arbitrator, to act as a new intermediary between the parties. Washington Post, Nov. 17, 1982, at A30, cols. 2-3. Martha helped draw the parties together. N.Y. Times, Nov. 17, 1982, at A28, col. 2. As part of the strike settlement, the union agreed to drop its §8(a)(5) charges. Washington Post, Nov. 17, 1982, at A30, col. 3. So the denial of the §10(j) authorization led almost directly to the settlement of the underlying charges in the case.

Lubbers Memorandum, supra note 38, Appendix A, at 2, provides the settlement rates for the 237 cases the NLRB considered between Jan. 1, 1980, and Dec. 31, 1983.
efforts on preparation of the petition, rather than on settlement, during that period of time.

The overall 49 percent rate of settlement after authorization and before court decision seems surprisingly high. One would expect that an alleged violator would want to wait out the few days or weeks before the hearing, hoping for a court decision in his favor. Why would an employer reinstate a discharged union drive leader, for example, before the court decides the employer must do so? The main reason, said one management attorney, is money. A lawyer's preparation for the section 10(j) hearing will cost the client a great deal, and since respondents may think that they will probably lose a case that the Board thinks is section 10(j)-worthy, the money would be wasted. Employers sometimes will settle section 8(a)(3) charges by giving the employee back wages and not reinstatement if the back pay award is smaller than legal fees would be, and if the employee does not want to return to the plant.¹¹⁶ That way, the employer avoids the disadvantage it might suffer in the campaign if the union adherent were reinstated.

The settlement rate at the next stage—after the district court has issued its decision—seems at first glance unexpectedly low, especially because most of the respondents in these cases lost. One might expect respondents to think that the ALJ will probably agree with the judge, so they should not continue to fight a losing battle. Indeed, one NLRB attorney said that simple section 8(a)(3) cases often do settle at this stage for these reasons,¹¹⁷ but most respondents, sixty percent of them, do not choose to settle.

Several reasons underlie the refusal to settle. One is the difference in the district court's and the ALJ's standards for decision of the merits of the underlying charge. The district judge, of course, makes no final decision on the merits. He need find only reasonable cause to believe that the NLRA has been violated. The ALJ, on the other hand, will have to find that the Act has in fact been violated. If a respondent thinks it has a fairly strong case on the underlying charge, it may decide not to settle until it has had an opportunity to make its case before the ALJ.

Another influence might be the fact that respondents who have not settled by this point have probably already decided to commit resources to battling the injunction and to pursuing litigation. Some of these re-

¹¹⁶ Telephone interview with Thomas J. Walsh, management attorney (Mar. 19, 1983).
¹¹⁷ The attorney said that settlement is not unusual, for example, in cases in which an employer violated §8(a)(3) by discharging a leader of a union organizing campaign. "A 10(j) injunction in such cases will typically order the employer to reinstate the discharged employee immediately. The prompt reinstatement of the employee dramatically demonstrates to other employees the Act's protection. The immediacy of the order means that backpay will be minimal. Prompt settlement resolving the unfair labor practices is, therefore, a realistic possibility in these [factually and legally simple] cases." Letter from Judith T. Poltz, NLRB staff attorney (Dec. 3, 1982).
spondents may be employers who are firmly resolved to resist initial unionization: a private labor lawyer noted that settlement after the district court's section 10(j) ruling was rare among employers who had willfully committed the violations. In addition, charging parties will then have won a significant court victory and will perhaps expect an administrative one. They therefore may be inflexible in settlement negotiations.

Settlement rates are far higher in section 10(l) cases than in section 10(j) cases, according to both private and NLRB staff attorneys. Several attorneys said that once a section 10(l) injunction issues against the union, the union will usually settle or the charging party will withdraw the underlying charge. Even the region's threat of filing a petition may be enough to force settlement.

There are many possible reasons for this difference between section 10(l) and section 10(j) settlement rates. In a picketing case, the union may well have made its point during the four or five days that the region takes to investigate the charge and to decide to seek section 10(l) relief. The union could stop picketing without losing much, and the basis for the charge would evaporate. A union also might settle if it ran out of money to litigate the case. Additionally, if the union is picketing at a construction site, as is often the case when section 10(l) actions are brought, the construction probably will be done before the administrative unfair labor practice proceedings finish. Even if the union wins the case, the right to picket will not mean much if the project is completed.

Another reason that section 10(l) injunctions might encourage settlement more than section 10(j) injunctions do is that the parties very often can predict the outcome of a charge underlying a section 10(l) action. A district judge or ALJ will be able to tell from photographs whether the union was picketing; he can read the signs to find out what message the union was conveying; he can know from the location of the line whether the picketing was primary or secondary. A union knows it will lose an accurate secondary boycott charge, so it will settle that charge. The outcomes of the charges subject to section 10(j), on the other hand, are usually much more doubtful. A discriminatory-discharge or a refusal-to-bargain case rests on subtle shadings of fact. Sev-

118. Telephone interview with Gerald Barrett, private labor attorney (Dec. 22, 1982).
119. Id.; letter from Howard Grossinger, private labor attorney (Dec. 8, 1982); letter from Cincinnati NLRB attorney (Nov. 16, 1982); letter from Judith T. Poltz, NLRB staff attorney (Nov. 3, 1982).
120. Telephone interview with Gerald Barrett, supra note 118; letter from Judith T. Poltz, supra note 119; letter from Thomas W. Seeler, Regional Director of Region 3 (Nov. 18, 1982).
121. Letter from Cincinnati NLRB staff attorney (Nov. 16, 1982).
122. Issues in the other charges subject to 10(l), jurisdictional picketing charges and hot cargo clause charges, are cloudier. Those charges involve fine questions of motive and complex issues of law. Interview with Harold J. Datz, supra note 47. But three-quarters of the §10(l) petitions filed in 1981 charged secondary picketing alone. 46 NLRB ANN. REP. 225 (Table 20) (1981).
eral violations may be intertwined. Unable to predict how the judge or ALJ will decide, the parties in a section 10(j) case will often hold out on settlement, hoping for a favorable decision.

The harmful future effects of litigating a section 10(l) charge also convince unions to settle early. If a regional director wins several secondary boycott cases against a union, he can sometimes get a broad order saying that the union has engaged in a pattern of secondary boycotts and that the next boycott will automatically be punishable by contempt. The union may want to settle the charge to avoid creating such a pattern.

Even more important in encouraging early settlement are the damage provisions in section 303 of the Labor Management Relations Act. That section says that anyone injured by an illegal secondary boycott can sue for damages and court costs. If the union settles before adjudication, it has not been found guilty of the charge, so it avoids damage liability.

2. Effect on Settlement Rates of Increased Use of Section 10(j)

Examination of past cases reveals the effect section 10(j) had on settlement of those cases. Another question relevant to the rate of settlement in section 10(j) cases is whether the increased use of section 10(j) that commentators have urged would increase rates of settlement of underlying unfair labor practices. If the increased potency of the threat of an injunction would either deter unfair labor practices or cause them to settle quickly once a charge was filed, an increase in section 10(j) use might decrease the workloads of Board officials and of district courts.

Once an alleged violation occurred and a charge was filed, settlement rates might rise between charge-filing and Board authorization, between Board authorization and district court decision, or after district court decision. Those various possibilities are represented on the following timeline:

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123. E.g., Local 3, IBEW, 264 N.L.R.B. 705 (1982), enforced without op., 742 F.2d 1438 (2d Cir. 1983) (finding of propensity to engage in unlawful secondary boycotts; broad order prohibiting not only secondary activity against the primary employer in the case, but also all secondary activity against any primary employer).

124. 29 U.S.C. §303 (1982). Several lawyers said that the damage provisions were a crucial factor in encouraging settlement of §10(l) charges. E.g., telephone interview with Gerald Barrett, private labor attorney (Dec. 22, 1982); telephone interview with Cincinnati NLRB staff attorney (Nov. 9, 1984).

125. Subsection (a) of §303 declares that it is unlawful for a union to commit an unfair labor practice defined in §8(b)(4) of the NLRA (i.e., a secondary boycott). Subsection (b) of §303 reads,

Whoever shall be injured in his business or property by reason of any violation of subsection (a) may sue therefore in any district court of the United States . . . , or in any other court having jurisdiction of the parties, and shall recover the damages by him sustained and the cost of the suit.

Figure 1

Progress of a Case Subject to a Section 10(j)
Injunction: Intervals During Which Settlement Rates Might Rise If Section 10(j) Use Were Increased

<table>
<thead>
<tr>
<th>Violation occurs</th>
<th>Unfair labor charge filed</th>
<th>Board authorizes section 10(j) petition</th>
<th>District Court decides section 10(j) petition</th>
</tr>
</thead>
<tbody>
<tr>
<td>Fewer violations might occur</td>
<td>Settlement rate might rise</td>
<td>Settlement rate might rise</td>
<td>Settlement rate might rise</td>
</tr>
<tr>
<td>Current rate (after district court decision and before ALJ action): 40% (supra §III(B)(1))</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Speculation about section 10(j) and settlement rates has focused on the Labor Law Reform Act’s (LLRA’s) proposal. Under that proposal, section 8(a)(3) and section 8(b)(2) charges of discrimination in hiring and firing during the organizing and pre-first-contract stages would have been subject to a mandatory injunction under section 10(l)-type procedures. After the bill failed, several commentators proposed that the Board effect a similar reform using the current section 10(j) in section 8(a)(3) cases. Under section 10(j), of course, seeking an injunction against section 8(a)(3) violations would not be mandatory, but the authors suggested that the regions review most section 8(a)(3) charges for injunctive relief and file for such relief much more often. It is instructive to focus on those employer-discriminatory-discharge proposals, as a study of whether settlement rates would rise if section 10(j) use were increased for all violations.

Professors Nolan and Lehr noted that the LLRA provision might deter discharges in the first place: nothing helps a union more than being

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126. For the text of the proposed amendment to §10, see supra note 8.
127. E.g., Samoff, supra note 80; Note, supra note 9. These commentators focused on §8(a)(3) violations, and did not include analysis of §8(b)(2) violations.
128. Samoff, supra note 80; Note, supra note 9.
able to claim it forced the employer to rehire a discharged employee. Professor Weiler has observed that the regions’ comparatively frequent use of section 10(l) has checked the growth of the number of violations subject to that section, but he does not believe that increased use of section 10(j) would have the same effect. Congress made section 10(l) relief available for the union violations at the very time it forbade the violations themselves, thereby showing, he argues, that it was serious about stopping those violations. An increase now in section 10(j) use might not have a similar effect on section 8(a)(3) violations, which Weiler states have become a way of life for anti-union employers. In addition, more employees may file section 8(a)(3) and section 8(b)(2) charges when they see that a more potent remedy is available to them. For these reasons, the number of discriminatory discharge charges might not fall if section 10(j) use were to rise.

An increase in section 10(j) use would also be unlikely to cause settlement rates to rise after the section 8(a)(3) charges were filed. The first chance for a change in settlement rates of underlying unfair labor practice charges would be before the Board authorizes the section 10(j) injunction. If an injunction were more likely to issue, an accused employer with a weak case might be more willing to settle at the early stage, knowing that he now could gain only a few months rather than a few years of delay if he refused to settle. This reasoning, however, ignores the fact that the regions already make a serious effort to settle weak cases. Employers might not settle early because they would want the discovery that the district court process gives them; after discovery they could see how strong the region’s case is and whether they really need to settle. Most importantly, settlement is unlikely because employees, thinking that a reinstatement and back pay order would soon be theirs, would be less willing than they now are to settle for immediate back pay without reinstatement. The next chance for a change in the settlement rates would be after Board authorization but before the district court proceedings concluded. Perhaps some respondents, seeing that an injunction was now a realistic possibility and not just a threat from the region, might decide to settle.

129. Nolan & Lehr, supra note 3, at 59.
130. Weiler, supra note 2, at 1801 n.123.
131. Id. at 1803 n.130.
132. Id.
133. Id.
134. The charged party can settle the §10(j) petition without settling finally the underlying unfair labor practice. The party agrees in a consent decree to remedy the violation pending Board determination of the case. Because there is little information on such consent decrees and because settlement of the underlying violations would have a greater effect on workloads, this subsection focuses on settlement of the violations themselves.
135. See Weiler, supra note 2, at 1801 n.130.
Employees, however, seeing the same thing, probably would refuse to settle for anything less than full back pay with reinstatement, and in fact, most employers would have a strong incentive to resist settlement on those terms. Reinstatement during a campaign will deal "a sharp rebuff to [the employer's] managerial authority at a time when such a rebuff is most likely to boost the union's stock in the upcoming election." Furthermore, the election is probably being blocked while the unfair labor practice charges are pending, and union support will erode further the longer the election is postponed. The cases that would go to district courts under the plan of increased use of section 10(j) would almost certainly be less clear-cut than are the present few carefully culled cases, so many employers will anticipate more favorable decisions from the district court. A combination of these factors is likely to cause the settlement rate at this stage to fall or stay the same, not rise.

The final point at which settlement rates might change is after the district court decision. It is hard to see, however, why settlement rates should rise at this stage just because more section 10(j) injunctions were sought before this stage. General Counsel Irving predicted that the settlement rate would actually drop here under the LLRA proposal.

In sum, then, it is unlikely that an increase in section 10(j) use will increase the rate of settlement of underlying unfair labor practices. In evaluating proposals to increase use of the section, one should therefore assume that the current rates of settlement, as laid out above in the discussion of the case study cases, will remain at roughly the same levels if the reforms are implemented. As a result, the increase in the workload of those who process section 10(j) actions might be a significant barrier to the success of the reform. This is not the only obstacle to its success. Other potential barriers are that the Board or the courts might resist the reform on the grounds that Congress did not intend for section 10(j) to be used too frequently, and that district judges might be reluctant to accept a reform that wreaks havoc on their dockets. However desirable in the abstract an increase in section 10(j) use might be, the barriers of Congressional intent, decision-makers' attitudes, and Board and court workloads might stymie a reform. Certainly a consideration of those

136. Id. at 1803.
137. E.g., NLRB v. Tri-City Linen Supply, 579 F.2d 51, 57 (9th Cir. 1978).
138. Roomkin & Block, supra note 38, at 76, 88-95.
139. By this time the regions, at least, may already have done much of the preparation that they would need to do for the ALJ hearing, so an increase in settlement might not save them much work. Letter from Thomas W. Seeler, Regional Director of Region 3 (Nov. 18, 1982); letter from Detroit private labor attorney (Dec. 22, 1982). Nor of course would it relieve the district judges of any burden. It could save the ALJ, the General Counsel, and the Board a good deal of labor, however.
141. See supra notes 111-25 and accompanying text.
practical factors is crucial to design of a workable reform. We turn now to that consideration.

IV
THREE BARRIERS TO INCREASING SECTION 10(j) USE

Because section 10(j) injunctions issue fairly promptly and restore the status quo for an eventual Board order, the section has provided a good remedy in the few cases in which it has been used. As discussed above, many commentators have argued that since a little section 10(j) has been good, a lot would be better. This section considers whether the reform they advocate could be implemented. The first subsection discusses the ways in which Congressional intent might limit expansion of the remedy. The next addresses the role that courts' attitudes play in the decision whether to increase section 10(j) use. The third considers recent changes in the Board's attitude toward the section. The fourth subsection evaluates whether the people who process section 10(j) petitions could absorb an increased caseload.

A. Congressional Intent: Setting an Upper Bound on Expansion of Section 10(j) Use

There are two major ways in which an increase in the use of section 10(j) might contravene the theory of labor relations that Congress expressed in the NLRA. These issues are not merely abstract and theoretical. At every stage of the section 10(j) process, an official—the regional director, an attorney in the General Counsel's office, a Board member, or a district judge—can draw on the two arguments and use them to justify denying injunctive relief.

The first argument rests on a comparison between the language Congress chose for section 10(j) and the language it chose for section 10(l). A sense of urgency pervades section 10(l): the regions must investigate forthwith the charges subject to the section, and the regional director must file for injunctive relief as soon as he finds reason to believe the charge is valid. Section 10(j) injunctions are allowed to move at a gentler pace. The regions need not give the charges priority investigation, and the regional director is not even permitted to file a petition until he issues a complaint and gets Board approval.

The Congress that added these two sections to the Act scarcely discussed the differences between them. By making the seeking of section

142. See, e.g., Note, supra note 12; Note, supra note 38; Comment, supra note 63 (all advocating increased use of §10(j)).
143. See supra text accompanying note 5.
144. See supra text accompanying note 52.
145. One commentator has said that the "lack of congressional guidance in either the statute or
10(l) injunctions mandatory, however, Congress implied that stopping certain union unfair labor practices is always in the public interest. The same legislators made seeking of section 10(j) injunctions optional and difficult. Congress must have thought that arresting the violations subject to that section—predominantly employer violations—was not necessarily or even usually in the public interest.\textsuperscript{146}

The Board naturally might conclude from the legislative language that Congress intended the agency to use section 10(j) with restraint. This argument of Congressional intent is, however, weak. Section 10(j) says the Board may seek an injunction against any alleged violation. Nothing in the language of the section or the legislative history compels the Board to use section 10(j) as little as it has. Had the Board doubled the number of its section 10(j) authorizations in 1981 it still would have granted authorization in only 2.6\% of the cases in which the regions issued complaints for violations subject to section 10(j).\textsuperscript{147} The number of authorizations would still have been less than the number of section 10(l) injunctions filed. Perhaps the Board could not, consistently with Congressional intent, authorize section 10(j) petitions in all unfair labor practice cases or even in half of them, but while the language of the section and the legislative history may set an upper bound on the use of section 10(j), they need do no more than that.

A sudden surge in the number of section 10(j) injunctions might also offend a second aspect of legislative intent. Throughout the NLRA the legislative history of section 10(j) is remarkable when considered in relation to the use of labor injunctions during the first half of this century.\textsuperscript{147} Comment, supra note 63, at 1025 (footnote omitted).


\textsuperscript{146} At least one district court has noted that although the expressed standards for granting \textsection{10(j)} relief are the same as those for granting \textsection{10(1)} relief, in a close case the court might more readily decide to grant a \textsection{10(1)} injunction. "This is because the conduct subject to injunction under \textsection{10(1)} is often very disruptive of commerce, while section \textsection{10(j)} activity does not normally affect commerce as much." Hirsch v. Trim Lean Meat Prods., Inc., 479 F. Supp. 1351, 1355 n.5 (D. Del. 1979).

\textsuperscript{147} In 1981 the Board authorized 71 General Counsel \textsection{10(j)} requests. \textit{March 1984 \textsection{10(j)} Hearing, supra note 54, at 11. The regions issued 5297 complaints for violations subject to \textsection{10(j)} injunctions. 46 NLRB ANN. REP. 177 (Table 3A) (1981). (This number excludes the complaints issued for combination unfair labor practice/representation cases and for unspecified other unfair labor practice charge combinations.)
Congress displayed its intention that an expert body, the Board, and not the district courts, would decide labor cases. Between a district court's section 10(j) decision and the Board's unfair labor practice decision, the parties' rights and duties will be determined by the district judge's conception of the fair resolution of the dispute. If the parties settle before their case reaches the Board, then the district judge will have had the last word. An increase in the use of section 10(j), the argument goes, would allow the district courts to usurp the authority that Congress intended the Board to have.

Board members, judges, and commentators have noted this problem. Former Board Chairman Frank W. McCulloch wrote that the section 10(j) injunction "should not and cannot become the ordinary remedy in unfair labor practice cases. Congress delegated to the five-man National Labor Relations Board sitting in Washington, and not to the district courts, the duty to give an expert and experienced content and direction to the National Labor Relations Act." The Second Circuit in a 1980 section 10(j) appeal urged the Board to decide the underlying unfair labor practice case as quickly as possible, because "in the interval between the grant of an injunction and final adjudication by the Board, the rights of the parties will have been determined by a court rather than by the expert agency established by Congress." Commentators have labeled as "highly questionable" and "dubious" the proposals to thrust large numbers of cases into district courts.

In part because of that incongruity, the decision-makers at every step of the section 10(j) process try to pick out for injunctive treatment only those cases in which eventual Board remedies will be inadequate. If the Board actually needs the court to preserve the status quo so the ultimate Board remedy will work, we should not worry that the Board's authority is being spurned. One could still argue that speeding up Board processes would fulfill Congress' intent more directly than would sometime resort to district courts; but Congress did intend to give district courts some role in administration of the Act. And in any event, this second argument on Congressional intent can be refuted as the first one was: the NLRA does not compel the Board to use section 10(j) at the present low levels. Section 10(j) use still could be increased a good deal

151. Weiler, supra note 2, at 1802.
without the injunctive remedy offending Congress' scheme of having an expert agency decide most unfair labor practice cases. The question of how much section 10(j) use can be increased will turn on decision-makers' attitudes toward the section and on the size of Board and court workloads.

B. District Court Attitudes Toward Section 10(j)

Perceptions that Congress intended that section 10(j) be used sparingly lie at the base of district courts' reluctance to consider section 10(j) petitions. In addition, judges wish to keep their swelling caseloads under control. An increase in section 10(j) use cannot succeed unless judges cooperate. Violators could laugh at the Board's increased use of the section if they knew that the court would probably deny the petition the Board had authorized. This subsection explores the courts' attitudes toward section 10(j) and discusses how those attitudes should influence a plan to increase section 10(j) use.

Board lawyers and private attorneys find that many district judges are not very receptive to section 10(j) petitions. Judges view the injunction as an extraordinary remedy that must rest on extraordinary facts, while the normal case is for an ALJ. Judges also often believe that the ALJ himself could and should issue a prompt decision in the underlying case so that an outsider court will not need to get involved. Many district judges, never having decided a section 10(j) case and feeling somewhat inexpert, are reluctant to order affirmative relief based on a mere showing of reasonable cause to believe that the Act has been violated. In addition, they may resent the havoc that a section 10(j) petition, which must be heard immediately, plays with their dockets.

Occasionally judges so wish to avoid the section that they do not respond to section 10(j) petitions filed in their courts. For example, in 1978 a judge in Massachusetts simply stayed proceedings on the section 10(j) petition until the ALJ rendered a decision. The district judge did not publish his initial decision, but the circuit court, in reversing the judge and remanding for a ruling on the merits of the section 10(j) petition, explained the judge's apparent rationale for the stay. The district judge evidently thought that he could not rule on the section 10(j) petition's merits unless he held an evidentiary hearing, and he realized that holding a full hearing would be burdensome. The judge apparently

153. Interview with John C. Truesdale, supra note 51.
154. Interview with John H. Fanning, supra note 152.
155. Interview with Harold J. Datz, supra note 47.
156. Interview with Peter B. Mirsky, supra note 54.
158. Id. at 396-98.
wished to use material from the ALJ's hearing in place of or as a supplement to material he might gather at his own hearing. Instead of staying his decision merely until after the ALJ's hearing, however, the district judge issued a stay to last until after the ALJ's decision. This the circuit court held was an abuse of discretion. While noting that the district court's concern about the burden of holding an evidentiary hearing was "understandable . . . in times when district courts are badly overburdened," the district court should not assuage that concern by simply declining to hear the petition. "[T]he court may not frustrate the intent of Congress in promulgating 10(j) by refusing to consider the petition until after the administrative law judge has rendered his decision, a significant portion of the time during which temporary relief, in the appropriate case, was designed to be in effect." 

Such open contravention of the legislative scheme is exceptional. Most district courts act fairly promptly on section 10(j) petitions, as the case study showed. But even judges who act promptly will frequently defer to the ALJ if a good argument can be made for doing so. There are two classes of cases in which courts will sometimes deny injunctions based on the status of the ALJ's proceedings. The first is the set of cases in which ALJ action is imminent. In D'Amico v. Gold-Stein Co., for example, the district court denied the injunction in part because the ALJ was going to hold a hearing in less than a month. The court reasoned that the ALJ was better able than the court to decide the issues. Similarly, in Kaynard v. Courier Life Publications, Inc., the ALJ had already heard the case but had not yet issued a decision. The court denied the injunction because the Board procedures that section 10(j) is supposed to bypass were already well underway. In both these cases the courts' decisions to sidestep the petitions are understandable but wrong. A section 10(j) injunction will be enforceable by contempt from the moment it issues until the time the Board renders a decision, usually a span

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159. See id. at 396-97.

160. The regional director, in his motion for clarification of the stay, stated that he would not contest a stay that would operate only until the end of the ALJ hearing, because he considered it a proper exercise of the court's jurisdiction to await the ALJ record for aid in the §10(j) decision. The regional director did contest the stay as issued, however, because it operated until the time of the ALJ decision. That decision might not issue until several months after the ALJ hearing. 590 F.2d at 396 n.2.

161. Id. at 397.

162. Id. On the remand the district judge denied the injunction. 471 F. Supp. 186, 192 (D. Mass. 1979) (decision on remand from 1st Cir.).

163. See supra note 89-110 and accompanying text.


165. Id., slip op. at 4-5.


167. Id. at 2380.
of almost a year. The ALJ’s decision is not immediately enforceable; the respondent can simply ignore it. In a case in which immediate relief is just and proper, then, the section 10(j) remedy is superior to the administrative order because under section 10(j) the relief will be immediate. Even less adequate to protect the charging party’s rights than the ALJ’s order—indeed, almost irrelevant to that purpose—is the holding of the ALJ hearing.

The courts’ reluctance to issue a section 10(j) injunction is no more justifiable in the second set of cases, in which the Board waits so long to petition for an injunction that the court decides that the argument for immediate relief is unconvincing. In *Seeler v. H.G. Page & Sons, Inc.*, for example, the Board did not apply for a section 10(j) injunction until four months after the charge had issued. The judge held that relief was not just and proper. The Board had “deemed permissible” any harm that would come to the parties through the additional delay before an ALJ decision. “The Board’s inaction in this case is the most compelling evidence against the need for intervention by this court.” But as several courts have recognized, the *H.G. Page* approach probably does not fulfill the purposes of section 10(j). As the Eighth Circuit said in a 1977 case, delay should be relevant only . . . where the delay is of such a character that a final Board order is likely to be as effective as an interlocutory court order. We obviously cannot deny relief for delay as a means of expressing our displeasure with the Board. To take that attitude would be to deprive employees of their statutory rights for reasons entirely beyond their control.

168. In 1980 the median time between the close of the ALJ’s hearing to the issuance of the Board’s decision was 291 days. 45 NLRB ANN. REP. 294 (Table 23) (1980). In many cases a §10(j) injunction would be issued even before the ALJ’s hearing, adding several weeks or months onto this time.

169. Parties contested about 80% of ALJ decisions in 1981. 46 NLRB ANN. REP. 177 (Table 3A) (1981).


171. Id. at 79.

172. Id.

173. Id. For similar treatment of pre-petition delay, see also Kobell v. Suburban Lines, Inc., 113 L.R.R.M. (BNA) 2990, 2993, 2994-95 (W.D. Pa. 1983), aff’d, 731 F.2d 1076 (3d Cir. 1984) (discussing pre-petition delay at 3310 n.27 in appeals court’s affirming decision; appeals court holds that delay is relevant to question whether relief should be granted).


175. Solien v. Merchants Home Delivery Serv., Inc., 557 F.2d 622, 627 (8th Cir. 1977). The First Circuit recently agreed. In Maram v. Universidad Interamericana de Puerto Rico, Inc., 722 F.2d 953 (1st Cir. 1983), the appeals court reversed the district court’s reliance on pre-petition delay as a basis for denying injunctive relief. The circuit court stated that a “busy administrative agency cannot operate overnight. The very fact that it must exercise discretion, and that its decision is entitled to presumptive weight . . . indicate that it should have time to investigate and deliberate.” Id. at 960 (footnote omitted). In ordering the injunction to issue, the court noted that the issuance would now come 14 months after the enjoinable conduct had occurred, but concluded that it could
Board officials are aware, however, that courts are reluctant to grant injunctions after too much delay, and the officials try to expedite cases. As former General Counsel William A. Lubbers wrote recently, "we expect that judicial reluctance to grant relief in 'old' cases will continue to be an obstacle to obtaining relief in the future. Speedy processing of 10(j) cases, through all steps of the administrative process, should therefore continue to be a high priority for the agency." 176

Even courts that decide to consider and grant injunctions use stringent standards in evaluating the petitions. Although the standards may be too strict to protect section 7 rights sufficiently, 177 their use is deeply ingrained. The strictness of the standards could stymie an attempt to increase use of section 10(j).

The Second Circuit, for example, still adheres to a policy set out in a 1966 section 10(j) case, McLeod v. General Electric Co. 179 "the issuance of an injunction is an extraordinary remedy indeed." A 1982 case reaffirmed the language, 180 and other courts echo it. 181 Starting from this premise, circuit and district courts consider a variety of factors in deciding whether relief is just and proper. Courts consider traditional equity arguments such as the likelihood of irreparable harm, 182 and the need to

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176. Lubbers Memorandum, supra note 38, at 27. Accord interview with Harold J. Datz, supra note 47; interview with Peter B. Mirsky, supra note 54, Irving, supra note 14, at 15,958. Irving, who was General Counsel when he wrote the cited memorandum, said that he impressed on the regional offices and the Washington staff that §10(j) cases must be handled quickly. He proposed preparing a model brief that regional attorneys could use in district courts. He said that the attorneys should tell judges that §10(j) petitions cannot come to court immediately because the statute makes the regional officers investigate the charge and get approval for the petition before they can file in court. Id.


178. Note, supra note 9, at 534-35.

179. 366 F.2d 847 (2d Cir. 1966), vacated as moot, 385 U.S. 533 (1967).

180. Silverman v. 40-41 Realty Assocs., Inc., 668 F.2d 678, 680 (2d Cir. 1982).

181. E.g., Boire v. Pilot Freight Carriers, Inc., 515 F.2d 1185, 1192 (5th Cir. 1975) (§10(j) is an "extraordinary remedy" to be used for "egregious unfair labor practices"), cert. denied, 426 U.S. 934 (1976).

preserve the status quo pending final determination of the issues.\textsuperscript{183} Judges also consider the policies that Congress endorsed in passing the sections,\textsuperscript{184} such as keeping delay from frustrating the basic remedial purposes of the Act,\textsuperscript{185} protecting the public from a continuing violation,\textsuperscript{186} and preventing the Board’s administrative processes from becoming useless formalities.\textsuperscript{187} In sum, courts consider very carefully the issue whether a section 10(j) injunction is just and proper.\textsuperscript{188} A blithe decision by the Board to flood district courts with new section 10(j) petitions could be thwarted by the stringent standards that the courts apply.

Since courts are reluctant to consider section 10(j) petitions, one might expect that the judges would generally deny them. In fact this does not happen. Between 1980 and 1983, the Board was successful—that is, the region prevailed in the district court or negotiated a satisfactory settlement—in 87 percent of the section 10(j) authorizations.\textsuperscript{189} Between 1975 and 1979 the success rate was 81 percent.\textsuperscript{190}

This high success rate actually is consistent with the district courts’ attitude toward section 10(j). Weak cases may settle early in the section 10(j) process, leaving only the more compelling ones when the court hearing arrives. More important, the Board and its agents, recognizing the district judges’ attitudes toward section 10(j), consciously try to select for section 10(j) action the cases they think the courts will accept. Reflecting on the use of section 10(j) in the last decade or two, the Executive Secretary of the Board said that “the approach that [different Boards and General Counsels] have had to 10(j) has really flowed from the experi-


\textsuperscript{184} In Hecht Co. v. Bowles, 321 U.S. 321 (1944), the Supreme Court interpreted the injunction provisions of the Emergency Price Control Act of 1942. The Court said that when Congress determines in a statute that public policy may demand injunctions, courts applying the injunction provision should consider not only traditional equity principles but also “the necessities of the public interest which Congress has sought to protect.” \textit{Id.} at 350. The lower courts are thus incorrect when they state that traditional equity considerations are irrelevant to §10(j) decisions, as in Levine v. C&W Mining Co., Inc., 465 F. Supp. 690, 693 (N.D. Ohio), \textit{aff'd in part and vacated in part}, 610 F.2d 432 (6th Cir. 1979). Some lower courts explicitly recognize that combining the sets of factors is the right approach. \textit{E.g.}, Gottfried v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1165 (E.D. Mich. 1979), \textit{aff'd mem.}, 615 F.2d 1360 (6th Cir. 1980). Most judges simply use a combination of factors without discussion.

\textsuperscript{185} \textit{E.g.}, Zipp v. Shenanigans, 106 L.R.R.M. (BNA) 2989, 2990 (C.D. Ill. 1980).

\textsuperscript{186} \textit{E.g.}, Wilson v. Liberty Homes, Inc., 500 F. Supp. at 1128.


\textsuperscript{188} Commentators have analyzed and criticized the court’s standards at length, exploring each of the above-listed factors. For further discussion of the courts’ 10(j) standards, see Note, supra note 9, at 533-38; Note, supra note 12, at 422-23; Note, supra note 38, at 848-55; Comment, supra note 63, at 1042-53.

\textsuperscript{189} \textit{March 1984 §10(j) Hearing}, supra note 54, at 60 (statement of William A. Lubbers).

\textsuperscript{190} \textit{Id.}
ence they've had in the courts."191 Other officials agree.192 Circuit law is more important to the Board's decision than is district law. In two identical and novel cases, for example, the Board might authorize section 10(j) in a circuit with a low reasonable cause standard and not in a circuit with a high standard.193

Board officials see this control over section 10(j) as crucial to the section's continued good health. The Board now goes into a district court with credibility on its side; it can show a district judge that it selects only a tiny number of cases for section 10(j) authorization, and can argue that each of those cases is truly worthy of extraordinary relief. These arguments can stop a district judge from balking at the prospect of interfering with the elaborate unfair labor practice machinery that Congress constructed.194 Officials who think that section 10(j) use should increase in the future nonetheless believe that "the more limited past use of 10(j) has stood the Board in good stead."195

In the absence of a legislative amendment to section 10(j), then, increase in use must be gradual and limited to succeed in the district courts. The balance of responsibilities is delicate. The district courts where section 10(j) petitions now appear more frequently are more sophisticated in approach than are the courts in regions where section 10(j) is rare.196 Through a carefully planned increase in section 10(j) use, the Board can encourage this sophistication and nurture the reform's success.

C. Recent Changes in Board Attitudes Toward Section 10(j)

Recently, attention has focused on the Board's own willingness to use section 10(j). In March 1984, the Manpower and Housing Subcommittee of the House Committee on Government Operations held a hearing on the Board's use of section 10(j) injunctive relief.197 Representative Frank, the chairman of the subcommittee, explained the reason he had called the hearing: "The focus of the hearing today is the recent decline and delay in the use of section 10(j) injunctive relief by the Labor Board. We want to examine the reasons for the delay and the appearance of a change in the pattern of doing it evenhandedly."198 The subcommittee was also concerned about the recent increases in the rate at which the

\[191\] Interview with John C. Truesdale, supra note 51.
\[192\] E.g., interview with John H. Fanning, supra note 152.
\[193\] Interview with Harold J. Datz, supra note 47. The Board is conscious, however, that it is making a national labor policy, not a policy for each circuit, and so it tries to treat all courts the same way where practicable. Interview with John C. Truesdale, supra note 51.
\[194\] Interview with John H. Fanning, supra note 152.
\[195\] Interview with Harold J. Datz, supra note 47.
\[196\] Interview with Peter B. Mirsky, supra note 54.
\[197\] March 1984 §10(j) Hearing, supra note 54, at 3.
\[198\] Id. at 3.
Board declined to authorize injunctive relief when the General Counsel had recommended it.\textsuperscript{199}

A Board decision to authorize section 10(j) injunctions less frequently in the future could undermine any attempt at reform. Even if the regions, the General Counsel, and the district courts wholeheartedly supported an increase in the use of the section, the Board could simply refuse to authorize injunctions at a higher rate. This subsection examines the evidence of a change in the Board’s attitude and explains why the recent changes in the Board’s use of section 10(j) may not signal a long-term change in that attitude.

Unquestionably, use of the section declined after Chairman Dotson took office on March 8, 1983. In the seventeen months before that date, the Board authorized eighty-one injunctions; in the eleven months after it, the Board authorized twenty-two.\textsuperscript{200} Between October 1981 and February 1983, then, before Dotson’s tenure, the Board averaged 4.8 authorizations per month. Between March 1983 and February 1984, it averaged 2 authorizations per month.\textsuperscript{201}

It also is uncontested that the rate of the Board’s rejections of the General Counsel’s recommendations in favor of granting section 10(j) injunctions has climbed recently. Between October 1981 and February 1983, the Board declined to authorize injunctions in 15% of the cases in which the General Counsel recommended authorization. Between March 1983 and February 1984, the board rejected 37% of the General Counsel’s recommendations.\textsuperscript{202}

The time span between the General Counsel’s section 10(j) recommendations and the Board’s section 10(j) decisions also increased. Between October 1981 and February 1983, Board action came within seven days of the General Counsel’s recommendation in 26.5% of the cases, within eight to fourteen days in 47%, and in more than fifteen days in 26.5%. Between March 1983 and February 1984, the Board’s action came within seven days in only 5.7% of the cases, within eight to fourteen days in 25.7%, and in more than fifteen days in 68.6%.\textsuperscript{203} A few cases languished between General Counsel recommendation and Board decision for six to eleven months during the 1983-84 period.\textsuperscript{204}

These recent changes in section 10(j) use do not necessarily signal

\textsuperscript{199} Id.
\textsuperscript{200} Id. at 11.
\textsuperscript{201} Figure 1 at id. also shows that between July 1975 and September 1981, a period of 75 months, the Board authorized 371 petitions. That works out to an average of 4.9 petitions per month.
\textsuperscript{202} Id. Seven General Counsel requests were pending before the Board when the figures for March 1983 to February 1984 were gathered. The rate of rejection between July 1975 and September 1981 was a mere 1%.
\textsuperscript{203} Id. at 13.
\textsuperscript{204} Id. at 4 (statement of Representative Frank).
that a reform advocating increased use of the section would not work. Chairman Dotson avowed at the hearing that the decline in the number of Board authorizations was not the result of a change in Board policy or method.\textsuperscript{205} The number of regional office requests for section 10(j) relief was lower during the October 1983 to February 1984 period than it had been in previous years. That decrease might account in part for the decline in authorizations.\textsuperscript{206} Indeed, the General Counsel sent an average of 5.5 authorization recommendations per month to the Board in the 17 months before Dotson took office, and an average of 3.8 per month in the 11 months after.\textsuperscript{207} Thus, in the later period, the Board had fewer petitions from which to select cases suitable for section 10(j) action.

The rise in Board rejections of General Counsel recommendations also does not necessarily show that the Board has set out to limit section 10(j) use. It might mean only that the General Counsel and the Board members have different perceptions of what kind of case is appropriate for section 10(j); if the General Counsel's and the Board's perceptions were in better harmony, the rate of Board authorizations might rise to previous levels.\textsuperscript{208}

Board officials think that the recent changes in section 10(j) use flow from changes in substantive Board law rather than from Board hostility toward the section itself. Associate General Counsel Datz explained,

\begin{quote}
[I]t is my view that the use of Section 10(j) has undergone a change that is consistent with the change occurring in substantive decisions of the Board. That is, as the current Board has issued decisions reversing certain lines of precedent finding a violation, there would no longer be 10(j) authorization in those areas. Accordingly, there has been a decline in the number of section 10(j) authorizations and some change in the types of
\end{quote}

\textsuperscript{205} Id. at 88 (statement of Chairman Dotson).
\textsuperscript{206} Id. at 11. During those four months, the regions requested 62 authorizations. Id. That rate stayed constant during the remaining months of fiscal 1984; the total number of requests in that year was 195. Letter from Peter B. Mirsky, supra note 54 (Feb. 5, 1985). In fiscal 1983, there were 309 requests; in 1982, 255; and in 1981, 301. \textit{March 1984 §10(j) Hearing, supra note 54, at 11.}

Of course, regional offices' perceptions that the Board is less likely now than formerly to grant §10(j) authorizations might have led the regions to submit fewer requests. Which phenomenon came first is not clear.

\textsuperscript{207} \textit{March 1984 §10(j) Hearing, supra note 54, at 11.}

\textsuperscript{208} For example, if the Board thinks the average alleged violation by a union is more likely to warrant §10(j) relief than the average alleged violation by an employer, and if the General Counsel does not think that, the rate of the Board's acceptance of the General Counsel's recommendations might decline. Between March 1983 and February 1984, the Board in fact authorized 7 of the 8 General Counsel requests for petitions against unions, but only 15 of the 27 requests for petitions against employers. Id. at 3. (The General Counsel recommended a total of 34 petitions against employers; seven of those requests were still pending when the figures were gathered. Id.) Representative Frank said that those figures showed that the Board was not being evenhanded in its treatment of unions and employers, id. at 3, and another witness at the hearing impliedly criticized the Board for bias, id. at 40 (statement of Laurence Gold, special counsel to the AFL-CIO). Chairman Dotson denied that the Board was biased, saying that the Board members consider each case individually. Id. at 96 (statement of Chairman Dotson).
10(j) cases being authorized. I do not regard this as a systemic change of approach in 10(j) cases. Rather, it is reflective of a change in substantive Board law.209

The Board has been cutting back on precedents. For example, in 1984 the Board *sua sponte* reversed an earlier decision concerning the legality of plant relocations.210 Under the earlier holding, certain relocations had constituted an unfair labor practice; under the later holding, those same sorts of relocations were legal. General Counsel Lubbers instructed the regions to seek dissolution of injunctions that courts had granted before the earlier case was overruled.211 Under the new holding, the Board will not authorize petitions in many relocation cases that would have been good candidates for section 10(j) relief under the old law. Thus, the number of authorizations for petitions against plant relocation unfair labor practices will decline.

If the Board’s section 10(j) use has indeed changed because of changes in substantive Board law, rather than because of Board members' new opinion that section 10(j) is not a useful weapon in the Board’s arsenal, then a reform advocating increased use of section 10(j) would not be stymied by any general Board reluctance to use the section. If section 10(j) requests corresponded to the current Board law on the substantive issues on which the unfair labor practice charges are based, the likelihood that the Board would grant relief would presumably be as high under Chairman Dotson as it was before he took office, although the types of cases in which petitions would be authorized would change.

Even if the current Board members do wish as a general matter to limit the use of section 10(j), that change in attitude would not necessarily stand as a permanent barrier to the success of a reform calling for increased section 10(j) use. If the reform would be good policy, and if the section really does provide an effective antidote to the harms that arise from administrative delay, observers should call for reform in hopes of dissipating the reluctance of agency officials to adopt a desirable change. Even if public opinion does not initiate change, Board members' terms last only five years,212 and the next Board might prove more responsive to a push for reform.


211. *Lubbers Memorandum*, supra note 38, at 11 & n.23.

D. Workload as a Barrier to Expansion of Section 10(j) Use

A final factor in the success of a reform effort would be the agency's and courts' ability to handle the increase in workload that the reform would cause. The new burden of cases could so overload Board personnel and district judges that section 10(j) relief might be delayed as long as ultimate Board relief now is. Workload could pose problems at the regional offices both before and after authorization, at the General Counsel and the Board levels during authorization proceedings, at the district court once the petition is filed, and even at the appeals court level. This subsection explores the dimensions of the workload barrier to increased use of section 10(j), concluding that the plans that most reformers have advocated would be impracticable absent major increases in staff at every stage of the section 10(j) process. A more modest reform plan, however, could work with only minor staff increases at most levels.

General Counsel John S. Irving, in his memorandum on the impact that the Labor Law Reform Act's proposal to apply section 10(l) to section 8(a)(3) and section 8(b)(2) discriminatory discharge violations would have had on Board operations,213 estimated, using 1979 statistics, that the new injunction proposal would channel 3479 cases to district courts.214 The corresponding figure using 1980 statistics would be about 4760 cases.215 A proposal might have more limited goals, however, than having the regions file all meritorious petitions in district court. In 1981

214. Irving Cost Impact Study, supra note 10, at G-5. Irving calculated that provisions of H.R. 8410 other than the injunction provisions would have driven up the number of unfair labor practice charges of all sorts by six percent. Id. at G-1. He then figured out the total number of deprivation-of-employment charges—that is, §8(a)(3) and §8(b)(2) cases excluding those that arise out of reductions of wages and hours—that would be filed during the organization and pre-first-contract phases if H.R. 8410 were enacted. That number was 17,395 cases. Forty percent of those, or 6958, would have been meritorious. Irving estimated that the new injunction provision would cause the pre-complaint settlement rate to drop by one-third, from 75% to 50%. So half of the 6958 charges would have settled before complaint. Thus 3479 cases would have been subject to the new §10(l). Because the LLRA provision provided for mandatory filing in district court, all of these cases would have landed there.
215. The figures for 1980 are as follows. In 1980, 20,005 §8(a)(3) and §8(b)(2) charges were filed. 45 NLRB ANN. REP. 243 (Table 2) (1980). In order to isolate the effect of the LLRA injunction provision, I do not add to this figure the six percent rise in caseloads that other provisions of the bill would have caused. Because the figures are not available, I do not subtract the cases that involved reductions in wages or hours, or the cases that involved charges of post-first-contract discrimination. The final figure therefore is somewhat bigger than it should be under Irving's method.

The merit factor in 1980 was 35.7%. Id. at 10, chart 5. Approximately 7140 of the 1980 §8(a)(3) cases, then, were meritorious. About half of the meritorious charges settled before complaint, id., in contrast to the 75% figure Irving used for the year he studied. (Irving does not give a source for his 75% figure. Chart 5 from the 1980 Annual Report shows the 1977, 1978, and 1979 pre-complaint settlement rates were about 50%.) If the pre-complaint settlement rate dropped by one-third, as Irving estimated it would, the rate for 1980 would drop from 50% to 33%. Of the 7140 cases, 2380 would settle before complaint. Thus 4740 cases would have been subject to the new §10(l).
the Board authorized section 10(j) petitions in 1.3 percent of the cases in which complaints issued.216 A reform plan could aim to increase the number of section 10(j) petitions to fifty percent or twenty percent or ten percent of the complaints issued rather than the one hundred percent that the LLRA would have mandated. If the plan set a mark of fifty percent for discriminatory discharge cases, 2380 cases would be channeled to district courts. If the goal were twenty percent, 952 cases would go to court; if ten percent—still almost eight times the 1981 authorization rate—the figure would be 476 cases.217 This subsection will evaluate the impact that each of these reform goals might have on Board and court workloads. The figures will be rounded off to 5000 cases, 2500 cases, 1000 cases, and 500 cases. The subsection will focus on the added workload of the section 10(j) procedure itself, not on the burdens of litigating the unfair labor practice charges that underlie section 10(j) petitions.

1. **Trial Attorneys—Private and Regional**

   In most circuits, the section 10(j) trial takes one day and a fairly elaborate hearing, with witnesses and briefs.218 Preparation for the section 10(j) and for the ALJ hearings undoubtedly overlaps to some extent.219

   Attorneys for respondents said they usually spend less time preparing for a section 10(j) trial than do NLRB staff attorneys. Private attorneys cannot do much preparation until they see the region's petition and supporting papers, and by that time the court date may be quite close.220

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216. 46 NLRB Ann. Rep. 177 (Table 3A) (1981); March 1984 §10(j) Hearing, supra note 54, at 11.  
217. These figures assume that the settlement rate reduction that Irving posited for the LLRA—33%—would apply even as the use of §10(j) became less certain. As use became more like present use, however, the settlement rate would approach the present rate. Thus the figures here probably overstate somewhat the likely actual result.  
218. Of the 78 cases for which the figures are available, 73% had one-day hearings or no hearing. Nine cases had two-day hearings, six had three days, four had four days, and two had five days. The Ninth Circuit frowns on elaborate §10(j) hearings, almost always limiting them to affidavits. Letter from Marcia H. Hoyt, of Hoyt, Hoyt & Walling, Walnut Creek, CA (Dec. 17, 1982). This limitation is unusual. Several of the published §10(j) decisions describe full-dress district court hearings. See, e.g., Grupp v. United Steelworkers, 532 F. Supp. 102, 103 (W.D. Pa. 1982) (direct and cross examination of witnesses, oral arguments, presentation of evidence, written trial memoranda); Farkas v. Connector Mfg. Co., 106 L.R.R.M. (BNA) 2195 (S.D. Ohio 1980) (oral arguments, presentation of evidence; docket sheet of case shows that pre-hearing memoranda and post-hearing briefs were submitted).  
219. The legal issues in the two trials are, however, different. If the ALJ hearing has been held before the §10(j) hearing, the parties may stipulate that the ALJ transcript be put into evidence before the district court. E.g., Zipp v. Bohn Heat Transfer Group, 110 L.R.R.M. (BNA) 3013, 3014 (C.D. Ill. 1982).  
220. E.g., telephone interview with Gerald Barrett, private labor attorney (Dec. 22, 1982); letter from Howard Grossinger, private labor attorney (Dec. 8, 1982). One attorney disagreed, saying that he could begin work before authorization because the Regional Director tells respondents' attorneys
Thus, comparatively speaking, the increased burden for private attorneys would be small.

Increased workload for the regions, however, is more troublesome because staffs there are limited by the size of Congress's appropriation to the NLRB. General Counsel Irving estimated that the region spends an average of about nine days preparing and trying a section 10(j) petition.\(^{221}\) If one uses that estimate, the various reform proposals would greatly increase regions' workloads. In 1982 there were 1155 professionals in the thirty-three regional offices.\(^{222}\) Assuming a 250-day work year (5 days a week, 50 weeks a year), those professionals worked a total of about 190,000 days in 1982, of which about 500 were spent preparing section 10(j) petitions for the courts.\(^ {223}\) The increased regional workloads under the different reform proposals are shown in the following table.

<table>
<thead>
<tr>
<th>No. of cases that reform proposal would channel to district courts</th>
<th>Total additional attorney-days that would be spent on section 10(j) preparation (col. 1 times 9 days)</th>
<th>Multiple of present amount of time spent on section 10(j) preparation (col. 2 divided by 500 days)</th>
</tr>
</thead>
<tbody>
<tr>
<td>5000 cases</td>
<td>45,000 days</td>
<td>90 times present level</td>
</tr>
<tr>
<td>2500 cases</td>
<td>22,500 days</td>
<td>45 times</td>
</tr>
<tr>
<td>1000 cases</td>
<td>9000 days</td>
<td>18 times</td>
</tr>
<tr>
<td>500 cases</td>
<td>4500 days</td>
<td>9 times</td>
</tr>
</tbody>
</table>

what issues have been submitted to the Board. Interview with Thomas J. Walsh, private labor attorney, in Washington, D.C. (Dec. 30, 1982).

\(^{221}\) Irving Cost Impact Study, supra note 10, at G-5.

\(^{222}\) PRELIMINARY SUMMARY OF OPERATIONS, 1982, supra note 91.

\(^{223}\) In 1982 the Board authorized 54 §10(j) petitions. If each of these consumed nine preparation days at the regional office, the total number of days spent preparing §10(j) petitions for the district courts was \((9 \times 54) = 486\) days.
% increase in work days (col. 1 divided by 190,000, total number of work days in 1982) | Number of additional attorneys needed per year to absorb increase (col. 2 divided by 250 days, the number of days an attorney works each year) | % increase in professional staff (col. 5 divided by 1155, the number of professionals in the regions in 1982)
---|---|---
16% | 180 attorneys | 16%
8% | 90 attorneys | 8%
3.2% | 36 attorneys | 3.2%
1.6% | 18 attorneys | 1.6%

Even these figures understate the actual increase in workload. In any but the automatic LLRA-like petitioning proposal (the 5000 case proposal), regional attorneys would spend some time preparing cases for which the Board would not authorize section 10(j) in the end.\footnote{Most of the work in the regions probably comes after Board authorization. However, before the Board’s decision, the regions write a 10(j) memorandum, but after authorization they must prepare a petition for the court, write briefs, prepare witnesses or affidavits, prepare an oral argument, and appear in court. Thus, the 500-day estimate represents the bulk of time the regions spent on 10(j) preparation in 1982.}

Could the regions absorb the increased workload of any of these reform proposals? It is very unlikely, to say the least, that Congress will increase the Board’s appropriation significantly in the next few years. The Board underwent a hiring freeze in 1981 and 1982,\footnote{Report on NLRB Case-Handling Performances, FY 1981, reprinted in 1981 LAB. REL. Y.B. 295, 296; Preliminary Summary of Operations, FY 1982, \textit{supra} note 91, at 2.} and its operating budget was reduced in 1982.\footnote{Preliminary Summary of Operations, FY 1982, \textit{supra} note 91, at 2.} The number of professionals in the regional offices decreased 5.3 percent in that year.\footnote{\textit{Id.} at 3.} Thus the 5000- and 2500- and even the 1000-case plans would seem to be impossible to implement unless the regions were to reduce drastically the attention they give to all cases except section 10(j) cases. The 500-case plan, however, might be manageable. An official in the Division of Operations Management noted that the regions absorbed without much staff change the increases in section 10(j) use that occurred during Irving’s tenure,\footnote{Telephone interview with official in the Division of Operations Management of the NLRB (Jan. 7, 1983).} when the number of injunctions tripled.\footnote{In 1976, before Irving became General Counsel, 20 petitions were filed in district court. The number rose to its highest point, 62 petitions, in 1979. \textit{See supra} note 62, Table 1.} Under the 500-case plan the number of section 10(j) petitions would be eight times the highest level of the Irving years.\footnote{500 divided by 62 is approximately eight.} It seems unlikely but not impossible that the regions...
could absorb such an increase without some dislocation or some increase in staffs.

2. General Counsel’s Office

According to Harold J. Datz, the Associate General Counsel in charge of the Division of Advice, the attorneys who process section 10(j) requests are stretched to their limit right now.231 There are times, Mr. Datz noted, when “a very hot 10(j) case can come in, and it just stacks up on the attorney’s desk. That attorney may not be able to turn to that case for some days, or even some weeks. Of course, we can try to reassign cases to attorneys who can handle them immediately, but on rare occasions, all of the attorneys have priority work.”232

Four staff attorneys and two supervising attorneys work on section 10(j) cases.233 Those six attorneys have been processing 250 to 300 section 10(j) requests each fiscal year for the past several years.234 Even the most modest reform proposal—under which 500 section 10(j) petitions would be authorized—would more than double the workload of the section 10(j) attorneys in the Division of Advice, however, because at present the General Counsel actually seeks section 10(j) authorization for only about one-quarter to one-third of the petitions the regions submit.235 Since the 500 case plan aims for 500 Board authorizations, the General Counsel’s Office attorneys thus would have to prepare six to eight times more petitions for the Board than they do now. The more sweeping reforms would overload the General Counsel’s Office even more seriously.

Mr. Datz believes that the section 10(j) process already takes too long. “The problem of delay is caused in substantial part by the fact that we have too many cases and not enough people to do those cases.”236 If that is the situation now, the General Counsel’s Office could not absorb a doubling of its section 10(j) workload, much less an increase of eight times current levels. Unless the NLRB’s budget were increased and new staff added, the section 10(j) process would lose its chief advantage over the regular administrative process—the advantage of speed.

3. The Board

The Board is the one group of section 10(j) decision-makers that
probably could handle a hefty increase in the number of section 10(j) petitions. According to John C. Truesdale, former Board Member and present Executive Secretary of the Board, the Board could not easily withstand an onslaught of cases in which it had to write opinions. In section 10(j) cases, however, the members need only make a decision. They could therefore consider many more section 10(j) cases without undue strain, and without adding more members to the Board. In fact, because section 10(j) decisions go to all five members, adding members would actually slow the process down.

Mr. Truesdale said that the Board probably could absorb a tenfold increase in the number of section 10(j) authorizations. The Board authorized fifty-one section 10(j) petitions in 1983. Thus the reform plan that would increase the number of section 10(j) authorizations to 500 is probably practicable as far as the Board is concerned. The plan that would set a goal of 1000 cases would increase the Board's section 10(j) load about twenty times, but the Board could probably handle this jump if it started allowing three-member panels to make section 10(j) decisions, the way it empowers them to make other decisions. The 2500 and 5000 case plans would swell the Board's section 10(j) load to 50 and 100 times the present level, much too large an increase for the Board to absorb, especially considering that the Board issued formal decisions and orders in only 1733 unfair labor practice cases of all types during the whole of 1981.

4. The District Courts

The ability of district courts to accept new cases is crucial to the success of any section 10(j) reform plan. Although section 10(j) hearings and decisions are intended to be quick and limited in scope, impressionistic evidence suggests that the cases are still a real burden to district judges. Judges estimated that they and their clerks spent between twenty and forty hours each considering papers, doing research, hearing arguments, and writing decisions in recent section 10(j) cases. While those

237. Interview with John C. Truesdale, supra note 51.
238. Interview with Berton B. Subrin, supra note 56.
239. Interview with John C. Truesdale, supra note 51.
241. Under §8(b) of the NLRA, 29 U.S.C. §153(b) (1982), the Board "is authorized to delegate to any group of three or more members any or all of the powers which it may itself exercise."
242. 46 NLRB ANN. REP. 177 (Table 3A) (1981). Of these, 1036 were contested cases. Id.
cases were perhaps more complex than many section 10(j) decisions, and while judges would be able to handle section 10(j) cases faster if they saw the petitions more often, the burden of a section 10(j) case still generally will not be light.

The magnitude of the burden is clearer if one looks at the number of trials that district judges complete in a year. In 1982 the 511 district judges completed 21,397 trials, of which 14,632 were civil trials, injunction hearings, and other contested proceedings. Of 4026 Labor Management Relations Act cases terminated in district courts in 1982, only 186 cases reached trial. Assuming that all of the filed cases under the section 10(j) reform plans would go to judicial decisions, the 5000 case plan would increase the number of civil trials held in 1982 by one-third. The plan would multiply the number of trials under the LMRA about twenty-five times and the number of section 10(j) trials perhaps 100 times or more. The 2500 case plan would increase the number of civil trials by one-sixth and the number of section 10(j) trials by about one-quarter.

District Judge for the Western District of Pennsylvania, said in a December 1, 1982, letter that in Grupp v. United Steelworkers, 532 F. Supp. 102 (W.D. Pa. 1982), he spent 14 hours in court time and four hours considering motions and conducting conciliation proceedings with counsel, and that he and his clerk spent about 10 hours drafting and reviewing the opinion.

Both Cross Sound Ferry and United Steelworkers required two-day hearings. Judge Weber said that United Steelworkers was unusually complex and thus required more time than a normal case. Letter from Judge Weber, supra note 243. Note, however, that if more cases were brought under §10(j), the Board probably would have to dip below the surface of egregious cases from which it now tries to draw petitions, so the new cases might be more complex than the current typical §10(j) case.

Judge Baker wrote that the Bohn Heat Transfer case was the only §10(j) case he recalled in his four years on the court. He said that the case “was a first experience and if §10(j) petitions became routine, I imagine I could handle them more expeditiously.” Letter from Judge Baker, supra note 243.


Id. at 260 (Table C-7). The definition of trial includes hearings on temporary restraining orders, preliminary injunctions, and other contested proceedings in which evidence is introduced. Id.

In recent years, between one-quarter and one-half of the §10(j) petitions filed in district courts have been settled, withdrawn, or dismissed before the trial judge issued a decision. 46 NLRB ANN. REP. 302 (Table 20) (1981) (23 of 58 filed petitions settled, withdrawn, or dismissed before decision); 45 NLRB ANN. REP. 291 (Table 20) (1980) (14 of 50); 44 NLRB ANN. REP. 286 (Table 20) (1979) (34 of 62); 43 NLRB ANN. REP. 283 (Table 20) (1978) (22 of 46). As considered above, however, the settlement rate might drop as the certainty of §10(j) authorization rose. See supra notes 126-41 and accompanying text. In any event, district judges probably do some work—sometimes even hold a trial—on petitions that drop out before decision. For all these reasons, it is more instructive to assume, for purposes of analysis, that all the cases would go to judicial decision.

The figures on how many of 1982's 54 §10(j) authorizations went to decision are not yet available. If patterns of recent years continue, see supra note 249 and accompanying text, probably between 25 and 40 cases went to decision. Even assuming that 50 cases did so, as we shall assume for the rest of this discussion, the 5000 case plan would have increased the number of §10(j) trials 100 times.
fifty times. The 1000 case plan would increase civil trials by about seven percent, LMRA trials five-fold, and section 10(j) trials twenty-fold.

The 500 case plan is more manageable. It would increase the number of civil trials by 3.3 percent, and the number of all trials (civil and criminal) by 2.3 percent. The number of all trials increased by 6.8 percent in 1980, 7.1 percent in 1981, and 0.75 percent in 1982.251 Thus, in most recent years, judges have absorbed increases three times as large as those that the 500 case plan would prompt. The 500 case plan would on average give every district judge one section 10(j) case a year. If the case took a total of three days of the judge's time, each judge would be spending 1.2 percent of his time on section 10(j) each year,252 an arguably bearable burden. Still, district judges are notoriously overworked, and even a seemingly small increase should not be advocated lightly.

5. Appellate Attorneys and Courts

An increase in section 10(j) use would impose burdens on attorneys and judges even after the district judges made their decisions. General Counsel Irving noted in his Labor Law Reform Act impact study that attorneys in the Division of Advice would have to consider for appeal 17 percent of the LLRA injunction cases and would have to file appellate briefs in 7.8 percent of the cases.253 The circuit courts would of course have to decide the cases filed. Thus the section 10(j) reform plans would impose burdens on appellate attorneys at the Board and on circuit courts.

a. Appellate Attorneys in the Division of Advice

A Board appellate attorney needs about 2.1 days to consider whether to appeal an injunction case and about 39 days to prepare a brief if the case is appealed.254 The various section 10(j) reform plans would augment Board appellate attorneys' workloads to the following extent.255


252. This is based on a 250 day work year.

253. Irving Cost Impact Study, supra note 10, at G-6. These were the FY 1977 figures for appeals of both §10(j) and §10(1) cases; the study does not give separate figures for the two sections. Irving noted at G-6 n.21 that §10(1) cases are rarely appealed, so the figures are probably based mainly on §10(j) appeals. The Board's annual reports do not give figures for appeals in §10(j) cases.

254. Irving wrote that five staff years would be needed to absorb the 591 additional considerations for appeal that the LLRA would bring to the Division of Advice; 41 staff years would be needed for the 271 briefs. Id. Using a 250 day working year, that works out to 2.1 days of work per appeal consideration and 39 days per brief.

255. The workload of private attorneys whose clients wish to appeal §10(j) decisions would also increase. As explained above, see supra notes 218-30 and accompanying text, the increased burden on private attorneys is not worrisome.
## Table 4

<table>
<thead>
<tr>
<th>Reform plan</th>
<th>Number of appeal considerations</th>
<th>Number of additional attorneys needed for appeal considerations (col. 2 times 2.1 days, divided by 250 days of work per year per attorney)</th>
</tr>
</thead>
<tbody>
<tr>
<td>5000 cases</td>
<td>850</td>
<td>7.1</td>
</tr>
<tr>
<td>2500 cases</td>
<td>425</td>
<td>3.5</td>
</tr>
<tr>
<td>1000 cases</td>
<td>170</td>
<td>1.4</td>
</tr>
<tr>
<td>500 cases</td>
<td>85</td>
<td>0.7</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Number of briefs (col. 1 times 7.8%)</th>
<th>Number of additional attorneys needed for briefs (col. 4 times 39 days, divided by 250 days of work per year per attorney)</th>
<th>Total number of new attorneys needed (col. 3 plus col. 5, rounded to nearest whole number)</th>
</tr>
</thead>
<tbody>
<tr>
<td>390</td>
<td>61</td>
<td>68</td>
</tr>
<tr>
<td>195</td>
<td>30.5</td>
<td>34</td>
</tr>
<tr>
<td>78</td>
<td>12.2</td>
<td>14</td>
</tr>
<tr>
<td>39</td>
<td>6.1</td>
<td>7</td>
</tr>
</tbody>
</table>

The Division of Advice now has twenty-three staff attorneys, twelve of whom are eligible to do section 10(j) appeal considerations and appellate arguments. Thus, even the 500-case plan would require adding one-third more lawyers to the Division staff.

### b. Circuit Courts

Appeals to the circuit courts would come from two sources: the Board when it lost and respondents when they lost. Irving noted that the General Counsel appeals injunction cases at a 7.8 percent rate. Under the 5000 case plan, then, the Board’s appeals would add 390 cases to circuit court dockets. Under the 2500 case plan, the number would be 195; under the 1000 case plan, 78; and under the 500 case plan, 39.

The rate at which respondents would appeal is somewhat more diffic-

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256. Letter from Peter B. Mirsky, supra note 54 (Oct. 2, 1984). The staff attorneys in the Division of Advice must do some work on initial §10(j) petitions before they are put on the briefing list. Only attorneys on the list can work on §10(j) appeals.

cult to figure, because no records are kept of such appeals. Respondents would appeal only those cases they lost, i.e., those cases in which an injunction petition against them was granted. The district court granted injunctions in 57 of the 87 cases that reached court decision between January 1980 and December 1983. Respondents appealed twelve of the 57 grants. They appealed, then, at a 21 percent rate. Assuming that this rate would stay the same if the number of section 10(j) petitions went up, and assuming that respondents would lose before the district court the same proportion of section 10(j) cases that they now lose—50 percent—the 5000 case reform proposal would produce 2500 respondent losses and 525 appeals. The 2500 case plan would produce 263 appeals, the 1000 case plan 105 appeals, and the 500 case plan 53 appeals.

The total number of appeals filed in the circuit courts in 1982 was 27,946, an increase of 6 percent over 1981 filings. The estimated total numbers of appeals by Board and respondents under the plans are summarized in Table 5.

<table>
<thead>
<tr>
<th>Case plan</th>
<th>Increase in appeals</th>
<th>Percent increase in 1982 filings</th>
</tr>
</thead>
<tbody>
<tr>
<td>5000</td>
<td>915</td>
<td>3.3%</td>
</tr>
<tr>
<td>2500</td>
<td>458</td>
<td>1.6%</td>
</tr>
<tr>
<td>1000</td>
<td>183</td>
<td>0.7%</td>
</tr>
<tr>
<td>500</td>
<td>92</td>
<td>0.4%</td>
</tr>
</tbody>
</table>

The 5000 case plan would increase circuit court filings half again as much as normal case pressures increased filings between 1981 and 1982. Although this would be an impermissibly great imposition by one section of one statute, the burden that the 500 case plan would impose is bearable.

Conclusion

The foregoing sections have shown that a radical expansion of section 10(j) use would be impracticable. Judges would balk at the idea of

258. Lubbers Memorandum, supra note 38, at Appendix B.
259. The factors that would discourage respondents from settling unfair labor practice charges if § 10(j) use rose, see supra notes 126-41 and accompanying text, might encourage respondents to appeal if they lost. Thus the appeal rate might go up.
260. The Board won court decisions in 21 out of 49 petitions decided in 1981, 46 NLRB ANN. REP. 281 (Table 20) (1981); 23 out of 45 in 1980, 45 NLRB ANN. REP. 291 (Table 20) (1980); 20 out of 65 in 1979, 44 NLRB ANN. REP. 286 (Table 20) (1979); 20 out of 45 in 1978, 43 NLRB ANN. REP. 283 (Table 20) (1978); and 24 out of 40 in 1977, 42 NLRB ANN. REP. 311 (Table 20) (1977). The percentage is usually about 50%.
261. 1982 ANNUAL REPORT OF U.S. COURTS, supra note 246, at 199 (Table B-3).
262. Filings in 1981 totaled 26,362. Id. The increase of 1584 cases is about 6% of 26,362.
playing such a major role in labor relations, and no one, from judges to regional lawyers, would be able to handle the increase in workload. But a more modest increase—to several hundred authorizations a year—might be practicable. This final section explores how the NLRB could make such a reform work.

There are two general approaches the agency could take. The first, which would require Congress’s help, would be a change in the environment that fosters unfair labor practices in the first place. Professor Weiler endorses this approach.\(^{263}\) He argues that increasing section 10(j) use now would be an incongruous and ultimately an ineffectual reform.\(^{264}\) Rather than having the NLRB tinker with current remedies, Congress should eliminate or drastically shorten the representation campaign. Most of the opportunities for committing violations would then simply disappear.\(^{265}\) If the NLRB and Congress took this tack, the agency would have the resources to prosecute more section 10(j) injunctions in the unfair labor practice cases that remained, but increased use of the section would have become unnecessary.

The second approach assumes that such an enormous change is unlikely to occur and suggests ways the NLRB can reform the present labor relations scheme through a fairly modest increase in section 10(j) use. A reform plan under this approach should have a goal of eventually increasing the number of section 10(j) injunctions to about 500 per year.

Two basic concerns should inform the agency’s strategy. The first is the likelihood that delay between charge and injunction will rise as the number of injunctions rises. The present median time of three and one-half months is already too long. The agency will have to find some way of reducing, or at least maintaining, this time span while increasing section 10(j) use. The second concern is that district judges, horrified at the prospect of a flood of new section 10(j) cases, will obstruct the reform. The agency will need to convince judges that it does not plan to bring all unfair labor practices to district court, and that the cases it is bringing there are carefully-chosen ones for which section 10(j) relief is eminently appropriate.

The NLRB may be able to alleviate somewhat the problem of increased delay by tinkering with the section 10(j) process. In January 1984 the Board Solicitor’s office and the General Counsel’s Division of Advice discussed ways to speed the section 10(j) process. They advocated that the agency’s section 10(j) memoranda be shortened or, if possible, eliminated; that the General Counsel use a ten-day target for submitting his or her section 10(j) memorandum to the Board; and that

\(^{263}\) Weiler, supra note 2.
\(^{264}\) Id. at 1798-1803.
\(^{265}\) Id. at 1804-22.
the Solicitor use a five-day target for securing at least a verbal vote of the Board.\footnote{266. March 1984 §10(j) Hearing, supra note 54, at 80 (statement of Chairman Dotson).}

Efforts to shorten the section 10(j) process might founder, however, if the number of petitions increased. Most likely, the NLRB can meet the problem of increased delay most effectively by devoting more resources to section 10(j) cases. As shown above,\footnote{267. See supra note 213-62 and accompanying text.} the regions and the General Counsel’s office, not the Board, are the sections that will need more attorneys. In order to process 500 additional cases per year, the regions would need eighteen more lawyers, an increase of 1.6 percent in professional staff,\footnote{268. See supra Table 3. This number is based on an increase to exactly 500 §10(j) injunctions. Of course, 500 authorizations is a goal, not a quota. Progress toward that goal would probably be fairly gradual.} though this number could be reduced if the regions were to make their investigations of section 10(j) cases more efficient. Bernard Samoff suggested, for example, that the regions form special section 10(j) investigative teams and that charging parties help regions build the section 10(j) case.\footnote{269. Samoff, supra note 80, at 56, 58.} The General Counsel’s office will need a more drastic increase in personnel. The workload that six lawyers presently bear would increase six to eight times under the 500-case proposal.\footnote{270. See supra notes 231-36 and accompanying text.} The agency would need to hire at least thirty more lawyers to keep the section 10(j) time period down at its current median of three and one-half months. Both the regions and the General Counsel’s office would need to add corresponding clerical staff as well.

In order to satisfy the new needs, the agency would be required either to divert resources from other areas or to get more money from Congress. Present agency prospects for a larger appropriation are dim, but the Board might get the funds if it made clear that they would be used for a specific, highly-effective reform, a reform that simply cannot work without more staff.

\footnote{266. March 1984 §10(j) Hearing, supra note 54, at 80 (statement of Chairman Dotson).}

\footnote{267. See supra note 213-62 and accompanying text.}

\footnote{268. See supra Table 3. This number is based on an increase to exactly 500 §10(j) injunctions. Of course, 500 authorizations is a goal, not a quota. Progress toward that goal would probably be fairly gradual.}

\footnote{269. Samoff, supra note 80, at 56, 58.}

\footnote{270. See supra notes 231-36 and accompanying text. Peter B. Mirsky, a Deputy Assistant General Counsel who is intimately involved with §10(j), has said that, if the increase in use were gradual, staff increases such as these might not be necessary. “I am confident that the current administrative machinery could properly handle in the future an equivalent percentage increase as was the case between 1971 under former General Counsel Nash and 1984 under former General Counsel Lubbers.” Letter from Peter B. Mirsky, supra note 54. In 1971, the Board authorized 13 injunctions (see Table 1, supra note 62). In 1983, the most recent year for which figures are available, the Board authorized 71. March 1984 §10(j) Hearings, supra note 54, at 11. That was a 550% increase in authorizations over a 12 year period. An equivalent increase from 71 petitions would bring the number to 391 authorizations. Mirsky did not say how gradual the increase would have to be in order for the current machinery to handle it. If the Board were to find it impossible to obtain the money to hire new attorneys and clericals, perhaps it could increase §10(j) use very slowly and not increase staffing. In light of the fact that agency lawyers are apparently now quite overloaded, however, an increase in agency resources would be a quicker, more efficient, and more surely-effective route to reform.}
Through careful strategy the NLRB also can alleviate the concern that district judges’ hostility to section 10(j) petitions will undermine the reform. First, the agency must have a rational way of choosing the 500 cases from the mass of unfair labor practices. Second, the regional lawyers must convince district judges that the selection has been careful, and must allay the judges’ fears that soon the Board will be trying to bring every unfair labor practice into district court.

The General Counsel should direct the first part of the strategy. Through speeches and memoranda, General Counsels Nash and Irving led previous successful campaigns to increase section 10(j) use. The tactic would probably work again. The General Counsel would have to outline the sorts of cases in which he or she thinks the regions should request section 10(j) injunctions and the Board should authorize them.

The General Counsel should advise the regions and the Board not to seek section 10(j) injunctions in cases in which the Board has not yet ruled on the substantive unfair labor practice underlying the possible petition. District judges do not like to be the first to speak on a novel labor relations issue, and Congress has not intended that they should be.

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272. Another possible tack would be rulemaking. The NLRB could set out in a rule the sorts of cases it considers especially appropriate for §10(j). One objection to this plan would be that it would enable parties to litigate not only whether §10(j) should actually be granted but also whether their case fell within the bounds of the rule. Another objection is that the decision whether to seek a §10(j) injunction depends on too many minute and variable shadings of fact for a general rule to cover the field satisfactorily. In any case, the Board has traditionally been opposed to rulemaking, so it would be unlikely to adopt the plan. But see St. Francis Hosp., 271 N.L.R.B. No. 160 (1984) (Member Dennis, concurring, and Member Zimmerman, dissenting, discussing with approval the general idea of the Board using its rulemaking power). On the NLRB’s choice between rulemaking and adjudication, see generally Bernstein, The NLRB’s Adjudication—Rule Making Dilemma Under the Administrative Procedure Act, 79 YALE L.J. 571 (1970); Kohn, The NLRB and Higher Education: The Failure of Policymaking Through Adjudication, 21 UCLA L. REV. 63, 67-75 (1973). See also Shapiro, The Choice of Rulemaking or Adjudication in the Development of Administrative Policy, 78 HARV. L. REV. 921 (1965).

273. A Second Circuit case, Silverman v. 40-41 Realty Assocs., Inc., 668 F.2d 678 (2d Cir. 1982), exemplifies the courts’ reluctance. In that case the district judge had issued a §10(j) injunction against an employer landlord who was trying to stop a union from picketing outside a dentist’s office in the corridor of an office building. Because the Board had not yet ever found that interior picketing on purely private property was protected, the Second Circuit reversed the lower court. Here, the court commented, the Regional Director:

inverts the traditional relationship between administrative agency and court: the court is asked to make the initial ruling as to the propriety of a novel and unprecedented application of the statute, and thereafter the Board will apply its expertise to the issues presented . . . [U]nless and until the Act is authoritatively construed in such fashion we do not believe that a section 10(j) injunction to permit interior picketing is a “just and proper” remedy, at least in the absence of the most compelling circumstances.

Id. at 681.
Avoiding section 10(j) in those cases may well mean that novel violations will be beyond effective remedy for a while, but that price is probably worth paying for the sake of the success of the overall reform. The agency will be able to branch out into a few novel areas if it does so cautiously.

The General Counsel should try to draw many of the new section 10(j) petitions from the mass of discriminatory discharge cases. The Labor Law Reform Act and many commentators have identified section 8(a)(3) and section 8(b)(2) violations as those most in need of injunctive relief. Stephens, Chaney, and Aspin have shown that current delayed remedies are certainly inadequate. Agency officials may be tempted to think that, because discriminatory discharge charges are so commonplace, such charges are not worthy of section 10(j). But section 10(j) seems to provide the only hope of remedying these violations.

Of course it is impracticable to use section 10(j) for all section 8(a)(3) and section 8(b)(2) cases. The agency should concentrate on cases in which discriminatory discharge charges and refusal-to-bargain charges are combined. In a section 10(j) suit on a section 8(a)(3) or a section 8(b)(2) charge alone, a district judge may tend to see the violation as one against an individual employee rather than as one against the rights of all the employees. The collective nature of the violation may be clearer when a refusal to bargain accompanies a discriminatory firing.

Directing agency officials to seek section 10(j) injunctions in combined discriminatory discharge and refusal-to-bargain cases will not suffice to help them choose the 500 new section 10(j) cases, however. The regions issued almost 5000 complaints under section 8(a) alone in 1981. The agency also should concentrate on charges brought during the organization and pre-first-contract phases. Again this suggestion is supported by precedent: the Labor Law Reform Act advocated it, as do commentators. Coercive tactics during the organization phase may impair the employees' freedom of choice on union election day, and such tactics at any time before a first contract may deprive them of the fruits of collective bargaining, which they have decided, through the election process, they want. Once a first contract has been achieved, the employer and the union may be able to use contract grievance procedures to resolve future charges, and they will not need the protections of the Act in general, and section 10(j) in particular, as much.

Even these two suggestions will undoubtedly leave more than 500 cases. The regions, General Counsel, and Board will still have to use

274. See §10 of the Labor Law Reform Act, reprinted supra note 8. See, e.g., Samoff, supra note 80.
275. 46 NLRB ANN. REP. 177 (Table 3A) (1981).
276. See §10, reprinted supra note 8.
277. E.g., Samoff, supra note 80, at 57.
their discretion in choosing appropriate section 10(j) cases. Since they will want to pursue both union and employer violations other than discharges and refusals-to-bargain, they will have to continue to consider the factors they consider now—the seriousness of the violation, the likelihood that an ultimate Board remedy will be futile, the frustration of the remedial purposes of the NLRA, and so on. Having a goal of approximately 500 authorizations, however, and having some direction on the sorts of cases that should be considered first, will help guide the agency officials in these decisions.

The regions must assist the NLRB by assuring district judges that the agency does not plan to start bringing every unfair labor practice case to district court. The best strategy would be to confront the issue directly, in the briefs or in court. The regional staff attorney could tell the district judge about the agency's new section 10(j) plan, emphasizing that even 500 cases represent less than one in ten unfair labor practice complaints potentially subject to section 10(j). Once the General Counsel has made public the memoranda advising the regions how to select the 500 cases, the regional lawyer could explain briefly the Board's criteria for selecting the new section 10(j) petitions. If the staff attorneys enter the courtroom knowing that district judges generally have qualms about issuing section 10(j) injunctions, the lawyers can confront the judges' reluctance directly and can perhaps dispel it.

District judges will become more receptive to section 10(j) as they start to see more petitions. Thus time will remove many of the initial obstacles to the 500 case proposal. Only legislative amendment and massive new appropriations could enable the agency to implement increases more drastic than the 500 case plan, increases such as those that some commentators have urged. Such a major reform may never come. Through modest funding changes and wise strategy, however, the NLRB can take the first steps now to implement an effective reform while awaiting more elemental changes in American labor law.